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BY

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AND

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ADVOKATES, HIGH COURT MADRAS.

ALLAHABAD Vol. 9.

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JUDGES OF THE HIGH COURT OF ALLAHABAD DURING 1898—1900.

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THE INDIAN LAW REPORTS, ALLAHABAD SERIES,
CONTAINING CASES DETERMINED BY THE HIGH
COURT AT ALLAHABAD. AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

ALLAHABAD—Vol. XX-1898.

FULL BENCH.

The 2nd February, 1897.

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Queen-Empress

versus

Ishri.*

*Criminal Procedure Code, sections 35 and 367—Concurrent
sentences not authorised by the Code.*

• There is no provision in the Code of Criminal Procedure by which a Court is empowered, on convicting an accused person of two or more offences at the same time, to direct that the sentences imposed in respect of such offences shall run concurrently.

THIS case was referred to a Bench at the instance of AIKMAN, J., in view of the rulings of the Court in *Queen-Empress v. Wazir Jan*, I.L.R., 10 All., 58, and *Queen-Empress v. Dalip*, I. L. R., 18 All., 246. The facts of the case, so far as they are necessary for the purposes of this report, appear from the order of the Court.

Knox, Burkitt and Aikman, JJ.—This case was called for on a perusal of the Sessions statement of the Bareilly District for the month of October 1896. The Sessions Judge had convicted an accused person of separate offences falling under sections 420, 467 and 471 of the Indian Penal Code. For each offence he sentenced the accused to suffer rigorous imprisonment for three months and directed that the sentences should run concurrently. The passing of concurrent sentences is nowhere authorised by the Code of Criminal Procedure. Section 35 of that Code provides that when a person is convicted at one trial of two or more distinct offences, the Court may sentence him for such offences to separate terms of imprisonment, but provides [2] that the separate terms of imprisonment shall commence one after the expiration of the other in such order as the Court may direct. These words show that the

passing of concurrent sentences was not in the contemplation of the Legislature for cases in which convictions take place at one trial. Section 397 of the Code provides that in case of a person already undergoing a sentence of imprisonment and such person being sentenced to another term of imprisonment, such latter imprisonment shall commence at the expiration of the imprisonment to which he has been previously sentenced. We cannot but regret that a power to pass concurrent sentences has not been conferred by the Code. Numerous cases occur to us in which such a power would be very salutary. As the law at present stands, we must hold that the concurrent sentences passed are illegal. We accordingly set aside the sentences passed in this case, and direct that for each offence the accused suffer rigorous imprisonment for a term of one month. These terms of imprisonment will run consecutively from the date of the original conviction. Let the papers be returned.

NOTES. c

[The Criminal Procedure Code, 1898, added these words to sec. 35, *visâ* 'unless the Court directs that such punishments shall run concurrently'. This case has therefore lost its authority.]

[20 All. 2]

APPELLATE CIVIL.

The 6th July, 1897.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Nabbu Khan.....Plaintiff

versus

Sita.....Defendant.*

Civil Procedure Code, sections 440 et seqq.—Lunatic—Act No. XXXV. of 1858—Lunatic, not adjudged to be so, may sue through a next friend or defend through a guardian ad litem.

The provisions of Chapter XXXI of the Code of Civil Procedure are not exhaustive, and where a person is admitted or has been found to be of unsound mind, although he has not been adjudged to be so under Act No. XXXV of 1858, or by any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is a defendant. *Porter v. Porter*, L. R., 37 Ch. D., 420; *Venkat-[3]ramana Rambhat v. Timappa Devappa*, I. L. R., 16 Bom., 182; *Tukaram Anant Joshi v. Vithal Joshi*, I. L. R., 13 Bom., 666; *Uma Sundari Dagi v. Ramji Haldar*, I. L. R., 7 Cal., 242, and *Jonnagadla Subbaya v. Thatiparthi Senadala Buthaya*, I. L. R., 6 Mad., 380, referred to.

THE facts of this case are as follows: During the years 1887—1890 three sons of one Mendu Khan sold certain shops belonging to the family to Gajju Mal, and the deed of sale was signed also by one of the brothers on behalf of a fourth brother, Nabbu Khan, who was of unsound mind. In 1894 the present suit was brought by Nabbu Khan's aunt, Musammât Chhoti, as his next friend to recover a one-fourth share in the shops sold on the ground that Nabbu

* Second Appeal No. 292 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th December 1894, reversing a decree of Syed Abdur Razzak, Munsif of Koil, dated the 5th June 1894.

Khan at the time of the sale had been insane and incapable of contracting. Nabbu Khan was admittedly insane and had been so from his birth, but he had never been adjudged a lunatic under Act No. XXXV of 1858.

The Court of First Instance (Munsif of Koil) decreed the claim, holding that, there being in fact no doubt as to the plaintiff's lunacy, there was no reason why he should not sue through a next friend, even though he had not been adjudged a lunatic.

The defendant (the representative of the original vendee) appealed. The Lower Appellate Court (District Judge of Aligarh) decreed the appeal, holding that it was necessary that the plaintiff should have been adjudged a lunatic under Act No. XXXV of 1858, and further because the plaintiff did not seek to recover possession of his share of the property on payment of a proportionate share of the purchase-money paid by the husband of the defendant appellant. The plaintiff thereupon appealed to the High Court.

Lala Gulzari Lal, for the Appellant.

Pandit Sundar Lal, for the Respondent.

Banerji and Aikman, JJ.—The suit out of which this appeal has arisen was brought on behalf of one Nabbu Khan, who is alleged to be a lunatic, by his aunt, Musammat Chhoti, as his next friend. Nabbu Khan has not been adjudged to be a [4] lunatic under Act No. XXXV of 1858, but the Lower Appellate Court has found it to be an admitted fact that he is a lunatic. That Court has, however, held, on the authority of certain rulings to which it has referred, that section 440 and the following sections of the Code of Civil Procedure are, with reference to the provisions of section 463, inapplicable to the case of a lunatic not adjudged to be so, and that therefore the aunt is not competent to sue on his behalf as his next friend. On this ground and on another ground, to which we shall refer hereafter, the learned Judge has dismissed the suit.

It is contended, in this second appeal which has been preferred on behalf of Nabbu Khan, that the fact that he was not adjudged a lunatic does not render the suit brought by him through a guardian an invalid suit. In our opinion this contention must prevail.

By section 463 of the Code of Civil Procedure the provisions of sections 440 to 462 are made applicable to the case of persons of unsound mind adjudged to be so. But that section does not, in our opinion, forbid the institution of a suit by a next friend on behalf of a person of unsound mind, who is in fact a lunatic, but has not been adjudged to be so, or the appointment of a guardian *ad litem* for the purpose of defending a suit brought against such a person. It is true, as held in *Uma Sundari Dasi v. Ramji Haldar*, I. L. R., 7 Cal., 242, that, so long as a person has not been adjudged to be of unsound mind, he cannot be deemed to have lost his civil rights and to be consequently incompetent to sue in his own name. But from this it does not follow that a person who is really of unsound mind, but has not been declared to be so, cannot sue through a next friend or defend a suit through a guardian *ad litem*. If we were to hold that a person of unsound mind is not entitled to sue by a next friend or defend by a guardian *ad litem* until he has been adjudged to be a lunatic, serious failure of justice might result. For example, if a trespasser were doing irremediable damage to the property of a lunatic, the interests [5] of the latter could not promptly be protected and the trespass could not be restrained by suit till an adjudication had been obtained that he was of unsound mind. Similarly if a lunatic causes serious injury to another, the latter will not be in a position to sue the lunatic without getting him declared to be

so, And if he be allowed to sue the lunatic without getting a guardian appointed for the suit, the lunatic will be seriously prejudiced, as the fact of his being of unsound mind will prevent him from defending the action. As observed by BOWEN, L. J., in *Porter v. Porter*, L. R., 37 Ch. D., 420, at pp. 429 and 430 :—"When there is a person of unsound mind, who, although not found to be of unsound mind by inquisition, nevertheless stands in need of the protection or the intervention of the Court as regards his property, real or personal, or as regards any portion of his property, then, supposing he would, if sane, be entitled to the intervention of the Court, a third person, a stranger, may come forward and do that which is clearly for the benefit of the person of weak mind. It is obvious that in the absence of the principal person who is concerned his property ought to be left, as far as possible, and so far as his interest does not render the opposite thing necessary to be done, in the condition in which it was—*quieta non movere*. But still, if it is for his protection and for his obvious benefit, then the Court ought to interfere to give him, while his senses are sleeping, the same sort of protection to which he would be entitled if his senses were awake and he could act for himself." These observations state in more forcible terms than we can employ, the reasons which ought to induce a Court to permit a person of unsound mind, although not adjudged to be so, to sue or defend through his next friend or his guardian *ad litem*, as the case may be. In our opinion the provisions of the Code of Civil Procedure are not in this respect exhaustive, and we hold that if a person be admitted or found to be of unsound mind, although he has not been adjudged to be so under Act No. XXXV of 1858, or any other law for the time being in force, he should, if a plaintiff, be [6] allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is the defendant. This was the view of SARGENT, C. J., and BIRDWOOD, J., in *Venkatramana Rambhat v. Timappa Devappa*, I. L. R., 16 Bom., 132, and apparently of JARDINE and CANDY, JJ., in *Tukaram Anant Joshi v. Vithal Joshi*, I. L. R., 13 Bom., 656. In the former case it was held that "although section 443* of the Code of Civil Procedure (XIV of 1882), read with section 463, does not oblige a Court to appoint a guardian *ad litem* for a defendant of unsound mind except in the case where he has been adjudged to be of unsound mind under Act XXXV of 1858, still upon general principles and in conformity with the practice of the Court of Chancery, the Court should assign a guardian *ad litem* for the defendant if it finds on inquiry that he is of unsound mind so as to be unfit to defend the suit." In the latter case the learned Judges seem to have been of opinion that, irrespective of the provisions of Chapter XXXI of the Code of Civil Procedure the next friend of a person of unsound mind not so adjudicated could maintain a suit, if, having regard to the nature of the suit and "the principles of equity as applied in the practice of tribunals," such an action could be brought by a next friend. In the particular case before the learned Judges they referred to the rule stated in Daniell's Chancery Practice, 6th Edn., Vol. I, p. 116, on the authority of *Halfhide v. Robinson*, L. R., 9 Ch., 373, namely, that "if the object of the action is to deal with the real estate of a person of unsound mind (as an action for partition or for sale in lieu thereof) the action cannot be brought by a next friend," and held that the suit, which was one for a partition of ancestral property, could not be maintained by the next friend of the lunatic.

* [Sec. 443 :—Where the defendant to a suit is a minor, the Court, on being satisfied of the fact of his minority, shall appoint a proper person to be Guardian *ad litem* to be guardian for the suit for such minor, to put in the defence for appointed by Court. such minor, and generally to act on his behalf in the conduct of the case.

A guardian for the suit is not a guardian of person or property within the meaning of the Indian Majority Act, 1875, Section 8.]

It has, however, been decided in the later case of *Porter v. Porter*, L. R., 37 Ch. D., 420, to which we have referred above, that an action which is *prima facie* for the benefit of a person of unsound mind (e.g., a partition action) may be brought by the next friend (Pope's Law and Practice of Lunacy, 2nd Edn., p. 325). So that [7] the rule on the subject in England is no longer the rule stated in Daniell's Chancery Practice.

In *Jonnagadla Subbaya v. Thatiparthi Senadala Buthaya*, I. L. R., 6 Mad., 380, all that was decided was that a guardian *ad litem* for a defendant who has not been declared to be a lunatic under Act No. XXXV of 1858 cannot be appointed under Chapter XXXI of the Code of Civil Procedure. We are, however, of opinion, for the reasons stated above, that upon general principles, and irrespective of the provisions of that chapter, a person of unsound mind, although not adjudged to be so, may sue by a next friend, and that a guardian for the suit for such a lunatic may be appointed by the Court.

In the case before us the claim is to recover possession of property alleged to belong to the lunatic Nabbu Khan which has been sold by his brothers. Such a suit is for the benefit of the lunatic, and could, in our opinion, be brought by his next friend. The Court below has erred in dismissing it on the ground that it could not be so brought. The Lower Appellate Court has also held the suit to be untenable on the ground that the sale was a *bona fide* one for adequate consideration, and that the plaintiff did not offer to pay a proportionate part of the purchase money. In our opinion this was not a valid ground for dismissing the suit. The learned Judge ought to have found whether the lunatic had benefited by the sale. If he had not, the mere fact of the purchaser paying full value would not give him any title to the share of the lunatic, which the brothers of the lunatic had no right to sell, nor would that entitle the purchaser to a proportionate share of the purchase money. Moreover, if it be found that the plaintiff, lunatic, benefited by the sale, that would not entail a dismissal of the suit, but the decree for possession should be made conditional upon his making restitution to the purchaser.

We allow the appeal, and, setting aside the decree of the Lower Appellate Court, remand the case to that Court under section 562 [8] of the Code of Civil Procedure, with directions to readmit it under its original number in the register and to try it on the merits. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

NOTES.

* [The C. P. C., 1908, O. 32, r. 15, has added these words :—" And to persons who *though not so adjudged* are found by the Court on inquiry, by reason of unsoundness of mind or mental infirmity, to be incapable of protecting their interests when suing or being sued."

The previous case-law on the subject was the same :—(1899) 23 Bom., 633 ; (1901) 25 Mad., 504 ; (1906) 33 Cal., 1094 ; (1905) P. R., 31 ; (1906) 3 L. B. R., 169.]

[20 All. 8]

The 6th July, 1897.

PRESENT:

-MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN

Puran Mal.....Plaintiff

versus •

Krant Singh.....Defendant.

Civil Procedure Code, section 544—Appeal—Ground of appeal common to all the judgment-debtors—Reversal or modification of decree as against all on appeal by one only.

Section 544† of the Code of Civil Procedure does not enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under section 544 any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. *Proiab Chunder Dutt v. Koorbanissa Bibee*, 14 W. R., 130, referred to.

THE facts of this case are fully stated in the judgment of BANERJI, J.

Babu Durga Charan Banerji, for the Appellant.

Babu Satya Chandar Mukerji, for the Respondent.

Banerji, J.—This was a suit for possession of certain property purchased at auction in 1882 by the plaintiff appellant as the property of one Ajab Singh and his son Umed Singh. The suit was brought against these persons only. Krant Singh, another son of Ajab Singh, intervened, under section 32 of the Code of Civil Procedure, and was added as a defendant. Ajab Singh did not enter an appearance. Umed Singh defended the suit by alleging that after the auction sale a compromise took place between him and the plaintiff, under which the plaintiff received [9] the purchase money from him and surrendered the property to him. Krant Singh's defence was to the effect that the property originally belonged to his grandmother Musammat Pohpa; that after her it passed to him, Krant Singh, and to his brothers Umed Singh and Dhaukkal Singh; that the plaintiff acquired by his auction purchase only the one-third share of Umed Singh, and that his claim in respect of two-thirds of the property was untenable. The Court of First Instance decreed the claim against all the three defendants. Neither Ajab Singh nor Umed Singh appealed, and they allowed the decree to

*Second Appeal No. 1163 of 1895, from a decree of W. Tudball, Esq., Additional Judge of Aligarh, dated the 9th September 1895, reversing a decree of Maulvi Abdur Rahim, Munsif of Kasganj, dated the 27th November 1894.

† [Sec. 544 :—Where there are more plaintiffs or more defendants than one in a suit,

One of several plaintiffs or defendants may obtain reversal of whole decree if it proceed on ground common to all.

and the decree appealed against proceeds on any ground common to all the plaintiffs or to all the defendants, any one of the plaintiffs or of the defendants may appeal against the whole decree, and thereupon the Appellate Court may reverse or modify the decree in favour of all the plaintiffs or defendants, as the case may be.]

become final as against them. Krant Singh alone preferred an appeal, and contended, first, that the plaintiff did not acquire more than a third share of the property by virtue of his auction purchase; and, secondly, that under a private arrangement, which took place after his auction purchase, the plaintiff withdrew from his purchase. He thus urged for the first time in appeal a ground which he had not taken in his defence in the Court of First Instance. The Lower Appellate Court held this ground of appeal to be a valid one, and, purporting to act under section 544 of the Code of Civil Procedure, it set aside the decree of the Court of First Instance and dismissed the suit. The other grounds of appeal were not tried at all.

. In my opinion the learned Judge has erred in applying section 544 to this case. That section does not enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants, and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under section 544 any one of the defendants may appeal against the whole decree and the appellate Court may [10] reverse or modify that decree in favour of all the defendants. This view is supported by the ruling of the Calcutta High Court in *Protab Chunder Dutt v. Koorbunnisa Bibee*, 14 W. R., 130. In this case there was no ground common to the defence set up by Umed Singh and that put forward by Krant Singh. On the contrary, the case of the latter was inconsistent with that of the former. Whilst Umed Singh urged that the whole of the property claimed had been reconveyed to him by the plaintiff after the auction sale, Krant Singh contended that Umed Singh had no more than a third share in the property, and that the plaintiff had acquired that share only under his auction purchase. The Court of First Instance also considered the case of Umed Singh separately from that of Krant Singh. It held that Musamat Pohpa, the owner of the property had died before Krant Singh and Dhaukkal Singh were born and the property passed to Umed Singh alone. It found that the allegation made by Umed Singh that the plaintiff had surrendered the property to him on receipt of the sale consideration had not been proved. That Court therefore in making its decree did not proceed upon a ground common to all the defendants. Consequently Krant Singh was not competent to appeal against the whole decree and the Lower Appellate Court had no authority, under section 544, to reverse or modify that decree in favour of all the defendants on the appeal of Krant Singh alone.

The Court has, in my opinion, erred in allowing Krant Singh to set up in appeal a case inconsistent with that put forward by him in the Court of First Instance. As I have said above, his contention in the Munsif's Court was that Umed Singh owned only a one-third share in the property, and that consequently the plaintiff's claim for the remaining two-thirds of the property was untenable. Inconsistently with that defence he urged in appeal that the plaintiff had no right whatever to the property, inasmuch as he had withdrawn from his auction purchase. This last contention suggests that the plaintiff had purchased the [11] whole property. Such an inconsistent plea he could not be allowed to raise in appeal, and the Lower Appellate Court ought not to have considered that plea and to have decided the appeal with reference to that plea.

I would allow the appeal as between the parties to it, and, setting aside the decree below, remand the case to the Lower Appellate Court under section

562 of the Code of Civil Procedure for a trial of the other questions raised in the appeal before that Court. The appellant will get his costs of this appeal.

Aikman, J. :—I concur in the judgment of my brother BANNEJI and in the decree proposed by him. As this appeal is allowed "as between the parties to it," it will not affect any benefit which the defendants to the suit who are not parties to it may have obtained by the decree of the Lower Appellate Court.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1900) 22 All., 386; (1908) 9 C. L.J., 461; (1902) 15 C. P. L. R., 118; see also (1904) 8 C. W. N., 496.]

[20 All. 11]

FULL BENCH.

The 7th July, 1897.

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BLAIR, AND MR. JUSTICE BURKITT.

Amjad Ali and others.....Plaintiffs

versus

Muhammad Israil and others.....Defendants.*

*Act No. VII of 1870 (Court Fees Act), sections 12 and 28—Court fee—
Finality of decision of Court on question of Court fee.*

The decision of the Court on a question of the Court fee payable on a plaint or memorandum of appeal which is to be "final as between the parties to the suit" must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a decision based upon the report of a munsarim before the plaint or memorandum of appeal is filed and therefore before any parties are before the Court.

Hence where a Court of First Instance held on the report of the Munsarim that a plaint presented to it had been insufficiently stamped, but subsequently, both parties being before the Court and arguments having been heard, decided that the Court fee originally paid was sufficient; it was held that the latter decision was the decision which was final as between the parties within the meaning of section 12† of the Court Fees Act, 1870.

* Second Appeal No. 889 of 1894, from a decree of H. G. Pearse, Esq., District Judge of Agra, dated the 26th July 1894, confirming a decree of Maulvi Aziz-ul Rahman, Subordinate Judge of Agra, dated the 12th March 1894.

† [Sec. 12:—(i) Every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or memorandum of appeal, shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be final as between the parties to the suit.

(ii) But whenever any such suit comes before a Court of appeal, reference or revision, if such Court considers that the said question has been wrongly decided, to the detriment of the revenue, it shall require the party by whom such fee has been paid to pay so much additional fee as would have been payable had the question been rightly decided, and the provisions of section ten, paragraph ii, shall apply.]

[19] THE plaintiffs in this case sued for pre-emption in respect of a sale deed executed on the 19th of October 1892. Their plaint was presented in the Court of the Subordinate Judge on the 16th of November 1893, the first day on which the Court was open after the Dasserah vacation. On that day the Munsarim reported that the court fees paid on the plaint were insufficient, and that the plaint required to be amended in respect of a claim for redemption. Upon this report the Court on the same day ordered that the plaint should be returned for amendment, and directed that it should be presented again, amended, and with the deficient Court fee duty, within four days. On the following day (November 17th) the plaintiffs appeared before the Subordinate Judge and objected to his order in the matter of the Court fee payable on their plaint. They contended that the amount of Court fees they had paid was sufficient, but at the same time they brought into Court the additional amount they had been ordered to pay, and submitted themselves to the order of the Court as to whether it should be paid or not. They also pointed out that they had not made any claim for redemption. On this petition the Court ordered the deficient Court fee duty to be paid, which was done, and the plaint was then admitted and registered and summonses were served on the defendants. The Court either disregarded or countermanded its order as to returning the plaint for amendment, and the case proceeded to a hearing without amendment. At the hearing of the suit the defendants raised the objection that the suit was barred by limitation, the plaint not having been properly stamped when presented on the 16th November, and the deficiency not having been made good within time. The Court, having heard arguments on this point, reconsidered its former *ex parte* decision, and held that the Court fee originally paid on the plaint was sufficient. The suit was ultimately dismissed on the merits.

The plaintiffs appealed, and the defendants preferred an objection under section 561 of the Code of Civil Procedure raising the same point of limitation. The Lower Appellate Court (District [13] Judge of Agra) allowed the objection and dismissed the suit on the ground that it was barred by limitation.

The plaintiffs thereupon appealed to the High Court.

Mr. D. N. Banerji, for the Appellants.

Mr. T. Conlan and Pandit Sundar Lal, for the Respondents.

Burkitt, J.—The suit in which this second appeal has arisen is one for pre-emption. The sale-deed on which the cause of action for pre-emption is alleged to have arisen bears date of the 19th of October 1892. The plaint was presented in the Court of the Subordinate Judge on November 16th, 1893, the first day on which the Court was open after the Dasserah vacation. Therefore, so far as the day on which it was presented is concerned, the plaint was within limitation under section 5 of the Limitation Act. On November 16th, the Court Munsarim reported that the court fees paid on the plaint were insufficient and that the plaint required to be amended in respect of a claim for redemption. On this report the Court on the same day ordered that the plaint should be returned for amendment, and directed that it should be presented again, amended and with the deficient Court fee duty, within four days. Now in passing that order the Subordinate Judge exceeded his powers, as has been held in the case of *Jainti Prasad v. Bacchu Singh*, I. L. R., 15 All., 65. The last day of the limitation period during which the plaint could have been presented so as to be a valid plaint was November 16th, 1893. If the plaint as presented on that day was not sufficiently stamped, and if the deficient duty were not paid on that day, it was not a valid plaint. The Subordinate Judge had no power to extend the period of limitation provided by Act No. XV of

1877 by permitting the intending plaintiffs to pay in the deficient Court fee after November 16th. The case is not one to which the proviso to section 28 of the Court Fees Act applies, and therefore no payment subsequent to November 16th of any deficient Court fees could validate the plaint. As matter of fact the plaint was not returned to the plaintiffs, for on the following day (November 17th) they appeared [14] before the Subordinate Judge and put in a petition in which they objected to his order as to the amount of Court fees paid on the plaint being insufficient. They contended that the amount of the court fees they had paid was sufficient, but at the same time they brought into Court the additional amount they had been ordered to pay and submitted themselves to the order of the Court as to whether it should be paid or not. They also pointed out that they had not made any claim for redemption. On this petition the Court ordered the deficient Court fee duty to be paid, which was done, and the plaint was then admitted and registered, and summonses were served on the defendants. The Court either disregarded or countermanded its order as to returning the plaint for amendment, and the case proceeded to a hearing without amendment.

One of the pleas taken by the defendants at the hearing was that the suit was barred by limitation. Their contention was that the plaint as presented on November 16th, 1893, was not a valid plaint, as it was not sufficiently stamped, and that as the deficient duty was not paid till the following day, when the limitation period had expired, there was not before the Court any valid plaint to which they could be called on to plead. The plaintiffs replied that the court fees paid originally on the plaint on November 16th were sufficient, and that the Court had acted erroneously in compelling them to pay a larger sum. They contended that the plaint as presented on November 16th was a valid plaint. On these pleadings the Subordinate Judge, having heard argument on an issue as to whether the suit was barred by limitation or not, decided that it was not so barred, holding that the stamp duty paid on November 16th was sufficient, that the plaint was "legal and valid" on the day on which it was presented, and that "subsequent proceedings cannot invalidate a valid plaint." The suit was ultimately dismissed on the merits.

On appeal by the plaintiffs the defendants put in an objection under section 561 of the Code of Civil Procedure. Their contention was that the Subordinate Judge was wrong in holding [15] that the suit was not time-barred and that the plaint was properly stamped when presented on November 16th. The District Judge on these pleas held that "the plaint being insufficiently stamped on November 16th was not a plaint," and that that day being the last day of limitation, the Subordinate Judge was not competent to give time to amend the plaint or make good the deficiency. The learned Judge further gave his reasons for holding that the plaint when presented was insufficiently stamped.

On second appeal to this Court the case has been referred to a Bench of three Judges. Before us the case has been almost entirely argued on the effect of the words "such decision shall be final as between the parties to the suit" in section 12 of the Court Fees Act, a point which apparently was not raised before the District Judge, and which, I must say, is not in so many words taken in the memorandum of appeal to this Court. The section cited above provides that "every question relating to valuation for the purpose of determining the amount of any fee chargeable under this chapter on a plaint or a memorandum of appeal shall be decided by the Court in which such plaint or memorandum, as the case may be, is filed, and such decision shall be

final as between the parties to the suit." The question we have to decide is— which of the orders passed by the Subordinate Judge in this case is the "decision" which is to be considered "final" under section 12.

Putting aside as immaterial the order passed on November 17th, it being merely a repetition of the order passed on the 16th, there are two orders which we have to consider. The first is the order of November 16th, by which the Subordinate Judge held that the plaint was not sufficiently stamped and directed the deficient duty to be made good within four days. It is admitted that if that order is the "decision" which section 12 makes final as between the parties, the case is at an end, the plaint not having been stamped within limitation to the amount required by that order. The second order is that passed at the hearing of an issue raised between the parties, by which it was held that the plaint when presented was sufficiently stamped, and so was a valid plaint. [16] If that order be the "decision" referred to in section 12 of the Court Fees Act, it is admitted that this appeal must so far be allowed.

In my opinion the latter of the two orders must be considered to be the "decision" referred to in section 12 of the Court Fees Act. To hold otherwise would, it appears to me, be most unjust and productive of hardship in many cases. The first order was not one passed between the parties. Indeed on November 16th, when that order was passed, there can hardly be said to have been any parties or any suit. The plaint had not been admitted nor registered, and the defendants had not been summoned. I find it difficult to understand how a decision can be arrived at, which will be final as between parties, at the making of which practically neither party was heard. On the presentation of the plaint, all that happened was that the Munsarim made a report to the Court which the Court adopted, apparently without even calling on the plaintiffs. On the following day, when the plaintiffs did contest the correctness of the order as to the insufficiency of the court fees, it was too late, limitation having expired, and, according to the respondents' contention, this decision, though passed without hearing either party, is final and deprives the plaintiffs of all redress. I am unable to believe that the Legislature intended the word "decision" to be so interpreted. I cannot think that it was intended to mean a mere *ex parte* order by the Court, passed without argument and in the absence at least of one of the parties—the defendants. I take it that in a case in which the defendants have appeared and in which one or other side challenges the correctness of the Court fees paid on the plaint, in that case the Court will have jurisdiction, and will be bound, to decide the question of valuation as between the parties, and may conceivably take a view different from that which it took when the plaint was presented and before it was admitted and registered. The latter order is, in my opinion, simply an interlocutory order which the Court may vary as long as it has seisin of the case. In this connection the word "filed" used in section 12 is significant. [17] That word certainly means something more than "presented" for admission. It implies that the plaint or memorandum of appeal has been admitted and put on the files of the Court. That is the sense in which the same word is used in section 28 of the Court Fees Act, and I see no reason why I should give a different meaning to it in section 12. And indeed the words of the section read in their natural and literal sense are wholly inapplicable to a case in which the plaint had not been filed, and in which there was therefore no existing suit, and no parties to such suit. To accept the opposite construction, the section would have to be read "is presented for admission and filing" and "such decision shall be final as between the persons intended

to be impleaded in a suit sought to be instituted." I know no principle of law which would justify so unnatural a construction.

When the Legislature intends to confer the status of finality upon an *ex parte* decision, it does so in plain and explicit terms, as in section 5* of the Court Fees Act. In the absence of clear and unequivocal language to the contrary, I must hold that a decision to be "final as between the parties" must be a judicial decision upon a hearing in which the general judicial maxim of "*Audi alteram partem*" has been observed. If then a plaint or memorandum of appeal has been so "filed," (and under the Rules of this Court it cannot be so filed without a report by the Munsarim that the Court fees paid on it are sufficient) it surely would be open to the defendant at the hearing to contend that the fees paid were insufficient, and that for that reason the plaint on the files of the Court was not a valid plaint. On deciding such a plea—as is the case here—the Court would in my opinion come to the "decision," which, under the wording of section 12 of the Court Fees Act, would be final as between the parties. As an illustration I would take a case in which Rs. 10 was the amount of Court fees legally chargeable on a plaint, but in which from ignorance the Munsarim reported to the Court that Rs. 1,000 ought to have been paid, and that the Court adopted and acted on that report. If then the plaintiff pay that sum—as indeed he [18] must do or have his plaint rejected—surely the defendant at the hearing would be entitled to plead that the proper Court fee chargeable on the plaint was Rs. 10, and that he—if the decree went against him—ought not to have to pay the extra Rs. 990 in costs. I certainly hold that he could ask the Court to decide the valuation for Court fees chargeable on the plaint, and to hold that it had acted erroneously in calling on the plaintiff to pay the Rs. 990, and that the plaintiff, if successful in obtaining a decree, could not recover that sum as part of the costs. This no doubt would be hard on the plaintiff, who simply obeyed the order of the Court, but the defendant would not be in fault, and the plaintiff would not be entitled to pass the loss on to the defendant and to make him responsible for the mistake of the Court.

In the above observations I desire to guard myself against its being supposed that in this judgment I have had in my contemplation any of the cases under section 54 of the Code of Civil Procedure in which the Court may reject a plaint. None of these cases come within the scope of the present appeal.

Some argument was addressed to us on an analogy which it was sought to draw from the practice of the High Court in cases under section 3 of the Court Fees Act. The procedure enjoined by statute and the practice of the High Court and of the District Court is, however, so very different in those matters that no useful analogy can be drawn from them.

[Sec. 5.—When any difference arises between the officer whose duty it is to see that any fee is paid under this chapter and any suitor or attorney, as to the necessity of paying a fee or the amount thereof, the question shall, when the difference arises in any of the said High Courts, be referred to the taxing-officer, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the Chief Justice of such High Court or of such Judge of the High Court as the Chief Justice shall appoint either generally or specially in this behalf.

When any such difference arises in any of the said Courts of Small Causes, the question shall be referred to the Clerk of the Court, whose decision thereon shall be final, except when the question is, in his opinion, one of general importance, in which case he shall refer it to the final decision of the First Judge of such Court.

The Chief Justice shall declare who shall be taxing-officer within the meaning of the first paragraph of this section.]

For all the above reasons I am of opinion that the order passed by the Court of First Instance at the hearing of the suit on March 12th 1894, was the "decision" which, under section 12 of the Court Fees Act, is final as between the parties.

I would therefore allow this appeal, and, setting aside the decree of the Lower Appellate Court, I would remand the case under the section 562 of the Code of Civil Procedure for a decision on the merits, the Lower Appellate Court having decided the suit on a preliminary point. I would direct that costs should abide the event.

[19] Knox, J.—I fully concur and have nothing more to add.

Blair, J.—I concur.

BY THE COURT.—The order of the Court is that the appeal be allowed, the decree on the preliminary point reversed, and the case remanded under section 562, of the Code of Civil Procedure to the Lower Appellate Court with directions to re-admit the case on its file of pending appeals and to dispose of it according to law. Costs will abide the result.

Appeal decreed and cause remanded.

NOTES.

[See, however, (1903) P. R., 74.]

[20 All. 19]

The 7th July, 1897.

PRESENT :

*MR. JUSTICE KNOX, MR. JUSTICE BLAIR, AND MR. JUSTICE BURKITT.

Nand Lal.....Plaintiff

versus

Bansi.....Defendant.*

*Pre-mortgage—Wajib-ul-arz—Co-sharer—Mortgagee of a co-sharer
not himself a co-sharer.*

Two co-sharers in a village, A and G, mortgaged their proprietary interest, with possession, to L. L. made either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to B, with a foreclosure clause in case of non-payment. B afterwards transferred to X for an unexpired period of sixteen years and eleven months the interest in the property which he had acquired from L. One N L, a co-sharer in the village, thereupon brought a suit for pre-mortgage in respect of the transfer to X, on the basis of the village *wajib-ul-arz*, which gave a right of pre-emption or pre-mortgage when the share of a co-sharer should be sold or mortgaged.

* Second Appeal No. 338 of 1896, from a decree of Munshi Mata Prasad, Subordinate Judge of Banda, dated the 3rd February 1896, reversing a decree of Babu Jailal, Munsif of Hamirpur, dated the 3rd December 1896.

* Held, that, inasmuch as B could not be regarded as a co-sharer, no right of pre-mortgage arose in favour of N L in respect of the transfer of the mortgagee interest from B to X. The principle laid down in *Khair-un-nissa Bibi v. Amin Bibi*, Weekly Notes, 1887, p. 93, and in *Ali Ahmad v. Rahmat-ul-lah*, I. L. R., 14 All., 195, followed.

THE material facts of this case are fully stated in the judgment of BURKITT, J.

Munshi Madho Prasad, for the Appellant.

Mr. Roshan Lal, for the Respondent.

Burkitt, J.:—The question we have to decide in Full Bench in this second appeal has arisen in the following manner. Two co-sharers named Asa and Gopal mortgaged their proprietary interest with possession to Musammam Laria. The latter made [20] either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to one Baldeo, with a foreclosure clause in case of non-payment. Baldeo afterwards transferred for an unexpired period of sixteen years and eleven months to the defendant-respondent Bansi the interest in the property which he had acquired from Musammam Laria. It is unnecessary to decide whether the instrument of transfer in his favour was an assignment by conditional sale of a mortgage or was a sub-mortgage. The plaintiff appellant, Nand Lal, being a co-sharer in the village, thereupon instituted this suit for pre-emption, or rather pre-mortgage, under the terms of the village *wajib-ul-arz*, which gives a right of pre-emption and of pre-mortgage when the share of a co-sharer is sold or mortgaged.

Now it is admitted that neither Musammam Laria nor her assignee Baldeo, nor Baldeo's assignee Bansi, is a co-sharer in the village. They are all of them strangers. It is also admitted that the plaintiff made no attempt to assert his alleged rights when the first or the second alienations were made.

The question we have to decide is—did the third transfer noted above give to the plaintiff appellant any cause of action on which he could maintain the present suit? The contention for the appellant is that a mortgagee in possession of the share of a co-sharer is *ipso facto* a co-sharer, and that if he give an assignment of his mortgage or execute a sub-mortgage to one who is not a co-sharer, the same result ensues as in the case of an alienation by a co-sharer.

In my opinion that contention is unsound and cannot be supported. A co-sharer, even though he has mortgaged with possession his interest in the mahal, and so has temporarily abandoned his right to actual possession of the land, is still nevertheless a co-sharer. As such he continues to enjoy many privileges in the village. He continues to be recorded in the *khewat* as proprietor, and above all he retains the right of redemption. No doubt the mortgagee in possession has by contract or by statute many of the rights, and is subject to many of the liabilities, of his mortgagor. [21] For instance, he may be entitled to sue the tenants for rent, if such be the condition of the mortgage, and he may be liable to pay Government revenue. But to my mind these very facts prove that the mortgagee in possession cannot be considered to be in law a co-sharer. For if that were his legal status, then it would require neither a contractual agreement nor any statutory provision to confer on him those rights or to render him subject to those liabilities. The *vakil* who appeared for the appellant was logically compelled to go so far as to contend that a lessee for a few days or weeks or months in possession of a portion, however small, of a co-sharer's property became *ipso facto* a co-sharer. Such a position is quite untenable. Indeed, to accede to the contention of the

appellant would be in many cases to defeat the whole object of the law of pre-emption. A co-sharer in the proprietary rights of a mahal would have only to let in as mortgagee with possession or as lessee for some limited time a perfect stranger, and then on the strength of that limited right the mortgagor or lessor might sell to him as a co-sharer his mortgagor or lessor rights, and thus by two separate steps confer upon him the whole of such mortgagor's or lessor's rights in the property, which he could not by law have conferred upon him by one single grant so long as any co-sharer chose to exercise his pre-emptive right. Such a contention to be successful must be supported by a strong consensus of authority.

In support of the appellant's contention the case of *Salik Sahu v. Jafar Ali*, Weekly Notes, 1881, p. 84, was cited. In that case it was held that "the term 'co-sharer' must be taken to mean the transferee for the time being of a co-sharer's interest." I am unable to concur in that dictum if it is to be taken as one of general applicability, though it may have been correct in the case in which it was pronounced. For I notice that in that case the defendants-respondents were co-sharers, who had alienated by conditional sale to a stranger a portion of a share which they had acquired by enforcing their own pre-emptive rights as co-sharers against one Ishri Singh, another [22] co-sharer. They clearly offended against the *wajib-ul-arz* none the less because the property which they alienated to a stranger had come into their hands by pre-emption from a stranger to whom another co-sharer had alienated it. I do not consider that case as being of any authority in the present appeal. The case of *Lachman Singh v. Ghasi*, I. L. R., 15 All., 137, cited for the appellant, does no more than lay down that mortgagees in possession liable to pay Government revenue may be sued by the lambardar under the Rent Act. The case of *Ganga Prasad v. Chunni Lal*, I.L.R., 18 All., 113, is not at all in point.

On the other hand in *Khair-un-nissa Bibi v. Amin Bibi*, Weekly Notes 1887, p. 93, it was held that a Muhammadan widow in possession, under an order of Court, of a share in the village in lieu of dower was not a co-sharer within the meaning of the *Wajib-ul-arz*, and was not competent to maintain a suit for pre-emption as a co-sharer. The Court in deciding that case remarked that such a person "cannot be in a better position than that of a mortgagee in possession," meaning of course that a mortgagee in possession was not a co-sharer. The last case to which I would refer is that of *Ali Ahmad v. Rahmat-ul-lah*, I. L. R., 14 All., 195, in which the Court, after deciding that a certain document was a mortgage by conditional sale, the term of which had not expired, went on to remark that the "plaintiff (the conditional vendor) had not by reason of the mortgage ceased to be a shareholder in the village, and that he was not by reason of his having mortgaged his share in the village disentitled to maintain this suit for pre-emption." The above two cases show that a mortgagee in possession is not a co-sharer, and that a co-sharer who has mortgaged his interest, even by conditional sale, still remains a co-sharer and continues to enjoy the privileges of that status, and amongst others the right of pre-emption. In the rule laid down in those cases I fully concur.

Turning now to the present case I hold that the original mortgagors, Asa and Gopal, did not, by reason of the mortgage they executed in favour of Musammatt Laria, lose the status of [23] co-sharers in respect of the mortgaged property, and that neither Musammatt Laria nor her assignee (or sub-mortgagee) Baldeo became a co-sharer by virtue of their respective mortgages. When therefore Baldeo assigned or sub-mortgaged to Bansi, that which he transferred was not a co-sharer's interest, but an assignment of a

mortgage of (or a sub-mortgage of) an interest executed by a stranger and not by a co-sharer. To such an alienation the terms of the *wajib-ul-arz* do not, in my opinion, apply. I would therefore affirm the decree of the lower Court and would dismiss this appeal with costs.

Knox, J.—I agree with my brother BURKITT, and have nothing further to add to what he has said. I would affirm the decree of the lower Court and dismiss this appeal with costs.

Blair, J.—I concur.

BY THE COURT.—This appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1903) 25 All., 421.]

[20 All. 23]

The 9th July, 1897.

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, MR. JUSTICE BURKITT, AND MR. JUSTICE AIKMAN.

Nand Kishore.....Plaintiff

versus

Raja Hari Raj Singh and others.....Defendants.

Act No. IV of 1882 (Transfer of Property Act), section 60—Mortgage-Purchase by mortgagee of portion of the mortgaged property—Mortgage not thereby necessarily extinguished.

The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage.

Ahmad Wali v. Bakar Hussain, Weekly Notes, 1883, p. 61, overruled. *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moo., I.A., 404, *Nilakant Banerji v. Suresh Chandra Mullick*, I. L. R., 12 Cal., 414, *Mahtab Singh v. Misree Lall*, N. W.-P., H. C. Rep., 1867, p. 88, *Bithul Nath v. Toolsee Ram*, N.-W. P., H. C. Rep., 1866, p. 125, [24] *Kesree v. Seth Roshun Lal*, 2 N.-W. P., H. C. Rep., 4, *Kuray Mal v. Puran Mal*, I. L. R., 2 All., 565, *Mahtab Rai v. Sant Lall*, I. L. R., 5 All., 276, *Sumera Kurr v. Bhagwant Singh*, Weekly Notes, 1895, p. 1, *Chunna Lal v. Anandi Lal*, I. L. R., 19 All., 196, *Khwaya Bakhsh v. Imzman*, Weekly Notes, 1885, p. 210, *Ballam Das v. Amar Raj*, I. L. R., 12 All., 537, and *Bisheshar Singh v. Laik Singh*, I. L. R., 5 All., 257, referred to.

THIS was a reference to a Full Bench of a question which is thus stated in the referring order :—

“ In this case certain villages were mortgaged to the same person, namely, Raja Sheoraj Singh, the predecessor in title of the respondents, under two

* Second Appeal No. 677 of 1892, from a decree of H. P. Mulock, Esq., District Judge of Moradabad, dated the 21st March 1892, reversing a decree of Babu Mritonjoy Mukerji, Subordinate Judge of Moradabad, dated the 26th September, 1891.

mortgages, upon which decrees for sale were obtained. One of the decrees is No. 66, and the other is No. 77. The latter decree was obtained upon a mortgage of date subsequent to that of the mortgage upon which the other decree was passed. A portion of the property mortgaged under decree No. 66 was purchased by the mortgagee in execution of a simple money decree. Another portion of the mortgaged property, which was subject to both the mortgages, was sold in execution of decree No. 77, and was purchased by the decree-holder mortgagee.

"The question has been raised whether these purchases had the effect of fully discharging decree No. 66, without regard to the value of the property sold and the price paid for it by the purchaser."

Mr. T. Conlan and Pandit Moti Lal, for the Appellant.

Babu Jogindro Nath Chaudhri and Babu Ratan Chand, for the Respondents.

The following judgments were delivered :—

Knox, J.—Two questions have been referred to us for decision. The form in which they have been referred admits of some improvement. They may be set out as follows :—(1) Does the purchase at a Court auction-sale (held in execution of a simple money decree) by a mortgagee of part of the property covered by the mortgage-deed have the effect of fully discharging the whole mortgage debt, without regard to the value of the property [25] sold and the price paid for it by the purchaser? (2) Does the purchase at a Court auction-sale (held in execution of a decree obtained upon a subsequent mortgage-deed) by the mortgagee of part of the property covered by a mortgage-deed of earlier date held by the same mortgagee, have the effect of fully discharging the whole of the prior mortgage-debt without regard to the value of the property sold and the price paid for the purchase?

The authority for holding that either of the above purchases would extinguish the whole mortgage-debt is to be found in a case decided by this Court—*Ahmad Wali v. Bakar Husain*, Weekly Notes, 1883, p. 61.

In that case the mortgagee purchaser held a decree enforcing a mortgage in his favour over several properties. One of these properties was put up for sale in execution of another decree against the original mortgagor, and the mortgagee, finding this, had it notified that the property advertized was being sold subject to the mortgage which he held, and at the sale which followed himself became the purchaser. He then sought to enforce his decree against the rest of the mortgaged property.

It was held that the fact of the purchase made by him of the portion of the property subject to his mortgage lien extinguished the mortgage debt *in toto*.

• No principle of law is laid down as being the principle upon which this judgment proceeded. The Judges contented themselves with setting out what appeared to be the facts of the case, and then without any further reason laid down the law which they considered applicable.

• But it will be found that this judgment stands quite alone and is in conflict with the view held by this Court from 1866 to 1897, and by other Courts in a large number of reported cases, which under similar circumstances recognize the prior mortgage-debt as still subsisting, and go on to lay down the principles upon which the mortgagor or a purchaser or assignee from the mortgagor of the equity of redemption over the whole or portion of [26] the remaining mortgaged property, may redeem such property or portion of it, a result which, it is needless to say, is quite incompatible with the conclusion that the prior mortgage-debt is extinguished by the fact of the

mortgagee purchasing a portion of the mortgaged property subject to the prior incumbrance.

In *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moo. I. A., 404, their Lordships of the Privy Council held that the appellant, who was transferee of the interest of the original mortgagee, and who had subsequently become the owner by purchase of the equity of redemption in twelve and three-quarters of the sixteen mauzas of which the mortgaged property was comprised, if desirous of retaining possession of the villages (in which he had not purchased the equity of redemption) as mortgagee, was entitled to do so against the plaintiff who had purchased the equity of redemption in one of the villages (Hosseinpore) and that the plaintiff's right in that case was limited to the redemption and recovery of Hosseinpore upon payment of so much of the sum as represented the portion of the mortgage debt chargeable on that village.

The same principles were again laid down by the Privy Council in *Nilakant Banerji v. Suresh Chandra Mullik*, I. L. R., 12 Cal., 414.

So far back as the year 1867, in *Mahtab Singh v. Misree Lall and Musamat Soondur*, N.-W. P., H. C. Rep., 1867, p. 88, this Court held that a mortgagee is entitled to say to each of several persons who have succeeded to the mortgagor's interests, that he shall not be entitled to redeem a part of the property on payment of part of the debt, because the whole and every part of the land mortgaged is liable for the whole debt. But it does not follow from this that a mortgagee who has acquired by purchase a part of the mortgagor's rights and interests, is entitled to throw the whole burden of the mortgage-debt on the remaining portion of the equity of the redemption in the hands of one who has purchased it at a sale in execution of a decree against the mortgagor. Each has bought subject to a proportionate share of the burden and must discharge it. [27] It will be further seen from the cases cited below that, so far from any inclination to hold that the mortgage-debt was discharged by the fact of the mortgagee purchasing a portion of the mortgaged property under such circumstances as are set out in the reference, this Court has consistently, with the one reported exception of *Ahmad Wali v. Bakar Husain*, Weekly Notes, 1883, p. 61, held that the mortgage-debt still subsisted, if not satisfied by the mortgagee's purchase, and had to be satisfied by any one seeking to redeem the remainder of the property. See *Bitthul Nath v. Toolsee Ram*, N.-W. P., H. C. Rep., 1866, p. 125, *Kesree v. Seth Roshun Lal*, 2 N.-W. P., H. C. Rep., 4, *Kuray Mal v. Puran Mal*, I. L. R., 2 All., 565, *Mahtab Rai v. Sant Lal*, I. L. R., 5 All., 276. In the very recent cases of *Sumera Kuar v. Bhagwan Singh*, Weekly Notes, 1895, p. 1, and *Chunna Lal v. Anandi Lal*, I. L. R., 19 All., 196, the same principle has been re-affirmed.

The law laid down in the above cases appears to have found a place in the last clause of section 60 of the Transfer of Property Act, wherein it is provided that nothing in section 60 shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgagee, or if there are more mortgagees than one, all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.

Where the mortgagee or mortgagees has or have acquired in part the share of a mortgagor, a person interested in a share only of the mortgaged property is entitled to redeem his own share only on payment of a proportionate part of the amount remaining due on the mortgage, a clear recognition that the mortgage-debt in part still subsists.

Several cases to the same effect will be found in the reported decisions of other High Courts.

The learned counsel for the appellant made some show of relying upon the case of *Khwaja Bakhsh v. Imaman*, Weekly Notes, 1885, p. 210, as an [28] authority in favour of his client; but in that case the mortgagee held two incumbrances over the same property and brought it to sale in execution of the puisne incumbrance after notifying that the sale was being made subject to the prior incumbrance. It was rightly held that the purchase, having been made subject to the prior incumbrance held by the purchaser himself, operated by the rule of merger to extinguish the prior incumbrance, there being no intervening equities in the case.

The same remarks apply to the case of *Ballam Das v. Amar Raj*, I. L. R. 12 All., 537, which was decided upon the same principles.

These cases are perfectly distinct from the cases previously cited.

Burkitt, J.—I concur with my brother KNOX and have nothing to add to his judgment.

Blair, J.—The plaintiff-appellant represents the mortgagor interests and the respondent-defendant the mortgagee interests in this suit. The question referred to us is whether the mortgagees by purchasing certain portions of the mortgaged property sold in execution of money decrees have thereby extinguished their mortgages over the whole of such property. In other words—does the confluence of the mortgagor and mortgagee interests in one person in a part of the property included in a mortgage or mortgages, operate as an extinguishment of the mortgagee's interests in the entire property?

The first case cited for the appellant was that of *Ahmad Wali v. Bakar Husain*, Weekly Notes, 1883, p. 61. It boldly answers the question in the affirmative. The learned Judges give no reason and rely upon no authority. No doubt their decision was based on the general doctrine of the indivisibility of mortgages. That case was professedly followed by a Division Bench of this Court (including one of the Judges who decided it) in the case of *Khwaja Bakhsh v. Imaman*, Weekly Notes, 1885, p. 210. The reason given in the judgment was that the mortgagee purchaser bought at a sale at which the prior [29] incumbrance was notified, and must therefore be taken to have bought at a price in which the amount of the notified incumbrance must have been taken into account. Apparently the learned Judges failed to observe the distinction between the case they were deciding and the case they supposed themselves to be following. The decision in *Khwaja Bakhsh* seems to me open to no exception, and is certainly no authority for the proposition that the purchase by a mortgagee of part of the mortgaged property does *per se* extinguish the whole mortgage. What was purchased in *Khwaja Bakhsh v. Imaman* was the whole and not part of the mortgaged property. To reconcile the principle upon which the two cases were decided, we should have to suppose that in the case of *Ahmad Wali v. Bakar Husain*, the Judges were of opinion that the whole amount of the notified incumbrance must have been taken by the bidders to have been exigible from that part of the mortgaged property so sold and bought. If that doctrine were universally applied, the result would be that if several parts of the mortgagor's equity of redemption were sold separately with notice of the incumbrance in execution of separate money decrees, and the purchasers were each one to take into consideration in the price paid, the amount of the whole incumbrance, the mortgagor would be mulcted in the amount of the whole incumbrance just as many times as there were sales. *E converso*, if the mortgagee were the purchaser in one of

such sales and paid a price in which the whole value of his incumbrance was deducted from the price he would have paid in the absence of incumbrance, then it would only be equitable to hold that his incumbrance was discharged by such purchase. In *Khwaja Bakhsh v. Imaman* the equity bought was co-extensive with the property mortgaged: that case therefore furnishes no answer to the question put to us.

The case of *Ballam Das v. Amar Raj*, I. L. R., 12 All., 537, appears simply to have followed the two previous rulings which I have discussed; but the Court apparently did not notice the distinction between [30] them. To the decision in that case in my opinion no just exception can be taken, but it is no authority for the much larger proposition contended for by the appellant.

Indeed both these later cases are consistent with the principle laid down by the Lords of the Privy Council in *Nawab Azimut Ali Khan v. Jowahir Sing*, 13 Moo. I. A. 404. It is remarkable that each of the Judges who decided the case of *Ahmad Wali v. Bakar Husain* has lent the weight of his authority to some other decision, the principle of which it seems practically impossible to reconcile with the judgment in that case. *Vide* the case of *Bisheshar Singh v. Laik Singh*, I. L. R., 5 All., 257, and that of *Ballam Das v. Amar Raj*, I. L. R., 12 All., 537.

The later judgments of this Court have consistently followed the principle of allocating to each part of a divided equity an *ad valorem* share of the mortgage-debt to which the whole property is subject. The Calcutta rulings are to the same effect. A vast preponderance of authority, based, as it seems to me, upon sound considerations of justice and equity, constrains me to answer the question put to us in the negative. It is not in my opinion a sound general principle of law that the purchase by a mortgagee at a sale under a decree of part of the mortgaged property extinguishes the mortgagee's rights against the whole.

Banerji, J.—The question referred to us is substantially this:—Has the purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, the effect of fully discharging the mortgage without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage?

My answer to the question is that such purchase does not necessarily discharge the mortgage in full and extinguish it. As I said in my judgment in *Chunna Lal v. Anandi Lal*, I. L. R., 19 All., 196, "such purchase has in some instances the effect of discharging the whole of the mortgage debt, but I am unable to hold that it has that [31] effect in every case." If a part of the mortgaged property be acquired by a sole mortgagee, or by all the mortgagees where there are more mortgagees than one, the integrity of the mortgage is thereby broken up and the owner of the remainder of the property becomes entitled to redeem his own share upon payment of a proportionate part of the amount due on the mortgage. But the mortgage does not, by reason of such purchase, of necessity become extinct. This is clear from the provisions of the last paragraph of section 60 of Act No. IV, of 1882, and the rulings cited in his judgment by my brother KNOX. That paragraph would be unnecessary and superfluous, if, as is contended on behalf of the appellant, the purchase of a part of the mortgaged property by the mortgagee has the effect of fully discharging the mortgage in every instance. That property may be sold subject to a mortgage and that the mortgagee himself may purchase the mortgagor's equity of redemption in whole or in part, either by private sale or

at auction in execution of a decree, can admit of no doubt. If, however, a part of the property comprised in a mortgage is sold subject to the mortgage, and the mortgagee himself buys it, certain equities arise between the mortgagee or his representative in interest on the one hand and the mortgagor or the mortgagor's representative in interest on the other, to which a Court is bound, as a Court administering justice and equity, to give effect. One of those equities is that the mortgagee by purchasing a part of the mortgaged property should not place the mortgagor in a worse position than that in which the mortgagor would have been had any other person purchased the property. Where several properties are mortgaged to secure one debt, such properties are, under section 82 of Act No. IV of 1882, liable, in the absence of a contract to the contrary, to contribute rateably to the debt, the extent of the liability of each property being proportionate to its value at the date of the mortgage. If the mortgagee himself purchases one of the properties liable to contribute rateably to the mortgage debt, he must bear a rateable share of the debt, and he cannot be allowed to benefit himself and to prejudice the mortgagor or the owner of the [32] remainder of the property by throwing on it the whole burden of the debt and making that property solely responsible for the debt. He must bring into account the value of the property purchased by himself. When property is sold subject to a mortgage, the price which the purchaser pays for it is ordinarily the difference between the market value of the property and the amount due upon the mortgage. If the mortgagee himself be the purchaser, and, as generally happens in such cases, the price paid by him, is not the full market value of the property, he should not be allowed to keep in his pocket the difference between the market value and the price paid by him and thereby damnify the mortgagor or other owner of the remainder of the mortgaged property. That is the reason why the mortgagee must bring into account the value of the property purchased by himself. As a result of his doing so, the mortgage may, in some instances, be found to have been fully discharged by his purchase. But there is no principle of law or equity under which it may be held that the fact of the mortgagee buying, subject to his mortgage, a part of the property comprised in his mortgage, is in itself sufficient to extinguish the mortgage. Suppose the mortgaged property consists of a large zamindari. Surely it cannot be said that if the mortgagee buys a few acres of land in the zamindari the whole mortgage will thereby be discharged. It is conceivable that the mortgagee may for special reason, *e.g.*, proximity to property owned by himself, be anxious to purchase a small portion of the mortgaged property, and may therefore pay full value for it, the remainder of the property being sufficient security for the mortgage debt. If he pays full value for the portion purchased by him, the purchase cannot in any way damnify the mortgagor so as to create an equity in his favour as against the mortgagee. It is true that if a person other than the mortgagee buys a part of the mortgaged property, he can only protect the part which he has purchased from the claim of the mortgagee, by payment of the whole of the mortgage money due, but he would have the right of contribution as against the other properties comprised in the mortgage. There appears to be no [33] reason why, if the mortgagee be the purchaser, he should be in a worse position than any other purchaser. For the above reasons I am of opinion that the fact of the mortgagee buying a part of the mortgaged property, does not necessarily extinguish the mortgage. To what lesser extent such a purchase may be held to have discharged the mortgage, is not a question which we are called upon to decide on the reference before us. All I need say on that question is that the answer will depend upon the circumstances of each individual case.

The only reported ruling in which a view contrary to that stated above was adopted is that of *Ahmad Wali v. Bakar Husain*, Weekly Notes, 1883, p. 61. The report is very meagre, but it appears from the record of the case to which we have referred, that in that case a subsequent mortgagee purchased a part of the property comprised in his mortgage in execution of a decree obtained by another mortgagee upon a prior mortgage. Strangely enough the property sold under the prior mortgage was sold subject to the lien created by the subsequent mortgage. OLDFIELD and BRODHURST, JJ., held "that if the sale was made subject to the lien which he [subsequent mortgagee] had, his debt must be held as satisfied." The learned Judges referred to no authority or principle of law which supported their view. They did not consider whether the difference between the market value of the property and the price paid for it was equal to the amount of the subsequent mortgage, and they held without any qualification that the fact of the mortgagee buying a part of the mortgaged property subject to his mortgage was enough fully to discharge the mortgage. For the reasons I have stated above I am unable to agree with the opinion of the learned Judges. I notice that in *Bisheshar Singh v. Laik Singh*, I. L. R., 5 All., 257, one of those learned Judges came to a conclusion inconsistent with the view adopted by him three days afterwards in *Ahmad Wali v. Bakar Husain*.

The next case which was referred to on behalf of the appellant was that of *Khawaja Bakhsh v. Imaman*, Weekly Notes, 1885, p. 210. That was a case [34] in which the whole of the mortgaged property was purchased by the mortgagee in execution of a decree obtained by him upon a subsequent mortgage, after notifying to intending purchasers the prior incumbrance held by him. It was held that the prior mortgage was discharged by the purchase. One of the learned Judges based his opinion on the doctrine of merger, which cannot certainly apply to the case of the purchase by the mortgagee of a part only of the mortgaged property. In such a case there cannot be a complete fusion of all the rights of the mortgagor and the mortgagee in the same person. That ruling, therefore, is no authority for the proposition for which the appellant contends.

In the case of *Ballam Das v. Amar Raj*, I. L. R., 12 All., 537, the mortgagee appears to have purchased the mortgaged property with the leave of the Court at a sale held in execution of a decree obtained by him upon his prior mortgage. I fail to see how such a purchase could have the effect of extinguishing a subsequent mortgage held by him over the same property.

The opinion I have expressed above is in accord with the ruling in *Sumera Khuar v. Bhagwant Singh*, Weekly Notes, 1895, p. 1.

I would answer the question referred to us by saying, as I have said above, that the purchase by the mortgagee of a part of the mortgaged property under the circumstances stated in the order of reference, does not necessarily extinguish the mortgage.

Aikman, J.—I concur with my learned colleagues in thinking that the case of *Ahmad Wali v. Bakar Husain*, Weekly Notes, 1883, p. 61, was wrongly decided, and I concur in the judgment of my brother BANERJI.

BY THE COURT.—We have no hesitation therefore in holding that the precedent *Ahmad Wali v. Bakar Husain*, Weekly Notes, 1883, p. 61, must be overruled, and in answering both the questions submitted to us in the negative.

We direct that with this answer the record be returned to the Bench which made the reference.

NOTES.

[This was followed in (1911) 12 I. O., 180; 10 M. L. T., 240.
See also (1909) 81 All., 378; (1900) 24 Mad. 996; (1901) 25 Bom. 88. In (1900) 22 All., .
282 the Full Bench considered several of the dicta in this decision.]

[35] *The 12th July, 1897.*

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Francis Legge.....Defendant

versus

Rambaran Singh and another.....Plaintiffs*.

Declaratory decree—Suit for a declaration of title to and possession in immovable property—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii., Arts. 120, 144.

A suit for a declaration of right to and of actual possession in immovable property is governed by the limitation prescribed by article 120 of the second schedule to the Indian Limitation Act, 1877. *Moru, Bin Patlaji v. Gopal Bin Satu*, I. L. R., 2 Bom, 120; *Durga v. Haidar Ali*, I. L. R., 7 All., 167; *Bhikaji Bajt, v. Pandu*, I. L. R., 19 Bom., 43; and *Mahomed Riasat Ali v. Hasin Banu*, I. L. R., 21 Cal. 157, referred to. The judgment of ODDFIELD, J. in *Debi Prasad v. Jafar Ali*, I. L. R., 3 All., 40, not followed.

THIS was a suit to obtain a declaration of the plaintiffs' right to and their possession of certain immovable property. The plaintiffs alleged that on the 28th of June 1883, the Settlement Officer had expunged their names from the revenue papers relating to the property in suit and had wrongfully caused the name of the defendant to be entered. They claimed to be in possession, and to have remained in possession all along, notwithstanding the settlement record, and they sued only for a declaratory decree.

The Court of First Instance (Munsif of Jaunpur) found as a fact that the plaintiffs were not in possession, and dismissed the suit, applying section 42 of the Specific Relief Act.

The plaintiffs appealed. The Court of first appeal (Subordinate Judge of Jaunpur) found that the plaintiffs were in possession and decreed their claim.

The defendant thereupon appealed to the High Court.

Mr. *Amir-ud-din*, for the Appellant.

Maulvi *Ghulam Mujtaba* and Maulvi *Muhammad Ishaq*, for the Respondents.

Knox, Blair and Burkitt, JJ:—This second appeal which has been referred to us for decision raises the important question by what limitation rule is a suit for a declaration of right to and [36] of actual possession in immovable property governed? The point arises in this way. The plaintiffs, who are respondents before us, allege that they are entitled to possession of and are in possession of certain property in mauza Bataura. They say that by an order dated the 28th of June 1883, the Settlement Officer, who was then conducting settlement proceedings in the Jaunpur district, on the application of the defendant, expunged their names from the village papers in respect of the property in dispute and recorded the name of the defendant as

* Second Appeal No. 591 of 1896, from a decree of Babu Baijnath, District Judge of Jaunpur, dated the 6th May 1896, reversing a decree of Babu Promotha Nath Banerji, Munsif of Jaunpur, dated the 21st December 1895.

being in possession. They further allege that they were, at the time the Settlement Officer made this entry, in possession, and that they have been in actual possession ever since up to the date of the suit, namely, the 15th of May 1895. Now, when twelve years have almost elapsed since the day when the Settlement Officer made the entry in the village papers of which they complain, and which they set forth as their cause of action, they come forward with this suit, in which they ask for a declaration both of right and of actual possession at the date of the suit in respect of the property in suit. The contention raised before us is that their suit was barred at the time they instituted it. The appellant bases his contention upon this, that there is no article in Schedule II of the Indian Limitation Act of 1877 which would apply to the suit as brought, and that therefore it must fall within the purview of Art. 120, an article which provides only six years within which to bring the suit from the date of the cause of action. If this contention is right, the suit is undoubtedly barred. The respondents seek, on the other hand, to bring the suit, though expressly described as a suit for a declaration of right to and of possession in immovable property, under Art. 144, which provides for suits for possession of immovable property or of any interest therein. It seems to us that there is the widest possible difference between a suit for a declaration such as is asked for in this suit and a suit for actual possession of immovable property. In a suit to which Art. 144 would apply, there must be a prayer, express or implied for the dispossession of some one from the property or from the interest in it which the suit claims. In the present suit [37] the plaintiffs have most distinctly asserted that they are and have all along been in possession of the property. There is no one to be dispossessed from it or from any interest in it. All that they want removed is a cloud, which they say was cast upon their title almost twelve years before the institution of the suit. We ought to notice that before this contention was laid before us it was contended by the learned vakil for the respondents that this was a suit to which, to use his own words, no limitation applies. He cited in aid section 23 of the Limitation Act, and contended that this was a case of a continuing wrong; that as long as what he contended to be the wrong 'entry in the village papers continued on record so long a fresh cause of action accrued every day. In the first place, this is not the allegation in the plaint, which sets forth a distinct cause of action as having accrued and become complete on the 28th of June 1883. Secondly, the act of the Settlement Officer, if it was a wrong to the plaintiffs, was a wrong committed once for all, and was very properly described as being the cause of action upon which the plaintiffs came into Court.

With regard to the contention that the suit fell within Art. 144, the learned vakil cited as the leading case in his favour *Moru Bin Patlaji v. Gopal Bin Satu*, I. L. R., 2 Bom., 120. That case, if we may so put it, was a very frail reed on which to rest so heavy a contention. The two Judges who were first seised of the case differed in opinion. One of them, it is true, appeared to be in favour of the view now urged upon our notice by the respondents. The Judges being divided in opinion, the plaintiff in that suit preferred an appeal under the Letters Patent, and thereupon it was held that the question of limitation was not one which could properly be raised in the suit. Another case which certainly does favour the respondents' contention is that of *Debi Prasad v. Jafar Ali*, I. L. R., 3 All., 40. We cannot concur in the remarks of Mr. Justice OLDFIELD in that case, which are set out on page 45. The learned Judge himself must soon have felt considerable doubt as to the view he took in that case, for [38] we find him in *Durga v. Haidar Ali*

I. L. R., 7 All., 167, expressly holding that claims declaratory in their nature were governed by Art. 120 of the Indian Limitation Act of 1877. To the same effect is the case of *Bhikaji Baji v. Pandu*, I. L. R., 19 Bom., 43, which was brought to our notice by the learned counsel for the appellant. The same learned counsel drew our attention to what the Privy Council had held in *Mahomed Riasat Ali v. Hasin Banu*, I. L. R., 21 Cal., 157. At page 163 their Lordships discuss the limitation applicable to such a suit, and say that Art. 120 should be applied unless it is clear that the suit is within some other article. We can find no such article, and no such article has been pointed out to us. We hold that the suit when instituted was barred by limitation and could not be maintained. We therefore allow this appeal, set aside the judgment and decree of the Court below and direct that the suit stand dismissed.

As regards costs, we think that, as the point was not raised in any of the Courts below, we should make no order, and we make none.

Appeal decreed.

NOTES.

[As regards the applicability of Art. 120, this was followed in (1906) 5 A. L. J., 637; (1908) 31 All., 9; (1908) P. R., 61; (1905) 1 C. L. J., 73.

The case where the declaratory relief is only ancillary to the main relief was distinguished in (1912) 15 I. C., 545 (All.).]

[20 All. 39.]

MISCELLANEOUS CIVIL.

The 13th July, 1897.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Chail Behari Lal.....Defendant

versus

Rahmal Das and another.....Plaintiffs. *

Civil Procedure Code, sections 372, 582—Parties to an appeal—Attaching creditor of decree-holder respondent seeking to be brought on to the record as a respondent.

Held that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent to the appeal under sections 372 and 582 of the Code of Civil Procedure.

THE facts of the case sufficiently appear from the order of the Court.

Munshi Madho Prasad, for the Applicant.

Banerji and Aikman, JJ.—This is an application under section 372 of the Code of Civil Procedure, read with section 582 of that Code, to be added as a respondent to an appeal [39] pending in this Court. The applicant is a judgment-creditor of the respondent, and he caused the decree appealed against to be attached in execution of a decree held by him against the respondent. It is contended on his behalf that by reason of this attachment he has acquired an interest pending the suit and is therefore entitled to be joined as a party to the appeal under section 372. In our opinion the applicant is not a person in whose favour there has been an assignment, creation

* Application in First Appeal No. 232 of 1894.

or devolution of any interest pending the appeal. It is conceded that he is not an assignee of the decree. What Mr. *Madho Prasad* urges on his behalf is that an interest has been created in favour of the applicant by operation of law, that is, by the attachment which he has obtained over the decree held by the respondent. With this contention we are unable to agree. As stated on page 264 of *Daniell's Chancery Practice*, Vol. I.—“It is a general rule that no one should be made a party to an action against whom, if brought to a hearing, no order can be made.” The test therefore is whether the applicant is a person in whose favour or against whom a decree can be made in the appeal. We think that he is not such a person. Mr. *Madho Prasad* relied upon the case of *Wallis v. Smith*, 51 L. J. Eq., 577. That case in our opinion has no bearing upon the present question. That was a case in which, after decree had been obtained, the decree-holder, plaintiff, took out a garnishee order against one of the debtors of his judgment-debtor. The London and South Western Bank, which held a decree against the decree-holder plaintiff, and which had got the plaintiff's decree attached, applied to be made a party to the proceedings taken out by the plaintiff against his judgment-debtor, and that application was granted. A case like that is provided for by section 273 of the Code of Civil Procedure, according to which a judgment-creditor who has caused a decree to be attached may under certain circumstances himself apply for the execution of that decree and may take all the steps necessary to realize the amount of the decree attached by him. That is a very different [40] thing from holding that an attaching creditor has a right to be heard as to the merits of the decree attached by him which is *sub judice* in appeal. For the above reasons we refuse the application with costs.

Application refused.

NOTES.

[In the O. P. C., (1908), O. 22, r. 10, sub-clause 2, provides that “the attachment of a decree pending an appeal therefrom shall be deemed to be an interest entitling the person who procured such attachment to the benefit of sub-rule (1).”

In (1910) 20 M. L. J., 524, a case under the O. P. C., 1892, this decision was applied.]

[20 All. 40]

APPELLATE CRIMINAL.

The 14th July, 1897.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Chidda and others.

Criminal Procedure Code, sections 337 and 529—Pardon—Tender of pardon by a Magistrate having powers under section 337, but not being the Magistrate before whom inquiry was being held.

A dacoity was committed in the district of Muttra and was being inquired into in that district. Pending such inquiry, one Partap Singh appeared before the Magistrate of the neighbouring district of Etah and obtained from him a tender of pardon in respect of the said dacoity, on the strength of which pardon he was examined as a witness by the Magistrate of the Etah district and made a statement implicating himself and others in the dacoity. Subsequently, on the case being committed to the Court of the Sessions Judge of Agra, the tender of pardon made by the District Magistrate of Etah was ignored and Partap Singh was tried and sentenced for the dacoity.

Held, on appeal to the High Court, that the Magistrate of the Etah District had no jurisdiction under the circumstances to make the tender of pardon which he did, and that his action in that respect was not covered by section 529 of the Code of Criminal Procedure.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Messrs. A. E. Ryves and A. H. C. Hamilton, for the Appellants.

The Government Advocate (Mr. E. Chamier), for the Crown.

Knox and Burkitt, J.—Chidda, Kallu, Kana, Partap Singh, Sona and Tunya have been convicted of an offence under section 395 of the Indian Penal Code and have one and all been sentenced to transportation for life. They have all appealed, and their appeals are now before us for decision. One of them, Partap Singh, pleaded guilty in the Court of Session, but in that Court he also pleaded in bar of sentence the fact that he had obtained what he considered a pardon under section 337* of the Code of [41] Criminal Procedure from

* [Sec. 337 :—In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any Magistrate of the first class inquiring into the offence, or, with the sanction of the District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor in the commission thereof.

Every person accepting a tender under this section shall be examined as a witness in the case.

Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing; and when any Magistrate has made such tender and examined the person, to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.)

the District Magistrate of Etah. In his memorandum of appeal here he pleads the same fact in bar of sentence. We will deal with his case first. The dacoity with which he is charged took place in the district of Muttra. The only inquiry connected with it that we know of was conducted from first to last in the district of Muttra. After that inquiry had continued for a considerable time in the district of Muttra; after one Balwanta had been arrested and obtained an offer of pardon from the District Magistrate of Muttra, and had named certain persons, and among them this very Partap Singh, who is himself a resident of Muttra, as having taken part in the dacoity, Partap Singh betook himself to the district of Etah, there presented himself before the District Magistrate, and, by some representations, of which we know nothing, obtained a tender of pardon from that Magistrate. The District Magistrate of Etah was not the District Magistrate before whom the offence of the dacoity was under inquiry, and he was certainly not one of the other persons mentioned in section 337 of the Code of Criminal Procedure. This being the case, he had no jurisdiction to tender a pardon to Partap Singh. Partap Singh was, however, examined as a witness by the Magistrate of Etah, and it is contended from the fact that he was so examined under a tender of pardon, however wrongly granted, that that tender of pardon cannot now be set aside. The last clause of section 529 is cited in support of this contention. In our opinion section 529 refers to quite different circumstances. It is a section which deals with acts done by a Magistrate in no way empowered by law to do those acts; it has no reference to a Magistrate empowered otherwise under the Act to tender pardon, but not possessing jurisdiction over the particular offence. The Magistrate of Etah, as Magistrate of the district Etah, is undoubtedly empowered to tender pardon in respect of offences inquired into in the Etah district which are covered by the provisions of section 337 of the Code of Criminal Procedure; but he has no such jurisdiction in respect of an offence of the same kind committed in the district of Muttra. On the other [42] hand a second or third class Magistrate in the Muttra district not inquiring into the offence or not empowered by the Magistrate of the district, has no power by law to tender a pardon to a person accused of having committed an offence covered by section 337 within the district of Muttra, but if such a Magistrate should tender a pardon in such a case, his proceedings would not be set aside merely on the ground of his not being so empowered. Under these circumstances the Court of Session was, in our opinion, right in ignoring the pardon tendered by the District Magistrate of Etah to Partap Singh, and the so-called pardon cannot be pleaded in bar of sentence. The appeal of Partap Singh is, therefore, dismissed.

[The remainder of the judgment being occupied chiefly with a discussion of the facts of the case, is not reported—Ed.]

NOTES.

[In 5 C. W. N., 686, this was distinguished.]

[20 All. 42]

The 15th July, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Tika Ram and another.....Defendants

versus

Shama Charan.....Plaintiff.*

Hindu Law—Adverse possession—Limitation—Suit by reversioner to Hindu female heir—Appeal from order of an appellate Court—High Court bound by findings of fact of the Court below—Civil Procedure Code, sections 562 and 588.

Where property which should by law be in the possession of a female heir is held adversely to such heir by a trespasser, the possession of the trespasser is adverse also as against the reversioners of such female heir as well as against the female heir, and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. *Hanuman Prasad v. Bhagauti Prasad*, I. L. R., 19 All., 357, approved.

The Full Bench decision in *Ram Kali v. Kedarnath*, I. L. R., 14 All., 156, has been impliedly overruled by the judgment of the Privy Council in *Mussummat Lachhan Kunwar v. Anant Singh*, L. R., 22 I. A., 25.

In an appeal from an order of an appellate Court the High Court is bound to accept, as in a second appeal from a decree, the findings of fact arrived at by the Lower Appellate Court. *Gauri Shankar v. Karima Bibi*, I. L. R., 15 All., 413, approved.

[43] THE facts of this case are fully stated in the judgment of the Court.

Mr. E. Chamier, for the Appellants.

Mr. D. N. Banerji, for the Respondent.

Edge, C. J., and Blair, J.:—In 1869 Jit Singh, who was possessed of a 12-biswa share in the village of Sitalpur, died. He left a son, Sewa, and a widow, Raika. Sewa and Raika obtained mutation of names in the Revenue papers each in respect of six biswas out of the twelve biswas. In 1873 Sewa died and left a widow, Musammatt Pan Kunwar. He left no son. Musammatt Pan Kunwar got mutation in her favour in the Revenue papers of the six biswas which had been entered in Sewa's name. Disputes began between Pan Kunwar and Raika after Sewa's death. They commenced to live separately. Each collected in respect of an 8-anna share of the 16 annas of the original 12 biswas, and in 1880 these ladies partitioned the 12 biswas between them. The Court of First Instance found that Raika's possession was adverse from the first, that is, from the death of Jit Singh. The Court of first appeal found that Raika's possession of the 6 biswas did not become adverse until the death of Sewa. There was evidence to support the latter finding. After the partition in 1880, Raika mortgaged the 6 biswas of which she was in possession to Puran Lal, who was the father of the defendants in this suit, who are appellants here. Puran Lal subsequently brought a suit for sale under the Transfer of Property Act on his mortgage, got a decree for sale, and on the 20th of October 1887, at the sale under that decree, purchased the 6 biswas which had been in the possession of Raika. In 1888 Raika died. On the 22nd of December 1893 Musammatt Pan Kunwar died. After her death the defendants 3, 4 and 5 in this suit, who were reversioners of Sewa, sold all their rights, whatever they were, in the 12 biswas, to the plaintiff. In December 1895 the plaintiff brought his suit against the representatives of Puran Lal to obtain

* First Appeal No. 24 of 1897, from an order of E. J. Kitts Esq., District Judge of Bareilly, dated the 1st April 1897.

possession of the 6 biswas which had been held by Musammat Raika. The suit was dismissed in the first Court on the finding that Raika had had adverse [44] possession since 1869. The Court of first appeal, holding that her adverse possession did not commence until 1873, and applying the Full Bench ruling of this Court in *Ram Kali v. Kedarnath*, I. L. R., 14 All., 156, set aside the decision of the first Court and made an order of remand under section 562 of the Code of Civil Procedure. From that order this appeal has been brought by the defendants-appellants.

Their contention is that the decision of their Lordships of the Privy Council in *Mussummat Lachhan Kunwar v. Anant Singh* * impliedly overruled the decision in *Ram Kali v. Kedarnath*, I. L. R., 14 All., 156, and that on the finding of Raika's possession being adverse from the death of Sewa in 1873, the Court of first appeal was bound to dismiss the appeal to that Court and affirm the decree of the first Court dismissing the suit, and had no power to make an order of remand.

On the other hand, it is contended for the respondents that their Lordships of the Privy Council in the case to which we have referred did not overrule the Full Bench decision of this Court in *Ram Kali v. Kedarnath*, I. L. R., 14 All., 156; that that decision applied, and, as there had been no suit by or against Musammat Pan Kunwar in which Raika's adverse possession had been established or Raika's adverse claim had been made, article 141 of schedule II of the Indian Limitation Act, 1877, applied, and limitation commenced to run, not from 1873, but from the death of Musammat Pan Kunwar in 1893, when the succession opened up to the defendants 3, 4 and 5. It was further contended, on behalf of the respondent that the finding of the Court of first appeal that the possession of Raika became adverse on the death of Sewa in 1873, was a bad finding in law, it being alleged that there was no evidence in support of it.

This is an appeal from an order of remand made by a Court of first appeal. The findings of fact of that Court of first appeal [46] are therefore in our opinion binding on us, unless they are contrary to law, if partly of law, and partly of fact, or unless there was no evidence to support them. We agree with the decision in *Gauri Shankar v. Karima Bibi*, I. L. R., 15 All., 413. This question of the legality of the order of remand could be raised, as it was, here, by an appeal under section 588 of the Code of Civil Procedure. It was open, according to the rulings of this Court, the propriety of which we need not discuss, as they are binding on us, to these appellants to have refrained from bringing an appeal against the order and to have raised the question of the legality or propriety of that order in an appeal against the decree which might ultimately be made by the Court of first appeal. That is the construction which has been put by this Court upon section 591 of Act No. XIV of 1892. In second appeal we are bound by the findings of fact of the Court of first appeal. We cannot question them, unless they are based upon a misconception of the law or have no evidence to support them. It would be an anomaly if, in an appeal from an order in the same suit of the Court of first appeal, we could do that which we could not do in an appeal from a decree of the Court in that suit, namely, question the findings of fact of the Court of first appeal, except upon one of the grounds to which we have alluded. We find that there is evidence on the record which shows that, at least from the death of Sewa in 1873, Musammat Raika took up an independent position and claimed the profits of the 6-biswa share entered in her name and obtained them for her own use. As the widow of Jit Singh, she had absolutely no title to the 6-biswa share or any part of it. Her only interest, so to speak, during

* L. R., 22 I. A., 25; S.C. I. L. R., 22 Cal., 445, *s. v. Lachhan Kunwar v. Mahorath Ram*.

the lifetime of her son, and on his death during the lifetime of his widow, was a right to be maintained. Consequently, it not having been found, and there being no evidence, that she was allowed possession for maintenance, the Court below rightly found that, at least from 1873, Raika's possession was adverse. In truth, the plaintiff had not set up that Raika had permissive possession, possession by courtesy, or possession in lieu of maintenance. The plaintiff came [46] into Court on the simple case, which was entirely disproved, that Raika never was in possession at all.

Now, on the findings of the Court of first appeal, if the Full Bench decision in *Ram Kali v. Kedarnath* was right, the order of the lower Court was right. If that decision has been impliedly overruled by the decision of the Privy Council to which we have referred, the defendants were entitled to move the Court of first appeal to dismiss the appeal to that Court. The Full Bench decision in *Ram Kali v. Kedarnath* was based on a Full Bench decision of the Calcutta Court in *Srinath Kur v. Prosunno Kumar Ghosh*, I. L. R., 9 Cal., 934. It appears to us that their Lordships of the Privy Council in the case of *Lachhan Kunwar v. Anant Singh*, to which we have referred, have impliedly overruled the Full Bench decision of this Court, and that article 141* of the second schedule to Act No. XV of 1877 does not apply where a trespasser has held, as against the widow of a sonless and separated Hindu, adverse possession, and that adverse possession must in such a case be counted, for the purposes of limitation, from the time when such trespasser or other person first began to hold adversely to the widow. In our opinion the law on this point and on article 141 is explained clearly by our brother BURKITT in *Hanuman Prasad Singh v. Bhagauti Prasad*, I. L. R., 19 All., 357. We allow this appeal with costs, and, setting aside the order under appeal, we dismiss the appeal to the Court of first appeal with costs, and restore and affirm the decree of the first Court dismissing the suit with costs.

Appeal decreed.

NOTES.

* [This decision is no longer law, as adverse possession has been held to commence against the full male reversioners, only after the termination of the intervening limited estates:— (1899) 23 All., 448; (1903) 25 All., 495; (1899) 23 Bom., 725; (1913) 11 A.L.J., 393; (1911) 8 A.L.J., 849; (1898) 26 Cal., 285.]

[Art. No. 141:—

| Description of suit. | Period of limitation. | Time from which period begins to run |
|--|-----------------------|--------------------------------------|
| Like suit by a Hindu or Muhammadan entitled to the possession of immoveable property on the death of a Hindu or Muhammadan female. | Twelve years ... | When the female dies. |

(20 All. 46)
APPELLATE CIVIL.

The 16th July, 1897.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BURKITT.

Huseni Begam and others.....Defendants
versus
The Collector of Moradabad.....Plaintiff.*

*Civil Procedure Code, section 539—Trust—Suit for removal of trustee—
Parties—Alienees of trustees not necessary parties.*

A suit may properly be brought and a decree made under section 539 † of the Code of Civil Procedure for the removal of a trustee. *Narasimha v. Ayyan* [47] *Chetti*, I.L.R., 12 Mad., 157 ; *Sathappayyar v. Periasami*, I. L. R., 14 Mad., 1 ; *Rangasami Naickan v. Varadappa Naickan*, I.L.R., 17 Mad., 462 ; *Chintaman Bajaji Dev v. Dhondo Ganesh Dev*, I.L.R., 15 Bom., 612 ; *Tricumdass Mulji v. Khimji Vullabhdass*, I.L.R., 16 Bom., 626 ; *Sayad Hussein Mian v. The Collector of Kaira*, I. L. R., 21 Bom., 48 ; *Sajedur Raja v. Baidyanath Deb*, I.L.R., 20 Cal., 397 ; *Mohi-ud-din v. Sayid-ud-din*, I.L.R., 20 Cal., 810, and *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*, I. L. R., 24 Cal., 418, referred to. *Subbayya v. Krishna*, I. L. R., 14 Mad., 186, followed.

In such a suit as above it is not necessary to make the alienees from the trustee defendant parties to the suit. *Bishen Chand v. Syed Nadir*, L.R., 15, I.A., 1 ; *Chintaman Bajaji Dev v. Dhondo Ganesh Dev*, I.L.R., 15 Bom., 612, and the *Attorney General v. The Port Reeve and others of Avon*, 33 L. J., N. S. Ch., 172, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, for the Appellants.

Mr. *E. Chamier*, for the Respondent.

Burkitt, J. (Knox, J., concurring).—The suit out of which this first appeal has arisen was instituted by the Collector of Moradabad (under

* First Appeal No. 36 of 1896, from a decree of G. J. Nicholls, Esq., District Judge of Moradabad, dated the 1st May 1895.

† [Sec. 539 :—In case of any alleged breach of any express or constructive trust created for public charitable or religious purposes, or whenever the direction of the Court is deemed necessary for the administration of any such trust, the Advocate-General acting *ex officio*, or two or more persons having a direct interest in the trust and having obtained the consent in writing of the Advocate-General, may institute a suit in the High Court or the District Court within the local limits of whose Civil Jurisdiction the whole or any part of the subject-matter of the trust is situate, to obtain a decree—

- (a) appointing new trustees under the trust ;
- (b) vesting any property in the trustees under the trust ;
- (c) declaring the proportions in which its objects are entitled ;
- (d) authorizing the whole or any part of its property to be let, sold, mortgaged or exchanged ;

(e) settling a scheme for its management ;
or granting such further or other relief as the nature of the case may require.

The powers conferred by this section on the Advocate-General may, outside the Presidency-towns, be, with the previous sanction of the Local Government, exercised also by the Collector or by such officer as the Local Government may appoint in this behalf.

Act No. X of 1840, section 2, is hereby repealed.]

instructions from the Local Government) under the provisions of section 539 of the Code of Civil Procedure.

The case for the plaintiff is that one Miran Shah, the ancestor of all the defendants, had, before his death some fifty years before suit, made a *waqf* of mauza Haibatpur for religious and charitable purposes, for the up-keep of a mosque and *imambara* he had founded, for the expenses of an annual "*urs*" or religious assembly to commemorate the Pir Ghaus Azam, to feed the poor at the "*urs*" and to keep his (Miran Shah's) tomb in repair. It is admitted that mauza Haibatpur had been granted revenue-free to Miran Shah, who was a man of great piety and sanctity among Musalmans; that the revenue-free grant was made by the Oudh Government, and that the village still remains *muafi*, not having been resumed at either of the two settlements which have taken place since the British Government came into possession. It was alleged for the plaintiff that the village came into the possession [48] of Miran Shah's heirs as trustees, and that they for a considerable time performed properly their duty as such; but latterly (having become Shiahs) they have, in breach of the trust, treated the trust property as their own, have mortgaged and otherwise alienated some portions of it, and have pulled down some of the trust buildings and appropriated to their own use the value of the materials. The plaintiff accordingly prayed for the appointment of new trustees—which of course implies the dismissal of the existing trustees; that the property be declared to be *wakf*, and that the defendants be required to furnish accounts and to pay sums which they had improperly appropriated in breach of the trust. It was also prayed that a scheme for the management of the trust should be settled.

Those of the defendants who appeared first of all raised a plea of limitation to the effect that they had been dealing with the property as their own for more than twelve years. There does not seem to have been any discussion as to this plea at the hearing. Clearly, once the trust was established, such a plea could not prevail. The next pleaded want of parties, that their transferees should have been made parties. This plea was overruled by the lower Court. In the fourth paragraph of the written statement the defendants deny the fact of the endowment, alleging that "the property in dispute was never endowed for charitable purposes as alleged by the plaintiff on behalf of any party, i.e., for the purposes set forth in the plaint." This paragraph, while denying the plaintiff's case as to the trust, may perhaps be regarded as an admission that the objects of the alleged *waqf* as set forth in the plaint are charitable purposes. In subsequent paragraphs the defendants deny that the income of the property in dispute was ever applied to the purposes mentioned in the plaint. They also deny the demolition of an *imambara* in Haibatpur and of an ancestral house in Sambhal. The first portion of this plea—like the first paragraph of the written statement—takes advantage of a blunder in the plaint, afterwards amended. The *imambara*, mosque, etc., were not in [49] Haibatpur, but in an adjoining mohalla of the town of Sambhal. There is nothing in the plaint about an ancestral house. The seventh paragraph of the written statement is important. In that paragraph the defendants admit that the property in dispute descended to them from Miran Shah, and they add that they spend money on the mosque, *imambara* and tomb according to their respective positions, a statement which at the hearing of this appeal was explained to mean that they were not legally bound to spend any money on such purposes, but did so of their own free will and pleasure. These are the only pleas which call for notice.

The District Judge gave the plaintiff a decree. The defendants appeal.

The first plea argued for them was that the suit was bad because the transferees from the defendants had not been impleaded. That plea was overruled, and we think rightly, by the learned District Judge. In support of this contention the learned advocate for the appellants cited the case of *Bishen Chand v. Syed Nadir*, L. R., 15 I. A., 1, in which, at p. 9, their Lordships found themselves unable, in a suit in which all the parties interested were not before them, to decide the extent of certain trusts, and whether any surplus remained over to the *mutawalli* for his private use. We cannot see that this case is any authority for the proposition that to a suit for the execution and administration of a trust the alienees of the trust property, who have an interest adverse to the trust are necessary parties. In the case of *Chintaman Bajaji Dev v. Dhondo Ganesh Dev*, I. L. R., 15 Bom., 612, which was a suit under section 539 of the Code of Civil Procedure for the execution and administration of a trust and for removal of the trustees, who had incumbered and alienated a large portion of the trust property, the incumbrancers and alienees were not considered necessary parties. And in the case of *The Attorney-General v. The Port Reeve and others of Aron*, 33 L. J., N. S. Ch., 172, it was held by the [50] Lords Justices that persons claiming title adverse to a trust cannot be made parties to a suit for the execution of the trust. No case has been shown to us in which, in a suit under section 539 of the Code of Civil Procedure, the alienees or incumbrancers have been made parties, and indeed it does not appear what relief could be granted against them under that section. We think that a prayer for recovery of possession from such persons could not be entertained under that section. The plaintiff in this suit could not institute a suit for possession. Such a suit could be instituted only by the trustee. We therefore overrule this plea.

Next it is contended that the *waqf* set up by the plaint is bad, as it is not for public religious or charitable purposes. The briefest consideration of the purposes of the *waqf* set out above is in our opinion abundantly sufficient to show that they are public charitable and religious purposes. That plea also fails.

The last plea of law raised by the appellants is that the suit is bad because a suit to remove a trustee cannot be entertained under section 539 of the Code. As far as we can ascertain the first doubt whether such a suit would lie was suggested by an *obiter dictum* in the case of *Narasimha v. Ayyan Chetti*, I. L. R., 12 Mad., 157, where the learned Judges are reported to have said that "it is not at all clear that a suit to remove a trustee can be maintained under section 539." The question was not decided in the next case, *Sathappayar v. Periasami*, I. L. R., 14 Mad., 1, as it was held that that case did not come under section 539, the object of the endowment being for private religious purposes, namely to perpetuate the spiritual family of a *guru*. But in the case of *Subbayya v. Krishna*, I. L. R., 14 Mad., 186, the question was very elaborately argued before a Bench of three Judges, and it was held by a majority of the Court that a suit to remove a trustee could be maintained under section 539 of the Code of Civil Procedure. The same question again came before the Madras High Court in *Rangasami Naickan* [51] *v. Varadappa Naickan*, I. L. R., 17 Mad., 462, when a Bench of three Judges (one of whom was the dissentient Judge in the case of *Subbayya v. Krishna* just mentioned) held that a suit to remove a trustee could not be maintained under section 539 of the Code. In *Chintaman Bajaji Dev v. Dhondo Ganesh Dev*, I. L. R., 15 Bom., 612, a case already cited, the question was not raised. It appears to have been taken for granted that such a suit could be maintained. In the case *Tricumdass Mulji v. Khimji Vullabhdas*, I. L. R., 16 Bom., 626, which was a suit to administer a public charitable trust,

to compel a trustee to account, and for the removal from office of that trustee and for the appointment of a new trustee, it was held, following the decision of the majority of the Bench in *Subbayya v. Krishna*, I. L. R., 14 Mad., 186, that the suit came under section 539, and could not be maintained, as the sanction of the Advocate-General had not been obtained. The most recent case in the Bombay Court is that of *Sayad Hussein Mian v. The Collector of Karra*, I. L. R., 21 Bom., 48, and in it the decision in the previous case following the ruling of the majority of the Judges in *Subbayya v. Krishna* was affirmed. There are also two cases in the 20th volume of the Indian Law Reports, Calcutta Series, namely, *Sajedur Raja v. Baidyanath Deb* at p. 397, and *Mohiuddin v. Sayiduddin* at p. 810, the rule laid down in which is to the same effect as in the Bombay cases and in *Subbayya v. Krishna*, I. L. R., 14 Mad., 186. The case of *Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav*, I. L. R., 24 Cal., 418, the report of which was published after we had reserved judgment in this appeal, follows and approves of the decision of the majority of the Bench in *Sybbayya v. Krishna*, I. L. R., 14 Mad., 186.

In this conflict of authority there is undoubtedly a preponderance of judicial decisions in favour of the proposition that a suit to have a trustee removed and another appointed in his place is a suit which is covered by the provisions of section 539 of the Code of Civil Procedure. We have considered and studied the elaborate judgments of the Madras High Court in the cases in [52] the 14th and 17th volumes of the Madras Reports. After mature consideration our opinion is in conformity with that expressed by the majority of the Bench in *Subbayya v. Krishna*, I. L. R., 14 Mad., 186. We entirely concur in the elaborate judgment of Mr. Justice WEIR and in the reasons he gives for the conclusion at which he arrived. We feel we can add nothing to it. We hold therefore that this suit is not bad because of the prayer for the removal of the existing trustees.

On the merits we are of opinion that the appellants have failed to make out their case. That mauza Haibatpur was granted free of revenue to Miran Shah, though a Sunni, by the Shiah Government of Oudh, on account of his character for holiness and sanctity is not denied. It is also admitted that the British Government has continued the *muafi* to Miran Shah's family up to the present day. The exhibits Record Nos. 18C. and 19C. show the reason why Government at the last settlement, instead of resuming the *muafi* grant (as it might have done), allowed it to continue. The first paragraph of the *wajib-ul-arz* No. 18C. shows the reason for the continuance of the *muafi* to be because mauza Haibatpur is a mahal "appropriated to charitable expenses in connection with a mosque, *imambara* and 'urs' of Ghaus Azam." And the same reasons for the continuance of the *muafi* are given in Record No. 19C. drawn up some three years later. We think these facts are most significant and important. It is admitted that Miran Shah left no son living at his death and that he was succeeded by his daughters (three in number), whose descendants are now in possession of Haibatpur. Why should the grant have been continued to them revenue-free, unless because of Miran Shah having dedicated Haibatpur to charitable and religious purposes? It is not even suggested that these descendants of Miran Shah in the female line had any personal claims to receive a revenue-free grant at the hands of the British Government, nor is it suggested that, either at the settlement of 1846 or at the subsequent [53] settlement of about 1874-75, any such personal claims were put forward. Clearly the *muafi* was continued at settlement because of the reasons stated in Record Nos. 18C. and 19C. Here we would refer to the attested copy (Record No. 74C.) of a deposition by Sayyed Hasan, a pleader who appeared

for Musammât Huseni Begam (one of the appellants here), in a partition case, in which it was sought to have mauza Haibatpur partitioned among the descendants of Miran Shah in 1889. The pleader in that deposition on behalf of his client, the defendant-appellant Musammât Huseni Begam, in the clearest terms declared mauza Haibatpur to be endowed property, the income of which was applied to the mosque, the *imambara* and the "*urs*," and that it was so applied by his client as *mutawalli* jointly with the other *mutawallis*. To the same effect is a petition, No. 75C. of the record, filed in the same partition proceedings by Musammât Muhamdi, one of the defendants to this suit, now deceased. The genuineness of the petition is proved by the evidence of Muhammad Husen, son of Musammât Muhamdi. This petition is much to the same effect as the deposition just mentioned above. It states that mauza Haibatpur is endowed property, and that it was granted *muafi* in 1840 to Miran Shah for charitable purposes. No. 76C. of the record is an attested copy of another deposition made by the pleader Sayyed Hasan in July 1869, on behalf of Musammât Huseni Begam in the partition case. This deposition emphasizes the pleader's former statement, and further makes mention of papers relating to the settlement of 1846, copies of which papers the witness produced to the official making the partition. The appellants have not attempted to produce any of the papers just mentioned, though, as they were produced by Musammât Huseni's pleader in 1889, it may be presumed she has possession of them now. There are further on record two petitions, Nos. 78C. and 79C., dated the 21st of January and 24th of February 1890, filed by Sayyed Asghar Hasan (one of the defendants-appellants) before the revenue authorities in mutation of names proceedings, in both of which he asserts that [54] mauza Haibatpur is an endowed village, the revenue of which is devoted to the mosque, *imambara*, *urs* of Ghaus Azam and support of the *mutawallis*. In No. 78C. it is alleged that the *wajib-ul-arz* (record No. 18C.) was prepared as proof of those facts. The documentary evidence detailed above establishes in our opinion a very strong case in favour of the plaintiff respondent.

The defendants appellants did not produce any documentary evidence. They have contented themselves with calling four witnesses, three of whom are worthless, while the deposition of the fourth, Intizam Ali, is more favourable to the respondent's case than to the appellants'.

The respondent has called three witnesses, Kazi Imam Ali, Sheikh Wilayat Ali and Masiat-ullah, all of whom were acquainted with Miran Shah. Their evidence most strongly supports the respondent's case, showing as it does that Miran Shah himself built the mosque and *imambara* and expressed his intention of dedicating the income of Haibatpur to their support. One of the witnesses professes to know of, and to have been present at, the execution of the *waqf* by Miran Shah. Two of them also speak of how the descendants of Miran Shah have now discontinued the charities and demolished the buildings.

Having now discussed all the material evidence in the case, it appears to us that there is a great mass of evidence in favour of the plaintiff which the appellants have in no way attempted to rebut. We have no hesitation in finding, concurring therein with the Court below, that Miran Shah did before his death dedicate mauza Haibatpur as a *waqf* for the religious and charitable institutions mentioned in the plaint, which he had established, the mosque, the *imambara* the "*urs*" of Ghaus Azam, &c. We find that mauza Haibatpur devolved on the daughters of Miran Shah and on their descendants in trust for the performance of the religious and charitable purposes to which

Miran Shah had dedicated the village. We concur with the lower Court in holding that the plaintiff is entitled to the declaration he has obtained as [55] to mauza Haibatpur being *waqf* property, and in the finding that the defendants are in possession as trustees of the *waqf* and have no proprietary rights in Haibatpur. We find that the trustees have grossly violated their duties as such, that they have failed to apply any portion of the income of the village to the purposes of the trust, that they have appropriated the income to their own private purposes and that they have dilapidated and dismantled the buildings constructed by Miran Shah, and have put into their own pockets the value of the materials of the *imambara*. We further find that they have wrongfully alienated portions of the endowed property and that they have denied that they are trustees and claim to be proprietors of Haibatpur in their own right. Such trustees should not in our opinion be permitted to remain any longer in possession of the trust property. We therefore direct their removal and that possession of the trust property be transferred to the *mutawalli* who has been nominated by the learned District Judge. We may add that, as no observations were addressed to us on either side either for or against the scheme for the administration of the trust prepared by the District Judge, we refrain from making any remarks as to it. The only questions argued before us are those which we have discussed in this judgment. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1899) 21 All., 200; (1902) 5 O. C., 110; (1905) 2 C.L.J., 460; see also (1906) Cal., 789; (1905) 2 C.L.J., 431.

The C.P.C., 1908, expressly includes within the scope of a suit under sec. 92, the removal of a trustee.

As against a trespasser, see in addition to the above, (1910) 14 O. C., 65; 10 I. C., 712.]

[20 All. 55]

FULL BENCH.

The 14th December, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, MR. JUSTICE BLAIR
AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Amba Prasad.*

Act No. XLV of 1860 (Indian Penal Code), section 124A.—Exciting disaffection—Meaning of term "disaffection" explained.

Any one who, by any of the means referred to in section 124A of the Indian Penal Code, excites, or attempts to excite, feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in section 124 A. Such feelings are necessarily inconsistent [56] with and incompatible with a disposition to render obedience to the lawful authority of Government and to support that Government against unlawful attempts to subvert or resist it. The term "disaffection" may be taken as synonymous with

* Criminal Appeal No. 1461 of 1897.

"disloyalty." The ordinary meaning of the term "disaffection" as used in section 124A is not varied by the explanation appended to that section.

When a person is charged with having committed the offence punishable under section 124 A of the Indian Penal Code, his intention may be inferred from one particular speech, article or letter, or from that speech, article or letter considered in conjunction with what such person has said, written or published on another or other occasions. Where it is ascertained that the intention of such person was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection. *Queen-Empress v. Jogendra Chunder Bose*, I. L. R., 19 Cal., 35, *In re the petition of Bal Gangadhar Tilak*, 14 The Times Law Reports, p. 50, referred to.

THE facts of the case are fully stated in the judgment of the Court.

Mr. *Roshan Lal* for the Appellant.

The Government Advocate (Mr. *E. Chamier*) for the Crown.

The judgment of the Court (EDGE, C. J., BLAIR and BURKITT, JJ.) was delivered by **Edge, C. J.** :—

Amba Prasad was committed by the Magistrate of Moradabad to the Court of Session of Moradabad for trial on a charge that on or about the 14th of July 1897, he did attempt to excite feelings of disaffection to the Government established by law in British India by publishing in a newspaper called the *Jami-ul-ulam*, of which he was proprietor, editor and publisher, an article entitled "*Azadi band hone se kabal namuna*" and had thereby committed an offence punishable under section 124A of the Indian Penal Code and within the cognizance of the Court of Session. In his examination before the Magistrate of Moradabad under section 364 * of the Code of Criminal Procedure, 1882, [57] Amba Prasad stated that he had published the issues of the *Jami-ul-ulam*, dated respectively 21st March 1897, 7th April 1897, 21st April 1897, 7th May 1897, 14th July 1897, 21st July 1897 and 28th July 1897. The article on the publication of which the charge was founded was contained in the issue of the newspaper of the 14th of July 1897.

* [Sec. 364 :—Whenever the accused is examined by any Magistrate, or by any Court other than a High Court established by Royal Charter or the Chief Court of the Punjab, the whole of such examination, including every question put to him and every answer given by him, shall be recorded in full, in the language in which he is examined, or, if that is not practicable, in the language of the Court or English; and such record shall be shown or read to him, or, if he does not understand the language in which it is written, shall be interpreted to him in a language which he understands, and he shall be at liberty to explain or add to his answers.

When the whole is made conformable to what he declares is the truth, the record shall be signed by the accused and the Magistrate or Judge of such Court, and such Magistrate or Judge shall certify under his own hand that the examination was taken in his presence and hearing, and that the record contains a full and true account of the statement made by the accused.

In cases in which the examination of the accused is not recorded by the Magistrate or Judge himself, he shall be bound, unless he is a Presidency Magistrate, as the examination proceeds, to make a memorandum thereof in the language of the Court, or in English, if he is sufficiently acquainted with the latter language; and such memorandum shall be written and signed by the Magistrate or Judge with his own hand, and shall be annexed to the record. If the Magistrate or Judge is unable to make a memorandum as above required, he shall record the reason of such inability.

Nothing in this section shall be deemed to apply to the examination of an accused person under section 263.]

In the Court of Session of Moradabad, Amba Prasad stated that his father's name was Gobind Prasad, a Kayasth, and that he, Amba Prasad, lived in Moradabad, and was 35-36 years of age. Upon the charge being read to him Amba Prasad pleaded guilty. Upon being asked :—"Do you wish to give any reasons as to why you should not be punished for this offence?"—Amba Prasad replied :—"I can give no reason. Through inexperience I have committed this fault, for which I am very ashamed, and I wish to throw myself unconditionally upon the mercy of the Government. This is all I wish to say." The Court of Session accordingly found Amba Prasad guilty of the offence of which he had pleaded guilty, and under section 124A of the Indian Penal Code sentenced him therefor to eighteen months' rigorous imprisonment. From that sentence Amba Prasad has appealed to this Court. In the petition of appeal the grounds of appeal are stated as follows :—

1. "That the prisoner appellant having pleaded guilty, having tendered an unqualified apology for the offence with which he was charged, and having thrown himself entirely upon the mercy of the Court, the sentence of 18 months' rigorous imprisonment passed upon him by the learned Sessions Judge is too severe.

2. That the judgment of the lower Court nowhere discloses the fact that the article upon which the prisoner appellant has been convicted was of such a serious character as to make its writer liable to a very heavy punishment.

3. That the lower Court, in holding that a term of '18 months' rigorous imprisonment was in the case of the appellant a mild sentence upon the authority of the case of *Queen-Empress v. [58] Tilak*, has failed to take into account the differentiating circumstances which make the appellant's offence very much less serious and therefore deserving of a much lighter sentence.

4. That there is nothing on record which, after the appellant's plea and apology, would make him liable to anything more than a nominal punishment.

5. That upon the foregoing grounds the prisoner appellant prays for mitigation of the sentence passed upon him by the lower Court."

"In order to determine whether or not this appeal should be allowed, and, if allowed, to what extent, it is necessary to consider section 124A of the Indian Penal Code and to arrive at a conclusion as to the degree of culpability in Amba Prasad to be fairly and reasonably inferred from his acts. The section is as follows :—

"124A. Whoever by words, either spoken or intended to be read, or by signs, or by visible representation or otherwise, excites, or attempts to excite, feelings of disaffection to the Government established by law in British India, shall be punished with transportation for life or for any term, to which fine may be added, or with imprisonment for a term which may extend to three years, to which fine may be added, or with fine.

Explanation.—Such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority, is not disaffection. Therefore, the making of comments on the measures of the Government, with the intention of exciting only this species of disapprobation, is not an offence within this clause."

That section has been under judicial consideration by Sir COMER PETHERAM in the *Queen-Empress v. Jogendra Chunder Bose*, I. L. R., 19 Cal., 35; by Mr. Justice STRACHEY on the trial of Bal Gangadhar Tilak

in the Bombay High Court, by a Full Bench of the [59] Bombay High Court, consisting of Sir CHARLES FARRAN, C.J., Mr. Justice CANDY and Mr. Justice STRACHEY, on the application of Bal Gangadhar Tilak for leave to appeal to Her Majesty in Council by a Board of the Judicial Committee of Her Majesty's Privy Council, consisting of the Lord CHANCELLOR, Lord HOBHOUSE, Lord DAVEY and Sir RICHARD COUCH, on the application of Bal Gangadhar Tilak for special leave to appeal to Her Majesty in Council; and by Sir CHARLES FARRAN, C.J., Mr. Justice PARSONS and Mr. Justice RANADE in the appeal of Ram Chandra Narayan and Kishnaji Dhondu from the order of conviction and sentence of the Sessions Judge of Satara in their case.

If there be any difficulty as to the true meaning of section 124A of the Indian Penal Code it is caused by the *Explanation* which forms part of that section. In the *Queen-Empress v. Jogendra Chunder Bose*, I. L. R., 19 Cal., 35, it was contended by the counsel for the accused persons that "disaffection" and "disapprobation" were synonymous words and had one and the same meaning. On that contention it was observed by Sir COMER PETHERAM, and in our opinion correctly, having regard to the question before him:—"If that reasoning were sound, it would be impossible for any person to be convicted under the section, as every class of writing would be within the explanation." Sir COMER PETHERAM thus defined "disaffection" and "disapprobation" as those words are used in section 124A:—"Disaffection means a feeling contrary to affection, in other words, dislike or hatred. Disapprobation means simply disapproval. It is quite possible to disapprove of a man's sentiments or action and yet to like him. The meaning of the two words is so distinct that I feel it hardly necessary to tell you that the contention of Mr. Jackson cannot be sustained. If a person uses either spoken or written words calculated to create in the minds of the persons to whom they are addressed a disposition not to obey the lawful authority of the Government, or to subvert or resist that authority, if and when occasion should arise, and if he does so with the intention [60] of creating such a disposition in his hearers, he will be guilty of the offence of attempting to excite disaffection within the meaning of the section, though no disturbance is brought about by his words or any feeling of disaffection, in fact, produced by them. It is sufficient for the purposes of the section that the words used are calculated to excite feelings of ill-will against the Government and to hold it up to the hatred and contempt of the people and that they were used with the intention to create such feeling."

The charge which was before the jury in *Queen-Empress v. Jogendra Chunder Bose* was that the accused had attempted to excite feelings of disaffection to the Government established by law in British India, and was not that they had in fact excited feelings of disaffection to the Government established by law in British India; and it is in relation to that charge which was before the jury that Sir COMER PETHERAM's direction to the jury must be read. Later on in his direction to the jury Sir COMER PETHERAM, in referring to the articles in respect of the publication of which the charges under section 124A arose, said:—"Were those articles intended to excite feelings of enmity against the Government, or, on the other hand, were they merely expressing, though in strong language, disapprobation of certain Government measures? You will bear in mind that the question you have to decide has reference to the intention, and, in fact, the crime consists of the intention, for a man might lawfully do the act without the intention. The evidence of the intent can only be gathered from the articles. The ultimate object of the writer may be one thing, but if, in attaining that object, he uses, as the means, the exciting of disaffection

against the Government, then he would be guilty under section 124A. If you think that these people, with the object of procuring the repeal of the Age of Consent Act, or of increasing the sale of their paper, disseminated these articles, intending to excite feelings of enmity, you will be bound to find a verdict of guilty."

Mr. Justice STRACHEY in his direction to the Jury in *Queen-Empress v. Bal Gangadhar Tilak*, in explaining section 124A [61] in reference to the charges in that case before the jury, said:—"I agree with Sir COMER PETHERAM in the Bangobasi case, that disaffection means simply the absence of affection." If that sentence had stood alone and was not explained by what followed, it would no doubt have constituted a misdirection. "Disaffection" necessarily implies an absence of affection, but a mere absence of affection is not "disaffection" within the meaning of section 124A. Mr Justice STRACHEY in that part of his direction which immediately follows the sentence which we have quoted made it perfectly plain what in his opinion "disaffection," within the meaning of section 124A, is. He said:—

"It means hatred, enmity, dislike, hostility, contempt and every form of ill-will to the Government. 'Disloyalty' is perhaps the best general term, comprehending every possible form of bad feeling to the Government. That is what the law means by the disaffection which a man must not excite or attempt to excite: he must not make or try to make others feel enmity of any kind towards the Government. You will observe that the amount or intensity of the disaffection is absolutely immaterial, except perhaps in dealing with the question of punishment: if a man excites or attempts to excite feelings of disaffection, great or small, he is guilty under the section. In the next place it is absolutely immaterial whether any feelings of disaffection have been excited or not by the publication in question. It is true that there is before you a charge against each prisoner that he has actually excited feelings of disaffection to the Government. If you are satisfied that he has done so, you will of course find him guilty. But if you should hold that that charge is not made out and that no one is proved to have been excited to entertain feelings of disaffection to the Government by reading these articles, still that alone would not justify you in acquitting the prisoners. For each of them is charged not only with exciting feelings of disaffection, but also with attempting to excite such feelings. You will observe that the section places absolutely on the same footing the successful exciting of feelings of disaffection and the unsuccessful attempt to excite [62] them; so that if you find that either of the prisoners has tried to excite such feelings in others, you must convict him, even if there is nothing to show that he succeeded.

"Again it is important that you should fully realize another point. The offence consists in exciting or attempting to excite in others certain bad feelings towards the Government. It is not the exciting or attempting to excite mutiny or rebellion, or any sort of actual disturbance, great or small. Whether any disturbance or outbreak was caused by these articles is absolutely immaterial. If the accused intended by the articles to excite rebellion or disturbance, his act would doubtless fall within section 124A, and would probably fall within other sections of the Penal Code. But even if he neither excited nor intended to excite any rebellion, or outbreak or forcible resistance to the authority of the Government, still, if he tried to excite feelings of enmity to the Government, that is sufficient to make him guilty under the section. I am aware that some distinguished persons have thought that there can be no offence against the section unless the accused either counsels or suggests rebellion or forcible resistance to the Government. In my opinion that view is absolutely opposed

to the express words of the section itself, which as plainly as possible makes the exciting or attempting to excite certain feelings, and not the inducing or attempting to induce to any course of action, such as rebellion or forcible resistance, the test of guilt."

In directing the jury as to the meaning and effect of the *Explanation* in section 124A, Mr. Justice STRACHEY said:—

"Observe first that, as I have already said, while the first clause shows affirmatively what the offence made punishable by the section is, the explanation states negatively what it is not. It says that something 'is not disaffection' and 'is not an offence within this clause.' Therefore its object is to protect from the condemnation pronounced by the first clause certain acts which it distinguishes from the disloyal attempts which the first clause deals with. The next and most important point for you to bear in mind is that the thing protected by the explanation is 'the making of [63] comments on the measures of the Government with a certain intention.' This shows that the explanation has a strictly defined and limited scope. Observe that it has no application whatever unless you come to the conclusion that the writings in question can fairly and reasonably be construed as 'the making of comments on the measures of the Government.' It does not apply to any sort of writing except that. It does not apply to any writing which consists not merely of comments upon Government measures, but of attacks upon the Government itself. It would apply to any criticisms of legislative enactments, such as the Epidemic Diseases Act, or any particular tax, or of administrative measures, such as the steps taken by the Government for the suppression of plague or famine. But if you come to the conclusion that these writings are an attack, not merely upon such measures as these, but upon the Government itself, its existence, its essential characteristics, its motives or its feelings towards the people, then you must put aside the explanation altogether and apply the first clause of the section. In the next place, supposing that you are satisfied that these writings can fairly and reasonably be construed as 'comments on the measures of the Government' and not as attacks upon the Government itself, still you cannot apply the explanation unless you believe that such comments were made with the intention of exciting only 'such a disapprobation of the measures of the Government as is compatible with a disposition to render obedience to the lawful authority of the Government' and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.' This, you will see, draws a distinction between attempting to excite feelings of 'disaffection' to the Government, and intending to excite only a certain species of 'disapprobation' of Government measures; and protects the latter only. What is the meaning of 'disapprobation' of Government measures as contrasted with 'disaffection' to the Government? I agree with Sir COMER PETHERAM that while disaffection means the absence of affection, or enmity, disapprobation means simply disapproval; and that it is quite possible to like or [64] be loyal to anyone, whether an individual or a Government, and at the same time to disapprove strongly of his or its measures. This distinction is the essence of the section. It shows clearly what a public speaker or writer may do, and what he may not do. A man may criticise or comment upon any measure or act of the Government, whether legislative or executive, and freely express his opinion upon it. He may discuss the Income-Tax Act, the Epidemic Diseases Act, or any military expedition, or the suppression of plague or famine, or the administration of justice. He may express the strongest condemnation of such measures and he may do so severely, and even

unreasonably, perversely and unfairly. So long as he confines himself to that, he will be protected by the explanation. But if he goes beyond that, and, whether in the course of comments upon measures or not, holds up the Government itself to the hatred or contempt of his readers,—as, for instance, by attributing to it every sort of evil and misfortune suffered by the people, or dwelling adversely on its foreign origin and character, or imputing to it base motives, or accusing it of hostility or indifference to the welfare of the people—then he is guilty under the section, and the explanation will not save him.

“The object of the explanation is to protect honest journalism and *bonâ fide* criticism of public measures and institutions with a view to their improvement, and to the remedying of grievances and abuses, and to distinguish this from attempts, whether open or disguised, to make the people hate their rulers. So long as a journalist observes this distinction he has nothing to fear. It seems to me that this view of the law secures all the ‘liberty which any reasonable man can desire, and that to allow more would be culpable weakness, and fatal to the interest not only of the Government but of the people. But now there are other words in the explanation which we have still to consider. To come within the protection of the explanation, a writing must not only be the making of comments on Government measures with the intention of exciting only disapprobation of them as distinguished from [65]disaffection to the Government, but the disapprobation must be ‘compatible’ with a disposition to render obedience to the lawful authority of the Government and to support the lawful authority of the Government against unlawful attempts to subvert or resist that authority.

“What that means is that even exciting disapprobation of Government measures may be carried too far. For instance, if a man published comments upon Government measures which were not merely severe, unreasonable or unfair, but so violent and bitter, or accompanied by such appeals to political or religious fanaticism, or addressed to ignorant people at a time of great public excitement, that persons reading those comments would carry their feelings of hostility beyond the Government measures to their author, the Government, and would become indisposed to obey and support the Government, and if it could fairly be gathered from the writing as a whole that the writer or publisher intended these results to follow, then he would be guilty under the section and would not be protected by the explanation. Observe the nature of this ‘disposition’ which makes the whole difference between a ‘disapprobation’ of measures which amounts to ‘disaffection’ to the Government, and a disapprobation which does not. It is not merely ‘a disposition to render obedience to the lawful authority of the Government.’ It is a disposition *both* to render obedience and also to *support* the lawful authority of the Government against unlawful attempts to subvert or resist it. And it is a disposition to support that lawful authority against unlawful attempts not only to ‘resist’ it—that is, to oppose it, but also to ‘subvert’ it—that is, to weaken and undermine it by any unlawful means whatever. And lastly, it is a disposition to support the Government against all such unlawful attempts whenever occasion may arise, not only against any particular unlawful attempt, proceeding or impending at the time of the publication.”

In refusing the application of Bal Gangadhar Tilak to the Bombay High Court for leave to appeal to Her Majesty in [66]Council Sir CHARLES FARRAN C. J., in delivering the judgment of the Full Bench, said :—

“The other ground upon which Mr. Russell has asked us to certify that it is a fit case to send to the Privy Council is that there has been misdirection, and he based his argument on one major and two minor grounds. The

major ground is that the section cannot be said to have been contravened unless there is a direct incitement to stir up disorder or rebellion. That appears to us to be going much beyond the words of the section, and we need say no more upon that ground. The first of the minor points is that Mr. Justice STRACHEY, in summing up his case to the jury, stated that disaffection meant the absence of affection; but, although if that phrase has stood alone, it might have misled the jury, yet, taken in connection with the context, we think that it is impossible that the jury can have been misled by it. That expression is used in connection with the law as laid down by Sir COMER PETHERAM in Calcutta in the *Bangobasi* case. There Sir COMER PETHERAM, instead of using the words 'absence of affection,' said 'contrary to affection' and if the words 'contrary to affection' had been used instead of 'absence of affection' in this case, there can be no doubt that the summing up would have been absolutely correct. Taken in connection with the context it is clear that by absence of affection the Judge did not mean the negation of affection, but some active sentiment on the other side. Upon that point we cannot certify that this is a fit case for appeal. In this connection, it must be remembered that it has not been alleged that there was a miscarriage of justice. The last point is in reference to the definition of the word 'Government.' It is a very minor point; but, striking out the words (which were not in the original charge) Mr. Russell has alluded to, we cannot see that there has been any misdirection as to the meaning of the word 'Government.' We, therefore, think the application must be refused."

On the application of Bal Gangadhar Tilak to the Judicial Committee of Her Majesty's Privy Council for special leave [67] to appeal to the Queen in Council Mr. Justice STRACHEY'S direction to the jury was elaborately criticised by an eminent counsel of the English Bar. In delivering the judgment of the Judicial Committee the Lord Chancellor is reported to have said:—"Their Lordships are of opinion, taking the view of the whole of the summing up, which is of very great length, that there is nothing in that which, in their Lordships' opinion, calls upon them to indicate any dissent from or necessity to correct what is therein contained. Looking at the summing up as a whole, and looking at each part of what was said by the light of what else was said, speaking generally of the argument which has been presented to their Lordships, they are of opinion that no case has been made out, consistently with the rules by which their advice to Her Majesty has been guided hitherto in giving leave to appeal in criminal cases, and therefore they will humbly advise Her Majesty that this is not a case in which leave should be granted." (14 The Times Law Reports, p. 50.)

So far as we can form an opinion from the imperfect report before us of the judgments of the Bombay High Court in the *Satara* case, we infer that Sir CHARLES FARRAN, C. J., held the same opinion as to the meaning and effect of section 124A of the Indian Penal Code as was expressed by Mr. Justice STRACHEY in the case of Bal Gangadhar Tilak, and that an attempt to excite feelings of disaffection to the Government is equivalent to an attempt to produce political hatred of Government as established by law, to excite political discontent and alienate the people from their allegiance. Sir CHARLES FARRAN apparently also held, and in our opinion rightly, that a man may be guilty of the offence of attempting to excite feelings of disaffection against the Government established by law in British India although in the particular article or speech he may insist upon the desirability or expediency of obeying and supporting Government. The reports which are before us of the judgments of Mr. Justice PARSONS and Mr. Justice BANADE in the *Satara* case are too [68] imperfect to enable

us to form an opinion as to their construction of section 124A. If their construction of section 124A differs materially from the construction placed upon that section by Mr. Justice STRACHEY, it necessarily follows that their construction would not be accepted as correct by the Judicial Committee of the Privy Council, which accepted Mr. Justice STRACHEY'S direction to the jury in Bal Gangadhar Tilak's case as a sufficient and not a misleading direction.

In our opinion anyone who, by any of the means referred to in section 124A of the Indian Penal Code, excites or attempts to excite feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in section 124A, no matter how guardedly he may attempt to conceal his real object. It is obvious that feelings of hatred, dislike, ill-will, enmity or hostility towards the Government must be inconsistent with and incompatible with a disposition to render obedience to the lawful authority of the Government and to support that lawful authority against unlawful attempts to subvert or resist it. The "disapprobation of the measures of the Government" may or may not in any particular case be the text upon which the speech is made or the article or letter is written, but if, upon a fair and impartial consideration of what was spoken or written, it is reasonably obvious that the intention of the speaker or writer was to excite feelings of disaffection to the Government established by law in British India, then a Court or a jury should find that the speaker or writer or publisher, as the case might be, had committed the offence of attempting to excite feelings of disaffection to the Government established by law in British India. To paraphrase is dangerous, but it appears to us that the "disaffection" of section 124A is "disloyalty;"—that is the sense in which the word "disaffection" has been generally used and understood during the century. We are further of opinion that the ordinary meaning of disaffection in section 124A, having regard to the [69] evils at which section 124A strikes, is not varied by the explanation contained in the section.

The intention of a speaker, writer or publisher may be inferred from the particular speech, article or letter, or it may be proved from that speech, article or letter considered in conjunction with what such speaker, writer or publisher has said, written or published on another or other occasions. Where it is ascertained that the intention of the speaker, writer or publisher was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published, could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection.

In the case before us Amba Prasad has pleaded guilty to an attempt by the publication of the article in question in the issue of his newspaper of the 14th of July 1897, to excite feelings of disaffection to the Government established by law in British India. He was well advised to plead guilty, as on an examination of that article the only possible defence open to him was that of insanity. His counsel before us could not suggest that there was the slightest justification or excuse for the gross and libellous charges against the Government contained in the article. Amba Prasad in publishing that article could have had but one object in view, and that was to excite amongst Her Majesty's Indian subjects, and particularly amongst Her Muhammadan subjects, feelings

of disaffection, disloyalty to the Government established by law in British India. The particular article taken in conjunction with other articles published in his newspaper on dates upon which, according to his own statement in the Magistrate's Court, he published his newspaper, shows that his object was to excite not merely passive disaffection, which in itself is an offence within section 124A of [70] the Indian Penal Code, but active disloyalty and rebellion amongst his Muhammadan fellow-subjects. The criminal offence which Amba Prasad committed is an exceedingly grave one. That offence he committed, regardless of the ruin, misery, and punishment which would have fallen on any of his fellow-countrymen who might have been so ignorant as to believe that the statements which he published were true, and who, acting on such belief, might have entered upon a course of active disloyalty to the Government. Amba Prasad is not a Muhammadan; he is a Kayasth. It may be assumed, from the fact that Amba Prasad was not for some considerable time to be found to meet this criminal charge, that, if his Muhammadan fellow-subjects had been induced by what he published to enter upon a course of active disloyalty, Amba Prasad would have been at a safe distance from the place of danger.

Amba Prasad alleges in his grounds of appeal that his plea of guilty and an apology, which he tendered after he had been committed for trial, entitled him to have only a nominal punishment inflicted upon him. His conviction was inevitable. An apology, particularly made after commitment, in such a case as this, need not be considered. Having regard to the gravity of the offence which Amba Prasad committed and to the misery, ruin and punishment which he might have brought upon ignorant people, the sentence which was passed upon him was entirely inadequate. We dismiss this appeal.

NOTES.

[The Penal Code was amended in 1898 in respect of sec. 124 A by the insertion of a comprehensive definition of 'disaffection' etc.]

See also (1908) 10 Bom. L. R. 848; (1908) 32 Mad., 3; in (1910) 38 Cal., 253, it was held necessary that there should be evidence on record to bring home the guilt to the printer or publisher.]

[20 All. 70]

REVISIONAL CRIMINAL.

The 8th July, 1897.

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Queen-Empress

versus

Makunda and another.

Act No. XXII of 1881 (Excise Act) sections 27, 28, 29, 30, 34, and 47—Act No. XII of 1896, sections 36, 37, 38, 41 and 57—Excise Officer—Jurisdiction.

Held that an officer invested with powers under sections 27, 28 and 29 of Act No. XII of 1881, who had power in certain events to take the case before a Magistrate under section 32, was an "excise officer" within the meaning of section 47 of the Act. *Queen-Empress v. Ram Charan*, Weekly Notes, 1896, p. 105, overruled.

[71] MUKUNDA and Badam were convicted of an offence under sections 12 and 39 of Act No. XXII of 1881 (Excise Act), and sentenced to fines. They were arrested and charged by a Police officer who had been invested with powers to act as an Excise officer under sections 27, 28 and 29 of Act No. XXII of 1881. Against this conviction an application in revision was made

to the Sessions Judge, in which it was objected, *inter alia*, that the convictions were bad unless the Police officer concerned had been authorized as an Excise officer under section 33 of Act No. XII of 1896, and that no proceedings were taken by the Police under sections 39, 41 and 42 of Act No. XII of 1896. With reference to these grounds and to the ruling of the High Court in *Queen-Empress v. Ram Charan*, Weekly Notes, 1896, p. 105, the Sessions Judge referred the case to the High Court under section 438 of the Code of Criminal Procedure.

The Government Advocate (Mr. E. Chamier), for the Crown.

Edge, C. J. and Blair, J.—This reference by the Sessions Judge of Saharanpur raises the question whether Muhammad Khan, a Sub-Inspector, was, on the 1st of November 1896, an excise officer within the meaning of section 57 of Act No. XII of 1896. He was, before the coming into force of Act No. XII of 1896, one of the class of officers on whom had been conferred powers to act as excise officers under sections 27, 28 and 29 of Act No. XXII of 1881. By section 2 of Act No. XII of 1896 powers conferred under any of the repealed Acts were to be deemed to have been conferred by and granted under that Act. Now Act No. XXII of 1881 had been amended by Act No. VI of 1885, which had introduced section 34A into the Act, a section which does not appear to have been brought to the attention of Mr. Justice BLENNERHASSETT in the case of *Queen-Empress v. Ram Charan*, Weekly Notes, 1896, p. 105. Section 47 of Act No. XXII of 1881 had also been amended by Act No. VI of 1885. "Under section 27 of Act No. XXII of 1881 an excise officer under [72] certain circumstances had power to arrest. Under section 28 an excise officer receiving a certain monthly salary had also power to arrest. Under section 29 certain excise officer had power to arrest. Turning to section 32 of Act No. XXII of 1881 we find that whenever an excise officer arrests any person " he shall within twenty-four hours thereafter make a full report of all the particulars of such arrest, seizure or search, to his official superior, and, unless acting under the warrant of the Collector, shall take the person arrested, or the article seized, with all convenient despatch to the Magistrate for trial or adjudication."

It appears to us that that section contemplated that the excise officer who arrested under section 27, section 28 or section 29 could, unless he was acting under the warrant of the Collector, give the Magistrate jurisdiction to act, and that section can only be read in harmony with section 47 by treating the excise officer who had power in certain events to take the case before a Magistrate under section 32 as an excise officer within the meaning of section 47. Sections 36, 37 and 38 of Act No. XII of 1896, correspond generally with sections 27, 28 and 29 of Act No. XXII of 1881 and section 41 of Act No. XII of 1896 corresponds with section 32 of Act No. XXII of 1881. Section 57 of Act No. XII of 1896 corresponds with section 47 of Act No. XXII of 1881. If the attention of Mr. Justice BLENNERHASSETT had been drawn to these sections, we think his opinion might have been otherwise.

We hold that the Magistrate had jurisdiction to act, and we send the case back to the Sessions Judge with directions to reinstate the case on his file and to dispose of it. .

NOTES.

[This was followed in (1909) 30 All., 377.]

[73] APPELLATE CIVIL.

The 19th July, 1897.

PRESENT :

MR. JUSTICE BANERJI.

Murad-Un-Nissa and another.....Plaintiffs

versus

Ghulam Sajad.....Defendant.*

Lambardar and co-sharer—Suit against lambardar for profits—Liability of heir of lambardar—Act No. XII of 1881 (N.-W. P. Rent Act), section 93, cl. (h).

The liability of a lambardar to pay to a co-sharer the profits which the lambardar has failed through his gross negligence to collect is a personal liability and cannot be enforced against the lambardar's legal representative. *Gulab v. Fateh Chand*, Weekly Notes, 1886, p. 32, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. J. Simeon, for the Appellant.

Maulvi Ghulam Muftaba, for the Respondent.

Banerji, J.—This was a suit brought by the plaintiffs appellants under clause (h) of section 93 of Act No. XII of 1881 for their recorded share of the profits for the years 1295, 1296 and 1297 Fasli against Abbas Ali Khan, the lambardar. The suit was brought in the Court of the Munsif and a decree was made by that Court for a portion of the amount claimed. On appeal to the District Judge, he, in exercise of the powers vested in him by section 208 of Act No. XII of 1881, remanded the case to the Court of the Assistant Collector. During the pendency of the suit in the Court of the Assistant Collector, Abbas Ali Khan, the lambardar, died. The plaintiffs made an application to bring on the record the present respondent Ghulam Sajjad as the son and legal representative of the deceased defendant. No order was passed by the Court upon that application, and a decree was apparently made against the deceased defendant. The amount decreed included not only a share of the profits actually [74] collected by the lambardar, but also an amount which he could have collected but for his gross negligence. Ghulam Sajjad, accepting the decree as a decree by which he was affected, appealed against it.

The learned Judge of the Lower Appellate Court, following the ruling of this Court in *Gulab v. Fateh Chand*, Weekly Notes, 1886, p. 32, held that the liability of a lambardar to pay to a co-sharer the profits which the lambardar did not collect through gross negligence was a personal liability and could not be enforced against his legal representative. The learned Judge therefore varied the decree of the Court of First Instance by making a decree for a share of the profits actually realized by the lambardar. In my opinion this decision of the Lower Appellate Court is right with reference to the ruling on which that Court has relied. I can see no distinction in principle between the case of the representative of a lambardar who died before the institution of the suit and that of the representative of a lambardar who died after the institution of the suit;

* Second Appeal No. 788 of 1896, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 29th July 1896, modifying a decree of H. Dupernex, Esq., Assistant Collector of Bulandshahr, dated the 8th January 1895.

in both cases the decree which has to be made is a decree against the legal representative to the extent of the assets of the deceased which have come into his hands. If the legal representative is not liable in the one case he is not liable in the other. This appeal is almost on all fours with Second Appeal No. 283 of 1895 decided by my brother AIKMAN on the 17th of May 1897.*

[75] In my opinion the appeal is untenable and must be, and it hereby is, dismissed with costs.

Appeal dismissed.

*The judgment in this case (*Bir Narain and another v. Girdhar Lal*) was as follows;—

AIKMAN, J.—The plaintiffs, who are appellants here, brought a suit under cl. (h) section 98 of the Rent Act to recover from the defendant, Girdhar Lal, who was lambardar of the village, their share of profits for the years 1298, 1299 and 1300 Fasli. The Court of First Instance found that the defendant was liable not only for the profits actually collected, but also for profits calculated on the recorded rent-roll, on the ground that it was due to his gross negligence that a balance remained unrealized. The defendant lambardar appealed against the decree of the Assistant Collector, and the learned District Judge in appeal held, on the basis of a previous decision in a case between the parties, that there was no such gross carelessness on the part of the lambardar as would entitle the plaintiff to a decree for a share of profits calculated on the recorded rental, and not on the collections. The plaintiffs come here in Second Appeal. Since the appeal was instituted in this Court the defendant lambardar has died, and his minor sons have been brought upon the record as his representatives. In my opinion the death of the original defendant renders it unnecessary for me to decide whether or not the Lower Appellate Court was wrong in relying upon the decision in the previous case. It was held by this Court in *Gulab v. Fateh Chand*, Weekly Notes, 1886, p. 32, that the liability of a lambardar to account for profits unrealized owing to his gross negligence or misconduct, is a personal liability which cannot be enforced in a suit against his heir. It is true in the case referred to the suit was brought in the first instance against the heir, whereas in the present case the suit was instituted against the lambardar personally. But as the plaintiff's claim is based on the alleged negligence of the deceased, and as it is not shown that in consequence of that negligence any assets came to the hands of his heirs, the claim cannot in my opinion be pursued against them. For this reason the appeal must fail. I dismiss it with costs.

[20 All. 76]

The 20th July, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Hardeo Singh and others.....Defendants

versus

Narpat Singh and others.....Plaintiffs.

Partition—Act No. XIX of 1873, sections 111, 113, 241—Objection to partition—Jurisdiction—Civil and Revenue Courts.

The procedure provided by section 113 of Act No. XIX of 1873 does not become obligatory on a Collector or an Assistant Collector in partition proceedings unless an objection to the partition has been made by a co-sharer in possession and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound to issue under section III, and not even then unless such objection raises a question of title. Unless, therefore, such objection has been made, a Civil Court is not empowered to exercise any jurisdiction in the matter of the distribution of the land or the allotment of the mahal by partition.

THE facts of this case sufficiently appear from the judgment of the Court.

[76] Pandit Baldeo Ram Dave, for the Appellants.

Munshi Gulzari Lal, for the Respondents.

Edge, C.J., and Blair J :—The plaintiffs brought the suit in which this appeal has arisen in effect to set aside the proceedings of an Assistant Collector in the partition of a mahal, and to have it declared that a sale-deed which was executed by some of the defendants of the lands which they obtained on partition was void, the plaintiffs alleging that those particular lands belonged to them. The partition proceedings were duly instituted under Act No. XIX of 1873. On receipt of the application for partition the Assistant Collector duly proceeded under section 111 of that Act, and the notice required by that section was duly issued. The plaintiffs' case is that they filed objections to the partition, alleging title in themselves, and no title in certain of the other persons who were recorded as share-holders or as having interests in the mahal, and that no notice was taken of their objections, but that the Assistant Collector went on and made the partition, allotting to certain of these defendants lands of the plaintiffs, these defendants having no title. The sale-deed in question was one relating to these particular lands. The first Court dismissed the suit on the ground that it was barred by section 241 of the Act No. XIX of 1873. The Court of First Appeal, misunderstanding the decision of this Court in *Nasrat-ullah v. Majib-ullah*, I. L. R., 13 All., 309, and not having regard to some material sections in the Act to be considered, set aside the decree of the first Court and made an order of remand under section 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought by the defendants.

The procedure provided by section 113 of Act No. XIX of 1873 does not become obligatory on a Collector or an Assistant Collector in partition proceedings unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound

* First Appeal No. 18 of 1897, from an order of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 28th January 1897.

[77] to issue under section 111, and not even then unless such objection raises a question of title. The only evidence on the record which has been brought to our attention showing that any objection to the partition was taken by the plaintiffs is a reference to that subject in the rubkar of the Assistant Collector finally dealing with the partition proceedings. It appears from that rubkar that no objection of any kind was made to the partition proceedings before the day specified in the notice which was issued under section 111. Consequently, upon the evidence on the record, the proceedings of the Assistant Collector were in compliance with law, and section 113 of Act No. XIX of 1873 never came into application. When section 113 of Act No. XIX of 1873 does not come into application in partition proceedings, section 241 of that Act prohibits the Civil Courts from exercising any jurisdiction in the matter of the distribution of the land or the allotment of the mahal by partition. Consequently, on the evidence upon the record this suit could not be maintained so far as a claim to interfere with the distribution of the land in the partition is concerned, and it follows that if a Civil Court could not alter that distribution of the land, it could not entertain a suit so far as it sought to set aside the deed of sale of land allotted in the partition to the parties who made the deed.

Mr. *Gulzari Lal* on behalf of the plaintiffs respondents has asked to be allowed time to produce evidence that the plaintiffs did in fact make an objection raising a question of title, and that such objection was made before the day specified in the notice issued under section 111 of the Act. It appears to us that, in face of the rubkar of the Assistant Collector, it would be mere waste of time to adjourn this case for any such purpose, and further, it is not when a case comes before a Court of Second Appeal that a plaintiff is for the first time to begin to think about the evidence, if it exists, necessary to prove his claim. Litigation would never come to an end if we were to accede to such an application as that which is now made.

* [78] The Court of first appeal should have dismissed the appeal to it. We allow this appeal with costs, and, setting aside the order of remand, we dismiss with costs the appeal to the Lower Appellate Court and restore and affirm the decree of the Court of First Instance dismissing the suit with costs.

Appeal decreed.

NOTES.

[This was overruled in (1901) 28 All., 291 F. B.]

[20 All. 78]

REVISIONAL CIVIL.

The 22nd July, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Sundar Singh.....Judgment-debtor

versus

Doru Shankar and others.....Decree-holders.*

Civil Procedure Code. section 622—Revision—Erroneous decision on point of limitation.

The fact that a Court having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred and proceeded to deal with it affords no ground for revision under section 622 of the Code of Civil Procedure. *Amir Hussan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, and *Sarman Lal v. Khuban*, I. L. R., 17 All., 422, referred to.

IN this case the decree-holders obtained a decree for money on the 2nd July 1884. On the 12th of April 1896 the decree-holders applied for a certificate under section 224 of the Code of Civil Procedure, and the certificate, having been prepared on the 2nd of July 1896, was received by the Court to which the decree was sent for execution on the 4th of July 1896. The decree-holders applied to that Court for execution on the 7th of July 1886. The judgment-debtors filed an objection to the effect that execution of the decree was time-barred. The Court (Munsif of Farrukhabad) disallowed the objection on the ground that the application for a certificate was made within time and the subsequent delay could not be imputed to the decree-holders. On appeal by the judgment-debtor, the Court of Appeal (Subordinate [79] Judge of Farrukhabad) dismissed the appeal, agreeing with the Court below. Sundar Singh, one of the judgment-debtors, applied in revision to the High Court.

Munshi Gulzari Lal, for the Applicant.

Babu Jivan Chandar, for the Opposite Parties.

Edge, C. J. and Banerji, J.—An application was made to transfer a decree for execution to another Court. An order for transfer was made and the certificate was duly transmitted. Thereupon the decree-holder applied to the Court to which the certificate had been sent for execution of the decree. Execution was in fact barred by that time by reason of section 230 of the Code of Civil Procedure. However, the Court held that section 230 could not be applied, as the application to transmit the decree had been made within time. As a matter of fact the Court was wrong. The making of an application to transmit the decree and the making of an order thereon did not suspend the operation of section 230. The Court made an order for execution. We are clearly of opinion that that order was wrong and in contravention of section 230 of the Code. But we are unable to distinguish the principle to be applied in this case from the principle applied by their Lordships of the Privy Council in *Amir Hassan Khan v. Sheo Baksh Singh*, I. L. R., 11 Cal., 6, and which was also applied by a Bench of this Court in *Sarman*

* Civil Revision No. 4 of 1897 against an order of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farrukhabad, dated the 8th December 1896, confirming an order of Babu Bakhtawar Lal, Munsif of Farrukhabad, dated the 18th August 1896.

Lal v. Khuban, I. L. R., 17 All., 422. Consequently we are reluctantly compelled to hold that we cannot entertain this application under section 622 of the Code of Civil Procedure to revise an order which in our opinion was bad in law, as the Court had jurisdiction to consider whether section 230 of the Code did not apply. We dismiss this application, but we make no order as to costs.

Application dismissed.

NOTES.

[This was followed in (1903) 25 All., 509; (1908) 4 N. L. R., 184 (limitation); (1911) 14 I.C., 52 All., (limitation); (1912) 39 Cal., 473 (limitation); (1912) 15 I.C., 679 Cal., (limitation); (1904) 2 L.B.R., 333; (1898) 18 A.W.N., 74; 78; (1912) 15 I.C., 839 Punjab (onus).]

[80] APPELLATE CIVIL.

The 24th July, 1897.

PRESENT :

MR. JUSTICE BANERJI.

Makund Ram.....Defendant

versus

Bodh Kishen.....Plaintiff. *

Code of Civil Procedure, section 586—suit of the nature cognizable in Courts of Small Causes—Act No. IX of 1867 (Provincial Small Cause Courts Act), section 15.

* *Held* that a suit to recover from a decree-holder money paid as the price of property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of section 586 of the Code of Civil Procedure.

THE facts of this case sufficiently appear from the **judgment** of the Court.

Babu Satya Chandor Mukerji, for the Appellant.

Maulvi Ghulam Mujtaba, for the Respondent.

Banerji J.—A preliminary objection has been taken to the hearing of this appeal by the learned vakil for the respondent on the ground that no appeal lies to this Court, the suit being one of the nature cognizable by a Court of Small Causes. The suit was one to recover from the defendant Rs. 130 under the following circumstances :—The defendant, in execution of a decree held by him against certain judgment-debtors, caused some property to be sold at auction and the plaintiff purchased it. Subsequently the plaintiff applied under section 315 of the Code of Civil Procedure to the Court which executed the decree for a refund of the sale price paid by him on the allegation that the judgment-debtors had no saleable interest in the property sold. That application having been disallowed, he brought the present suit against the defendant, decree-holder, to recover from him the sale price paid by the plaintiff, together with interest. It is urged on behalf of the respondent that this was a suit which was not excluded from the cognizance of a Court

* Second Appeal No. 792 of 1896 from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 4th July 1896, confirming a decree of Munshi Harbandhan Lal, Officiating Munsif of Pilibhit, dated the 8th April 1896.

of Small Causes by the second schedule to Act No. IX of 1887. If the [81] suit does not come within any of the classes of suits specified in that schedule it is a suit which, under the second paragraph of section 15 of Act No. IX of 1887, was cognizable by a Court of Small Causes. In my opinion the suit was not covered by any of the articles mentioned in the second schedule as excepted from the cognizance of a Court of Small Causes. The learned vakil for the appellant refers to article 23 which relates to "suits to alter or set aside a decision, decree or order of a Court or of a person acting in a judicial capacity." This is not a suit to set aside any order. If a decree be passed in the suit in favour of the plaintiff, it may have the effect of nullifying the order of the Munsif refusing to refund to the plaintiff the sale price paid by him, but that circumstance would not make the suit a suit to set aside a decision, decree or order, which it does not purport to be. The amount claimed being a sum not exceeding Rs. 500, a second appeal is barred by section 586 of the Code of Civil Procedure. The appeal is dismissed with costs.

Appeal dismissed.

[20 All. 81]

The 27th July, 1897.

PRESENT:

MR. JUSTICE KNOX AND MR. JUSTICE BURKITT.

Dost Muhammad Khan and others.....Defendants

versus

Said Begam and others.....Plaintiffs.*

Civil Procedure Code, section 13, Expl. II—Res judicata—Muhammadan law—Dower—Suit for dower debt after previous suit for partition amongst heirs—Effect of partition decree as constituting res judicata between co-defendants.

Two of the daughters of a deceased Muhammadan sued the remaining heirs for partition of the inheritance, and a decree for partition was made, which was confirmed on appeal by the High Court. Pending the appeal to the High Court, two other daughters of the deceased, who had been parties defendants in the suit for partition, brought a suit by which they claimed a large share in the estate of the deceased as part of the dower debt due to their mother. In this suit they impleaded as defendants all the surviving descendants of their deceased father.

Held that the claim for dower should have been made a ground of defence in the former suit by the plaintiffs, who had been defendants in the suit for [82] partition and that as no such defence had been set up in that suit the claim in respect of the dower debt fell within the purview of explanation II to section 13 of the Code of Civil Procedure and the suit was barred, not only as against the plaintiffs to the former suit but as against the other defendants to that suit.

* First Appeal No. 283 of 1893 from a decree of Shah Ahmad-ullah, Subordinate Judge of Meerut, dated the 10th July 1898.

THE facts of this case are fully stated in the judgment of the Court.

• Mr. T. Conlan, Pandit Moti Lal and Maulvi Ghulam Mujtaba for the Appellants.

Mr. Abdul Majid, Munshi Ram Prasad and Pandit Sundar Lal for the Respondents.

Burkitt, J. (Knox, J., concurring):—This is a first appeal by the defendants from a decree of the Subordinate Judge of Meerut, dated July 10th, 1893, in favour of the plaintiffs, respondents.

The plaintiffs, Musammat Said Begam and Musammat Shahzadi Begam, are daughters of the late Syed Mir Khan, Sardar Bahadur, of Khanpur by his wife Hasno Begam. The plaintiffs' mother died in 1879, and their father in 1889. The present suit was instituted in May 1892. The defendants impleaded in the suit were all the surviving descendants, male and female, of the plaintiffs' father and also his surviving widows. The plaintiffs allege that when he married their mother their father on the same day (August 11th, 1863) executed a *kabin-nama*, or deed of dower, by which he agreed that the dowry of his intended wife should be Rs. 12,000 in cash and one-seventh of all his immoveable property. They further allege that out of the dower debt due to their mother one-fourth devolved on their father, as one of her heirs on their mother's death. They therefore sued for possession of three-fourths of one-seventh of the immoveable property, after deducting so much of it as might be recoverable from their shares as heirs to their father's estate, and Rs. 8,182 in cash.

The Subordinate Judge gave the plaintiffs a decree for possession of the property as claimed out of their father's estate as it existed at his death, and for Rs. 4,091 in cash. The decree [83] for possession was made as against the whole estate left by the Sardar Bahadur. No deduction was made on account of the amount of the dower debt payable from the plaintiff's personal share by inheritance in that estate. Out of the twenty-one defendants impleaded, nine submitted to the decree of the Court. Twelve appealed, and they impleaded as co-respondents with the plaintiffs one Syed Hasan Khan, son of the late Sardar Bahadur, because it was alleged he had purchased the interest of one of the plaintiffs in the decree. This Syed Hasan Khan is one of the defendants who did not join in this appeal.

The first plea argued on behalf of the appellants at the hearing is a plea which, if successful, must put a summary end to the suit. It is the second plea in the memorandum of appeal, and is to the effect that "the present suit was barred under section 13 of the Code of Civil Procedure with reference to the litigation ending in decree of the Subordinate Judge of Meerut, dated January 15th, 1892."

To explain this plea it is necessary to set out some facts respecting the previous litigation. They are as follows:—

On January 23rd, 1890, two ladies, named Bibi Jan and Bibi Sahib Jan (the latter of whom is now deceased and is represented by the appellants Nos. 7-12), daughters of Syed Mir Khan, Sardar Bahadur, instituted a suit against all the surviving descendants, male and female, and the surviving widows of their father, to recover by partition their shares as daughters according to Muhammadan Law in their deceased father's estate. Among the defendants impleaded in that suit were the two plaintiffs (who also are daughters of the Sardar Bahadur), Musammat Said Begam and Musammat Shahzadi Begam, of the present suit. The latter did not put in any written defence in that suit. The only defendants who appeared were the eight sons of the

Sardar Bahadur. In that suit a decree was passed by the Subordinate Judge on January 15th, 1892, in favour of the plaintiffs, and that decree was, on appeal to this Court, affirmed on April 23rd, 1897. The present suit was instituted on the [84] 21st May 1892, more than four months after the Subordinate Judge had given his decree in the former suit, and while that decree was pending in appeal in this Court. The contention in the present appeal is that the plaintiffs respondents might and ought to have made their present claim a matter of defence in the former suit, and that as they failed to do so, it must now be held, in accordance with the second explanation to section 13 of the Code of Civil Procedure, that that claim was a "matter directly and substantially in issue" in the former suit and that therefore the present suit is barred. There is no dispute as to the facts. It is admitted that these plaintiffs respondents were impleaded as defendants in the former suit and they did not put in any defence. A perusal of the plaint in the former suit, a copy of which has been put in evidence in this appeal, shows that these plaintiffs respondents were, conjointly with the other defendants in that suit, impleaded as being in possession of the estate left by the deceased Sardar Bahadur their father, the estate of which the plaintiffs in that suit sought to recover their legal shares as heirs.

For the appellants here our attention was called to the decisions of their Lordships of the Privy Council in the cases of *Mahabir Parshad Singh v. Macnaghten*, L. R., 16 I. A., 107, and *Kameswar Parshad v. Rajkumari Ruttun Koer*, L. R., 19 I. A., 234, and on their authority we were asked to hold that the claim of the plaintiffs in the present suit was barred by the principle of *res judicata*.

In the former suit the plaintiffs asked for possession by partition of 14/120 shares out of the whole of certain specified properties (set forth in schedules) which they alleged had been of the Sardar Bahadur at his decease and were at the date of the suit in possession of the persons impleaded as defendants, and amongst others of the female plaintiffs respondents to this appeal. The contention for the appellants is that these ladies not merely might but ought to have pleaded in the former suit that the plaintiffs to that suit could not get a decree for 14/120 shares in the whole immoveable property left by their deceased father, because (debts by Muham-[85]madan Law taking precedence of inheritance) they (the present plaintiffs respondents here) had a title to three-fourths of one-seventh of the estate as it stood at the date of the *kabin-nama*, and to a large sum in cash, which claim should be paid before the plaintiffs of that suit could take their shares in the estate by partition as heirs. As their father and mother had both died before 1890 the cause of action for the dower debt had accrued before the institution of the former suit. In our opinion it was incumbent on these ladies when defendants in the former suit, which was a suit for partition, even if they did not on other grounds dispute the claim of the plaintiffs in that suit, to have pleaded, at least as a partial defence to that suit, that a decree for partition should not be made until the debt due to them, on the footing of their mother's dower, both in moveable and in immoveable property, had first been deducted from the property left by their father. The effect of the claim to the dower debt, if then made by these ladies and substantiated, would have been to reduce considerably the extent of the immoveable property and the cash out of which the plaintiffs in the former suit would take their 14/120 shares. We are of opinion that in that suit for partition these ladies should have informed the Court and the plaintiffs that they had a claim which would have the effect mentioned above, and should have objected *then* to the Court giving to those

plaintiffs a decree for possession of 14/120ths out of their father's estate as it stood at his death, and should have represented that those plaintiffs were only entitled to a decree for possession by partition of 14/120ths of as much of that estate as remained after the dower debt had been discharged, or due allowance made for it.

What has happened is that in the former suit the Subordinate Judge, and this Court in appeal, after deciding distributively the number of shares into which the property left by the late Sardar Bahadur should be divided, and the number of such shares to which each of the heirs (all of whom were impleaded in the suit) of the deceased was entitled, held that the plaintiffs in that suit were entitled to possession of 14/120ths of the property left by the [86] Sardar Bahadur and gave a decree accordingly. It follows therefore that, if the decree in the present case is to stand, the decree in the former suit—to which the plaintiffs in the present suit were parties—must be torn up, and considerable deductions will have to be made from the area of the immovable property and from the amount of the movable property, possession of which was adjudged to the plaintiffs of the former suit. Those plaintiffs have thus most unnecessarily been exposed to the trouble, annoyance and expense of a second suit, the subject matter of which might have been decided in the former suit.

In our opinion the second explanation to section 13 of the Code of Civil Procedure is peculiarly applicable to such a state of things. The rule laid down in that explanation appears to us to be, to some extent at least, founded on the principle which underlies section 43 of the same Code, namely, that of preventing a multiplicity of suits and unnecessary litigation. We have shown above that the present suit was quite unnecessary. Bearing in mind the observations of their Lordships of the Privy Council as reported at page 238 of their judgment in *Kameswar Parshad v. Rajkumari Ruttun Koer*, L.R., 19 I. A., 234, we have no hesitation in holding that this matter of the dower debt ought to have been made a ground of defence by the respondents Said Begam and Shaghzadi Begam when they were defendants in the former suit. It must therefore be considered to have been directly and substantially in issue in that suit. It follows therefore that the present suit is barred as a *res judicata* and should have been dismissed, certainly as far as the plaintiffs in the former suit and their representatives in title (defendants appellants in the present suit) are concerned.

As to the other defendants to this suit (some of whom have appealed and some have not), all of whom were defendants in the former suit, we note that no suggestion was made at the hearing of this appeal on behalf of the respondents, that the decree under appeal should be modified so as to exempt from its operation the plaintiffs of the former suit. Irrespective of that matter we are [87] of opinion that the present suit is barred by the principle of *res judicata*, not merely against the plaintiffs (as decided above), but also as against the defendants in the former suit, and even though the plaintiffs in the present suit were co-defendants in the former suit. That suit, as we have already pointed out, was a suit for possession by partition. In such a suit the decree is not—like a decree for money or for the delivery of specific property—a decree in favour of the plaintiffs only. In a suit for partition (as the former suit was) the decree is, or ought to be, a joint declaration of the rights of the persons interested in the property of which partition is sought, and is a decree in favour of each sharer. It decides what interest each of the sharers has in the property, the subject of partition, whether those sharers be plaintiffs or defendants, and renders unnecessary any subsequent suit by any of such sharers for a declaration

of his interest in the property (*vide* Sheikh Khoorshed Hossein v. Nubbee Fatima, I. L. R., 3 Cal., 551, and Ramchandra Narayan v. Narayan Mahadeo, I.L.R., 11 Bom., 216. In the former suit, in order to adjudicate on the relief to be given to the plaintiffs, *i.e.*, in order to ascertain to what share in their father's property they were entitled, it was absolutely necessary to ascertain also what were the shares of all the other heirs of the Sardar Bahadur, and who they were. Those other heirs were all the defendants of the former suit, including the female plaintiffs respondents to this appeal, and the decree therefore was not merely an adjudication as to the shares in the property of which partition was sought to which the plaintiffs in that suit were entitled, but also of the shares to which each of the defendants *inter se* was entitled out of the property left by the Sardar Bahadur at his death. Practically each of the defendants obtained a decree for his or her fractional share in that property, a decree which he or she could not have obtained had the female respondents in the present suit put forward (as we think they ought to have done) and established their claim to their mother's dower debt. The question whether all these defendants are entitled to their various shares out of the property [88] left by the Sardar Bahadur at his death, and not to the same fractional shares out of that property diminished by payment of the dower debt, is, we think, just as much a *res judicata* in favour of those defendants as we have held it to be in the case of the plaintiffs in the former suit. For the above reasons we are of opinion that the present suit is barred by the principle of *res judicata* as against all the persons impleaded as defendants in the former suit, and that it should have been dismissed as against them also.

Some arguments were addressed to us for the appellants on other points arising in the appeal, but, as in our opinion the suit fails, we consider it unnecessary to discuss them.

We allow this appeal. We set aside the decree of the lower Court and, as we hold that the suit was barred *ab initio*, we, under the provisions of section 544 of the Code of Civil Procedure, direct that it stand dismissed as against all the persons impleaded as defendants. The respondents will pay appellants' costs in both Courts.

* Appeal decreed.

NOTES.

[See also (1910) 32 All., 469 ; (1906) 31 Bom., 271 ; *Nalini v. Sarna* (1914) 19 C.W.N., 531 P.C. ; (1904) 1 A.L.J., 394 ; (1908) 8 C.L.J., 369.]

[20 All. 88]

The 30th July, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Muhammad Husain.....Defendant

versus

Niamat-un-nissa and others.....Plaintiffs.*

Pre-emption—Muhammadan Law—Right of pre-emption not surviving to heir of pre-emptor.

According to the Muhammadan law applicable to the Sunni sect if a plaintiff in a suit for pre-emption has not obtained his decree for pre-emption in his life-time the right to sue does not survive to his heirs.

THIS was a suit for pre-emption under the Muhammadan law. One Maqsud Hasan sold his kouse in Shamsabad to Muhammad Husain. The plaintiff, Muhammad Hasan, thereupon brought a suit for pre-emption against the vendor and the vendee. That suit was dismissed on the 7th of October 1896, on the ground that the plaintiff had not proved his compliance with the Muhammadan law in the matter of the necessary preliminary [89] demands. On the 13th of October 1896 the plaintiff pre-emptor Muhammad Hasan died. On the 10th of November 1896 two of his heirs appealed, and on the 8th of December 1896 the remaining heir was joined as a party to the appeal. The Lower Appellate Court (Subordinate Judge of Farrukhabad) found that the necessary demands had been made, and passed an order of remand under section 562 of the Code of Civil Procedure. From this order the defendant appealed to the High Court on the main ground that "the right of pre-emption being personal, the cause of action" did not survive to the heirs of the deceased plaintiff, and they could not therefore have appealed from the decree of the Court of First Instance.

Maulvi Ghulam Mujtaba, for the Appellant.

Pandit Baldeo Ram Dave, for the Respondents.

"Edge, C. J., and Blair, J.—One Maqsud Hasan sold his house in Shamsabad to Muhammad Husain. One Muhammad Hasan, thereupon, claiming under the Muhammadan law of pre-emption applicable to Sunnis of the Hanifi sect, brought his suit for pre-emption. That suit was dismissed on the 7th of October 1896, on the ground that Muhammad Hasan, the then pre-emptor, had failed to prove that he had made the necessary demands. On the 13th of October 1896, Muhammad Hasan the pre-emptor died. On the 10th of November 1896, two of his heirs appealed and on the 8th of December 1896, the remaining heir was joined as a party to the appeal. The Court below found that the necessary demands had been made, and passed an order under section 562 of the Code of Civil Procedure remanding the case for trial on its merits. From that order this appeal has been brought.

The short point which we have to decide is—did the right of pre-emption determine upon the death of Muhammad Hasan? All the authorities of which we are aware show that it did; that the right of pre-emption is gone when the pre-emptor is a Sunni of the Hanifi sect, and has not obtained his decree during his life-time, and that the right to sue does not survive to his heirs. [90] The authorities will be found at page 505 of Baillie's Moohummudan

*First Appeal No. 6 of 1897, from an order of Maulvi Muhammad Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 23rd December 1896.

Law, Hanifesa (2nd edition); Hamilton's Hedaya by Grady, (2nd edition, p. 560); Tagore Law Lectures, 1873 (Shama Charan Sarcar) p. 534; Tagore Law Lectures, 1884, (Ameer Ali) 2nd edition, Vol. I, p. 603.

In this case Muhammad Hasan had not obtained possession. We allow the appeal, and, setting aside the order of remand, we restore the decree of the first Court, but upon different grounds. There will be no costs of the appeal to the Court below or of the appeal to this Court. •

Appeal decreed.

[20 All. 90]

The 30th July, 1897.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BURKITT.

Sheorania.....Plaintiff

versus

Bharat Singh.....Defendant.*

*Minor—Suit on behalf of a person alleged to be, but not in fact, a minor—
Procedure on discovery that the plaintiff was of full age at the
commencement of the suit.*

A suit was instituted on behalf of a person alleged to be a minor, through her next friend. The plaintiff obtained a decree. The defendant appealed, and on this appeal the alleged minor applied to be placed on the record in her own right as respondent, stating that she had attained her majority since the institution of the suit. The affidavits, however, by which this application was supported, showed that she had been of full age at the time when the plaint was filed. *Held* that the suit must be dismissed. *Taqi Jan v. Obaidulla*, I. L. R., 21 Cal., 866, dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, for the Appellant.

Pandit Moti Lal and Kunwar Parmanand, for the Respondent.

Knox and Burkitt, JJ.—The suit out of which this second appeal arises was instituted on a plaint signed and verified by one Lachmi Narain, calling himself the next friend of Musammât Sheorania, whom he described to be a minor. [91] Sheorania was his daughter, and the suit was instituted on the 23rd of April 1894. On the 24th of September 1894, a decree was given upon this plaint in favour of the plaintiff. The defendant presented an appeal, and, when the next friend got notice of the appeal, Sheorania herself came forward and applied to the Court to be allowed to carry on the suit as a major. From the affidavit which she filed, and from the affidavit which her father Lachmi Narain filed, it is proved beyond doubt that Musammât Sheorania had attained her majority some time before the institution of the suit in April 1894. Upon this the defendant, who was appellant in the Court below,

* Second Appeal No. 650 of 1895, from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 20th March 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 24th September 1894.

represented to the Judge that the suit should be dismissed, and it was dismissed.

It is now contended in appeal to this Court that the Judge should not have dismissed the suit, but should have allowed the plaint to be amended and the suit to be carried on by Musammat Sheorania, or, if amendment could not be allowed, the phrase "Lachmi Narain as next friend" might be treated as mere surplusage. In support of this the learned counsel for the appellant cited the case of *Taqi Jan v. Obaid-ulla*, I. L. R., 21 Cal., 866. We find ourselves unable to follow the procedure adopted in that case. We have before us what is not a plaint by Musammat Sheorania, inasmuch as it is neither signed nor verified by her, and she, according to both her own statement and that of Lachmi Narain, is the only person, if any, entitled to sue as plaintiff. The person who signed and verified the plaint is Lachmi Narain, a person not duly authorized by Sheorania in that behalf. Musammat Sheorania was of full age when the plaint was filed, and Lachmi Narain therefore had no standing whatever in the case. The *vakalatnamahs* in the case are also signed by Lachmi Narain, and, so far as the record shows, the whole proceedings were carried on by Lachmi Narain, a man who had no interest whatever in the property in dispute and had no cause of action against the defendant. What purports to be a plaint by Musammat Sheorania is not a plaint by Musammat Sheorania, and [92] cannot therefore be amended by her. The appeal fails and is dismissed with costs in all Courts, which will be borne throughout by Lachmi Narain, the person who signed and verified the plaint on the record.

Appeal dismissed.

NOTES.

[See however (1894) 21 Cal., 861; (1898) 26 Mad., 167; (1906) 28 All., 416. See also (1905) 32 Ind., 396 as regards limitation.]

[20 All. 92]

The 31st July, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Abdul Hai and others.....Defendants

versus

Nain Singh and another.....Plaintiffs.*

Pre-emption—Wajib-ul-arz—Partition without new wajib-ul-arz being framed—Act No. XIX of 1878 (North-Western Provinces Land Revenue Act) section 107.

When a mahal is divided by perfect partition into two or more separate mahals a separate record of rights should be framed for each of the new mahals.

Where under such circumstances no fresh records of rights are framed for the new mahals, the co-sharers in any one of the new mahals cannot, unless under very exceptional circumstances, claim, under the terms of the old record of rights applicable to the original undivided mahal, pre-emption in respect of land situated in any of the other new mahals. *Ghure v. Man Singh*, I. L. R., 17 All., 226, referred to.

*First Appeal from Order No. 85 of 1897, from an order of H. W. Lyle, Esq., Additional Judge of Moradabad, dated the 20th April 1897.

THIS was a suit for pre-emption of a share in a village. The village in which the property in suit was situated had originally consisted of one mahal, but prior to the sale which gave rise to the present suit had been divided by perfect partition into two separate mahals. On this partition, however, no new *wajib-ul-arzes* had been framed for the new mahals. The plaintiffs pre-emptors were owners of shares in one of the new mahals and the share sold was a share in the other new mahal. The existing *wajib-ul-arz*, framed when the village was undivided, stated that the custom of pre-emption prevailed in the village.

The Court of First Instance (Subordinate Judge of Moradabad) dismissed the suit, holding that the plaintiffs, not being sharers in the mahal in which the share sold was situated, could not claim pre-emption by virtue of the old *wajib-ul-arz*. The Court followed the ruling of the High Court in *Ghure v. Man Singh*, I.L.R., 17 All., 226.

[93] The plaintiffs appealed. The Lower Appellate Court (District Judge of Moradabad), relying on certain rulings of the High Court, *viz.*, *Gokal Singh v. Mannu Lal*, I. L. R., 7 All., 772, *Kuar Dat Prasad v. Nahar Singh*, I. L. R., 11 All., 257, *Shiam Sundar v. Amanant Begam*, I. L. R., 9 All., 235, and *Abbas Ali v. Ghulam Nabi*, Weekly Notes, 1891, 137, allowed the appeal and made an order of remand under section 562 of the Code of Civil Procedure. From this order of remand the defendants appealed to the High Court.

Mr. *Amir-ud-din* for the Appellants.

Munshi *Gobind Prasad* for the Respondents.

Edge, C. J. and Blair, J.:—This was a suit for pre-emption. The share sold was in a mahal which had formed a part of a larger mahal. The co-sharers in the larger mahal had obtained a perfect partition under Act No. XIX of 1873. The plaintiff in this case is a co-sharer in the other mahal, in which the share sold is not, which formed part of the larger area. It appears that no separate *wajib-ul-arz* was prepared at the date of partition. The plaintiffs' contention is that the old *wajib-ul-arz* still applies, and that, inasmuch as he is a share-holder within the area to which that *wajib-ul-arz* applied, he is entitled to pre-emption, although he is not a share-holder in the particular mahal in which the share is which was sold. The rulings on this point are somewhat conflicting; but in one of the last rulings of this Court on this subject it was said:—"The result then is that the document upon which the respondents base their right, and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed and which never contemplated the existing state of things." We have quoted from the judgment by Mr. Justice KNOX in *Ghure v. Man Singh*, I. L. R., 17 All., 226, at p. 234. We believe that the decision in that case is in harmony with the view now entertained in this Court. The object with which share-holders of a mahal seek for partition is to sever their connection as co-sharers [94] with other share-holders of the mahal. Some desire to separate their interest from other co-sharers because the latter do not pay their quota of the Government revenue regularly, thereby bringing liability for their arrears upon all the co-sharers of the mahal. Sometimes, no doubt, partition is sought because co-sharers cannot get on comfortably with each other as co-sharers in the same mahal. In any view of the subject it would require very strong evidence to satisfy us that after share-holders in a mahal have applied for and obtained partition and consequent separation of their interest from other share-holders in the mahal they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre-empt in the new mahal and

become again their co-sharers. It is obvious to our minds that, on a true construction of Act No. XIX of 1873, it is the duty of the Collector or Assistant Collector on making a perfect partition to frame a separate record of rights for each of the new mahals. Unfortunately it is not always done, and hence these endless disputes between the share-holders in different mahals which formed parts of one original mahal. If Collectors or Assistant Collectors would read section 107 of Act No. XIX of 1873 with the definition of "Mahal" as given in section 3 of that Act, they would see that apparently it is the intention of the Legislature that each mahal should have a separate record of rights. A decision of two Judges of this Court in *Angan Fateh Chand v. Bibi Hamid-un-nissa*, Second Appeal No. 1249 of 1892, in which an order of remand was made on the 19th March 1894, and which was decided on the 18th February 1895, supports the opinion which we have expressed. We allow this appeal, and set aside the order of the Court below, and dismiss the appeal to that Court with costs, and restore and affirm the decree of the first Court. The appellant will have the costs of this appeal.

Appeal decreed.

NOTES.

[The Full Bench decision on this subject in (1899) 22 All. 1 was approved by the Privy Council in (1915) 37 All., 129 (Sir John Edge).]

[95] REVISIONAL CRIMINAL.

The 2nd August, 1897.

PRESENT:

MR. JUSTICE KNOX.

Queen-Empress

versus

Ram Pal.*

Act No. IX of 1890 (Indian Railways Act) sections, 113, 132—Act No. XLV of 1860, sections 40, 64—Criminal Procedure Code, section 33—"Offence"—

Travelling on a Railway without a proper ticket—Punishment.

A passenger who travels in a train without having a proper pass or ticket with him has not committed an "offence." He cannot therefore be legally sentenced to imprisonment in default of payment of the excess charge and fare which may be recovered under the provisions of section 113 cl. (4) of Act No. IX of 1890.

IN this case the Joint Magistrate of Allahabad tried one Ram Pal summarily under section 113 of the Indian Railways Act, 1890, and ordered him under that section to pay a certain excess fare together with a penalty, and further sentenced him to ten days' simple imprisonment in default of payment of the amount. The Magistrate of the District being of opinion that the sentence of imprisonment in default was illegal, the act of the accused not amounting to an "offence" within the meaning of the Indian Penal Code, referred the case to the High Court for orders under section 438 of the Code of Criminal Procedure.

The following order was passed:—

Knox, J.—Travelling in a train by a passenger without having a proper ticket, with him is not an offence under the Railway Act of 1890. It is true

* Criminal Revision, No. 408 of 1897.

that section 113 together with section 106 and the sections which follow up to as far as section 130 are all placed under a heading of "Other offences." The classification is unfortunate, for several of these sections cannot possibly relate to an offence at all, and section 132 shows clearly that acts committed under section 113 are not deemed offences within the technical meaning of that word. All the proceedings taken by the Assistant Magistrate are set aside and the record will be returned..

NOTES.

[These are similar decisions:—1 Bom. L. R., 166; 5 N. L. R., 151; 20 Mad., 385; 18 Bom., 440; 12 Cal., 192.]

[96] APPELLATE CIVIL.

The 2nd August, 1897.

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR

Mir Azmat Ali.....Plaintiff

versus

Mahmud-ul-nissa.....Defendant.*

Suit for marriage—Jactitation of marriage—Jurisdiction of Civil Courts in British India to entertain such a suit between Muhammadans.

Held that a suit for jactitation of marriage will lie in a Civil Court in British India, and is not within the ruling of the Privy Council in Rajah Nilmony Singh v. Kally Churn Bhattacharjee, L. R., 2 I. A., 83.

THE plaintiff sued in the Court of the Subordinate Judge of Meerut for a declaration that the defendant was not, as she falsely alleged herself to be, the wife of the plaintiff, and that a child to which she had given birth, and which she alleged to be his, was not his. The plaintiff's case was that the defendant had been married to one Kallu Mir, and that the marriage was still subsisting. Prior to this suit being brought the defendant had obtained from a Criminal Court an order against the plaintiff for the maintenance of her child as having been begotten by the plaintiff, though the Criminal Court did not find that the defendant was married to the plaintiff. The present suit was dismissed by the Subordinate Judge, who found that the defendant was the lawfully married wife of the plaintiff and that the child was his.

On appeal by the plaintiff the defendant respondent raised an objection that the suit was not cognizable at all by a Civil Court. This objection was sustained by the Lower Appellate Court, which dismissed the appeal, relying on the case of *Rajah Nilmony Singh v. Kally Churn Bhattacharjee*, L. R., 2 I. A., 83.

The plaintiff appealed to the High Court.

Messrs. T. Conlan and D. N. Banerji, for the Appellant.

Babu Jogindro Nath Chaudhri, for the Respondent.

* Second Appeal No. 679 of 1895, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 1st May 1895, confirming a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 24th March 1894.

Edge, C. J. and Blair, J.:—This is a suit for jactitation of marriage which was brought by a Muhammadan, named Mir Azmat Ali, against one Musammat Mahmud-ul-nissa. She had taken [97] proceedings against him in the Magistrate's Court on more than one occasion to obtain orders of maintenance for herself and her child on the allegation that she was the wife of Mir Azmat Ali and the child was their child. The first Court dismissed the suit, finding for the defendant that she was the plaintiff's wife. The plaintiff appealed. The first appellate Court dismissed the appeal on the ground that such a case came within the ruling of the Privy Council in *Rajah Nilmony Singh v. Kally Churn Bhattacharye*, L. R., 2 I. A., 83, and that consequently the suit did not lie. But the case before the Privy Council was a very different one. The decision apparently is one which would forbid the institution of a novel description of suit to set aside a mere assertion. A suit for jactitation of marriage is not by any means a novel description of suit: it was a suit in which relief was given in England in the Ecclesiastical Courts, and when the jurisdiction of those Courts was transferred to the Divorce Court by the Act of 1857, the jurisdiction of the Ecclesiastical Courts in suits for jactitation of marriage was transferred to the Divorce Court. In England it was not only a well-known suit within the jurisdiction of the Ecclesiastical Courts, but it was considered proper that that jurisdiction should be continued by the Divorce Court in England, and there can be no doubt that unless a man is entitled by means of the Civil Courts to put to silence a woman who falsely claims to be his wife, the man and others may suffer considerable hardship, and his heirs may be harassed by false claims after his death. The suit for jactitation, however, is one not to be encouraged, particularly in a country like this, in which persons unfortunately are too anxious to discover forms of legal procedure by which they can annoy their neighbours. In our opinion, however, such a suit lies in a Civil Court in this country. The Court trying such a suit will of course take care, before granting a plaintiff a decree, to see that it is strictly proved that the defendant did seriously allege that the disputed marriage had taken place and that the plaintiff did not acquiesce in the claim or allegation of the [98] defendant as to the disputed marriage, and further that in fact no marriage had taken place between the parties. We set aside the decrees of the Lower Appellate Court, and remand the case under section 562 of the Code of Civil Procedure to that Court to be disposed of upon the merits.

Appeal decreed and cause remanded.

[20 All. 98]

The 4th August, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE AND MR. JUSTICE, BANERJI.

Aman Singh and another.....Plaintiffs
versus
 Narain Singh and others.....Defendants.*

Civil Procedure Code, section 462—Compromise on behalf of a minor—Suit to set aside compromise as having been entered into without the leave of the Court.

Where the guardian *ad litem* of certain minors assented on their behalf to a compromise, which compromise was accepted by the Court, and a decree passed thereon, and was found not to be prejudicial to the interests of the minors: it was held that the minors could not, after the decree based upon the compromise had become final, succeed in a suit to set it aside on the sole ground that the Court had not previously given leave to the guardian to enter into the compromise. *Kalavati v. Chedi Lal*, I. L. R., 17 All., 531, distinguished.

THIS was a suit to set aside a decree passed on the basis of a compromise. One of the plaintiffs was of full age, the other a minor. At the time of the compromise in question being made both had been minors, and had been represented by their mother Musammat Ganga as guardian *ad litem*. The Court of First Instance decreed the plaintiffs' claim, holding that the conduct of Musammat Ganga in relation to the compromise was suspicious and that she had been fraudulently induced by the plaintiff in the former suit to assent to it on behalf of her minor sons.

On appeal by the defendants the Lower Appellate Court (District Judge of Aligarh) held that the fraud and collusion alleged by the plaintiffs had not been proved, neither was it shown that the compromise entered into on their behalf by the mother of the [99] minors was prejudicial to the minors' interest. That Court accordingly allowed the appeal and dismissed the plaintiffs' suit.

The plaintiffs thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhry and Babu Durga Charan Banerji, for the Appellants.

Munshi Ram Prasad and Pandit Sundar Lal, for the Respondents.

Edge, C. J., and Banerji, J.—This suit was brought to set aside a decree made on a compromise. The plaintiffs here were minors at the time of the previous suit and were lawfully represented in that suit by their guardian. The guardian was an assenting party on their behalf to the compromise and to the making of the decree, and it is found in this suit that the compromise was not prejudicial to the interests of the minors; but the Court had not, before the compromise was made, given leave for its being made. Under those circumstances it is contended on behalf of the plaintiffs here that they are entitled to a decree setting aside the decree which was made on the compromise, and reliance is placed upon the judgment of this Court in the case of *Kalavati v. Chedi Lal*, I. L. R., 17 All., 531. It is said, as appears to be true, that the Court, although it sanctioned the compromise after it had been entered into, had not given leave to the guardian to make the compromise before it was

* Second Appeal No. 724 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 8th April 1895, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 19th December 1894.

made, and that consequently there was no good compromise in law binding upon the minors upon which a decree could lawfully have been made. In our opinion there is a difference between a case in which the validity of a decree made upon a compromise in a suit in which a minor is a party is challenged in appeal from that decree, and a case like the present, where the validity of a decree which has become final is sought to be questioned in a separate, subsequent and independent suit between the parties.

Now in the present case it has not been proved that the decree in the previous suit was in any respect obtained by fraud. It is not shown that the decree in the previous suit was in any respect disadvantageous to the minors. It would probably be now [100] impossible, if we were to decree this suit, to put the parties back into the same position in which they were when the decree in the previous suit was made upon the compromise. Further, we cannot overlook the fact that if we were to hold that a decree based upon a compromise which was not disadvantageous to a minor, but for the making of which leave had not been given by the Court before it was effected, could be avoided and set aside in a subsequent suit, we should be opening a door to ruinous litigation in these Provinces in cases in which the Court had in fact sanctioned a compromise before making a decree.

On these considerations we dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This decision was not followed in (1910) 34 Mad., 314, though followed in (1908) 8 C. L. J., 274; 13 C. W. N., 163; (1911) P. L. R., 134; 11 I. C., 523. See also (1903) 31 Cal., 111; (1898) 2 O. C., 45. As regards the preemptory character of the provisions relating to compromise, see also (1906) 28 All., 585 P.C.; (1911) 36 Bom., 53.]

[20 All. 100]

The 5th August, 1897.

PRESENT:

SIR JOHN EDGE, Kt., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Serh Mal and others.....Plaintiffs

versus

Hukam Singh.....Defendant.*

Pre-emption—Wajib-ul-arz—Sale to a stranger—Re-sale before suit to a co-sharer—Effect of such re-sale.

In cases of pre-emption based upon a *wajib-ul-arz* the right of pre-emption does not survive, if the land, which is subject to pre-emption, having been sold to a stranger, is subsequently re-sold by the stranger vendee before suit to a co-sharer having equal rights with those seeking pre-emption.

THIS was a suit for pre-emption. One Munni Lal sold a share in a certain village on the 1st of August 1893 to Bhawani Prasad, a stranger to the village. On the 23rd of July 1894, Bhawani Prasad sold the share in question to one Hukam Singh. On the 24th of July 1894 the plaintiffs, who were co-sharers in the village, brought a suit for pre-emption under the terms of the village

* Second Appeal No. 786 of 1895, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 15th April 1895, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 7th February 1895.

wajib-ul-arz on the basis of the sale of the 1st of August 1893. To this suit only Munni Lal and Bhawani Prasad were originally made defendants. Hukam Singh was subsequently added as a defendant on the 7th of November 1894. Hukam Singh was also a co-sharer in the village having equal rights of pre-emption with the plaintiffs.

[101] The Court of First Instance (Subordinate Judge of Aligarh) decreed the plaintiffs' claim, holding that the sale-deed in favour of Hukam Singh was fictitious and that Hukam Singh had forfeited his right of pre-emption by reason of his having purchased the property from Bhawani Prasad.

Against this decree the defendant, Hukam Singh, appealed. The Lower Appellate Court (District Judge of Aligarh) allowed the appeal and dismissed the plaintiffs' suit as against Hukam Singh, holding that the sale to Hukam Singh was a *bona fide* transaction, and that the plaintiffs had no superior pre-emptive rights as against him.

The plaintiffs appealed to the High Court.

Pandit Sundar Lal, for the Appellants.

Mr. D. N. Banerji, for the Respondent.

Edge, C. J., and Banerji, J.—Shareholders in a village in which there was under the *wajib-ul-arz* a right of pre-emption amongst the shareholders, sold certain bighas of land to a stranger. Out of that sale this suit has arisen. The plaintiffs claim pre-emption as co-sharers having a right of pre-emption. One of the defendants, namely, Hukam Singh, is a co-sharer having an equal right of pre-emption with the plaintiffs. He claims under a sale-deed which has been found by the District Judge in appeal to be genuine. That sale-deed bears a date prior to the date of the institution of this suit. It was a sale-deed by which the stranger vendee sold to Hukam Singh the land which he had previously purchased from the other co-sharers. The first Court decreed the claim of pre-emption. The Court of First Appeal, on appeal, dismissed the suit. From the decree of the Court of First Appeal this appeal has been brought.

It has been contended here on behalf of the plaintiffs appellants that, at the moment when the sale to the stranger was made, the plaintiffs obtained their cause of action. That no doubt is true. It has been contended further that the plaintiffs, having obtained a cause of action before the sale to Hukam Singh, are entitled to a decree of pre-emption in this suit which will deprive [102] Hukam Singh of the benefit of his purchase. For that proposition there is authority. A Judge of this Court sitting alone decided, in Second Appeal No. 649 of 1895, that in such a case the subsequent re-sale by the stranger vendee could not bar the right of a shareholder to obtain a decree for pre-emption against the purchaser share-holder from the stranger. With that proposition we cannot agree. In a coparcenary village, in which, whether by custom or agreement, there is a pre-emption for the share-holders on a sale to a stranger, each shareholder of equal right has, at the moment such a sale is effected, an equal right to pre-empt the whole property sold. The custom of the Muhammadan Law in such a case has never been applied in these Provinces in cases of pre-emption arising under a *wajib-ul-arz* like that in this case. We refer to the rule by which all persons entitled to pre-empt are entitled to a share in the pre-empted property. In our opinion, until a suit has been brought by a co-sharer for pre-emption of the property sold to a stranger, another co-sharer can purchase from the stranger the share which had been sold to the stranger. The stranger on his purchasing a share from a co-sharer obtains a vested interest in the share, and his interest acquired by such purchase can only be divested by voluntary sale by him or by a decree in a

suit. Now in this case, as we have said, Hukum Singh had equal rights of pre-emption with the plaintiffs. He purchased the share from the stranger before the plaintiffs filed their suit, and in our opinion he is entitled to hold it.

We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1906) A.W.N., 215 : 3 A.L.J., 544 ; (1901) 23 All., 247 : (1899) 21 All., 374 ; (1909) 7 A.L.J., 77 ; (1909) 12 O.C., 229 ; (1908) 11 O.C., 220 ; (1910) 32 All., 340. In (1903) 25 All., 421 this was extended to the case of the stranger-vendee himself becoming a co-sharer. See, however, (1909) P.R., 91. •

The date of the suit is the material factor :—(1909) 31 All., 530 ; (1909) 6 A.L.J., 966 : 32 All., 45 ; (1909) 1 I.C., 528 (All.).]

[103] FULL BENCH.

The 14th August, 1897.

PRESENT : •

SIR JOHN EDGE, KT., CHIEF JUSTICE, MR. JUSTICE KNOX AND
MR. JUSTICE BLAIR.

Gaya Bharthi.....Plaintiff

versus

Lakhnath Rai.....Defendant.*

Pre-emption—Wajib-ul-arz—Construction of document.

By the clause in a *wajib-ul-arz* which related to pre-emption it was provided as follows :—

“ When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so, first, in favour of a near co-sharer, next, in favour of a co-sharer of his *thok*, and, lastly, in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (*i. e.*, any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share.”

Held that, in the case of a conditional sale of property to which this *wajib-ul-arz* applied, there were only two stages contemplated by the *wajib ul-arz*, and not three. The first stage was at or about the time of the execution of the deed of conditional sale, and at that time pre-emption might be had by a co-sharer at the rate indicated in the *wajib ul-arz*. The second stage was when the conditional vendee had brought his suit for foreclosure, and at that time the pre-emptor would have to pay the amount found to be due under the deed of conditional sale. When once, however, the order for foreclosure had been made absolute, the co-sharer's right of pre-emption was gone and extinguished.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, (for whom *Babu Jivan Chandar Mukerji*), for the Appellant.

Munshi Ram Prasad, for the Respondent.

* Second Appeal No. 780 of 1895, from a decree of Rai Sanwal Singh, Subordinate Judge of Azamgarh, dated the 25th March 1895, modifying a decree of *Munshi Ganga Prasad*, Munsif of Muhammadabad Gohna, dated the 27th June 1894.

Edge, C. J., Knox and Blair, JJ.:—This appeal has arisen in a suit for pre-emption. The appellants are the plaintiffs, who claim to pre-empt under a condition in the *wajib-ul-arz* relating [104] to the village. The condition is in that part of the *wajib-ul-arz* which bears the heading "*shafa*." It is advisable to state what the whole provision for pre-emption is. It is as follows:—
 "When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so first in favour of a near co-sharer, next in favour of a co-sharer of his *thok*, and lastly in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (i.e., any co-sharer who wishes to sell or mortgage) fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire, and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share."

What happened in this case was this:—A co-sharer mortgaged a share in the village by a conditional sale-deed. The mortgagee, conditional vendee, subsequently brought his suit for foreclosure under Act No. IV of 1882, and obtained a decree for foreclosure and an order was subsequently made making the foreclosure absolute. Thereupon the present plaintiff appeared on the scene and claimed to step into the shoes of the mortgagee vendee and to become in fact absolute owner, upon payment, not of the mortgage money for which the decree for foreclosure was passed, but of Rs. 20 per bigha for cultivated land, and Rs. 5 per bigha for waste land.

This *wajib-ul-arz* has been before another Bench of this Court in the case of *Loknath Singh v. Dhajju Singh*, Second Appeal No. 359 of 1895, in which the decision of the Bench was given on the 17th of July last. In that case the learned Judges differed, Mr. Justice BANERJI holding that the pre-emptors in that case, who were claiming under exactly the same conditions as the pre-emptor [105] in this case, could not have pre-emption except upon payment of the full decretal amount of the foreclosure decree. On the other hand Mr. Justice AIKMAN held that, although the foreclosure decretal amount in that case was Rs. 2,226-8-0, the plaintiffs were entitled to pre-emption upon payment of Rs. 654-8-7, the latter being the amount calculated at Rs. 20 per bigha for cultivated land, and Rs. 5 per bigha for waste land.

We are bound to say that, if the plaintiffs, in the case to which we have referred, had, after the making of the decree for foreclosure, any right whatsoever of pre-emption under the *wajib-ul-arz*, the only construction possible in that event to put on the *wajib-ul-arz* was, in our opinion, that which was adopted by Mr. Justice BANERJI. To illustrate by that case the position contended for on behalf of the pre-emptor appellant in this case, we may point to the following facts. There were three stages in the case. One was at the time when the co-sharer desired to mortgage his share, and mortgaged it. At that time, according to the *wajib-ul-arz*, the other co-sharers were entitled to pre-empt for Rs. 654-8-7. The next stage was after the suit for foreclosure had been brought, which would be equivalent to the service of notice of foreclosure under the Regulation which was in force when this *wajib-ul-arz* was made, and before the order absolute for foreclosure was made. At that time, if the plaintiffs in the former case had sought pre-emption, they could only have obtained the rights of the mortgagee on payment of the mortgage money due at the time, that is, on payment of a sum exceeding Rs. 2,000. The

decree for foreclosure absolutely fixed the amount which must be paid in order to prevent the right to redeem being foreclosed for ever. The next stage, was that subsequent to the making of the order absolute for foreclosure. At this last stage, according to Mr. Justice AIKMAN, the co-sharer seeking pre-emption was in a more fortunate position than he would have been at the intermediate stage, and was entitled to pre-empt by payment of Rs. 654-8-7, the amount calculated at Rs. 20 and Rs. 5 per bigha, as already mentioned; and, according to Mr. Justice AIKMAN, in [106] that third stage, for that sum of money, a person claiming pre-emption was entitled to step into the shoes of the mortgagee who had obtained a decree and an order absolute for foreclosure, upon payment of the Rs. 20 and Rs. 5 per bigha, irrespective of what the principal mortgage money may have been and irrespective of the amount at which the interest on that principal may have arrived. Mr. Justice AIKMAN was quite right in saying that in construing this class of *wajib-ul-arzes* one should endeavour to ascertain what the intention of the parties was and to construe them as far as possible with regard to that intention. In our opinion the parties to this *wajib-ul-arz* never could have had any such intention as that which would have been consistent with the construction put upon the *wajib-ul-arz* by Mr. Justice AIKMAN.

But the real point and the real answer to the plaintiff's suit was not raised by the defendant-appellant in the appeal before those learned Judges. We are not referring to what the parties may have thought was the real answer: we are referring to what appears to us to be, upon the true construction of the *wajib-ul-arz*, the real answer to this suit and to the former suit. In our opinion this *wajib-ul-arz* contemplates only two stages, and not three. It contemplates a time when a contract of a sale or of mortgage is about to be entered into or has been entered into. The Indian Limitation Act, 1877, fixes a time within which a co-sharer desiring to claim pre-emption on a sale or on a mortgage must bring his suit. The second stage is when the conditional vendee has brought his suit for foreclosure, and before he has obtained his order absolute on the decree for foreclosure. Up to the time when that order is made absolute the co-sharer desiring to pre-empt may, under this *wajib-ul-arz*, obtain pre-emption upon payment of the amount decreed in the suit for foreclosure. When the order absolute for foreclosure is made the co-sharer's right to pre-empt under this *wajib-ul-arz* is in our opinion gone and extinguished. There is no provision as to what is to take place then, and a co-sharer not having availed himself of his right [107] to pre-empt before the order absolute, the decree of the Civil Court must take effect and must fully vest in the vendee the rights which he obtains under his order absolute for foreclosure. At that time the matter has reached the stage when it is beyond the scope of this custom or contracts in this *wajib-ul-arz*, and the right of the decree-holder under his Civil Court decree cannot be affected.

That is our view of the law to be applied to the case. If the defendant had filed a cross appeal, we could have given effect to it by dismissing the plaintiff's suit; but all we can do now is to dismiss the plaintiff's appeal, as he has not made out a case upon which we should alter in his favour the decree of the Court below.

We dismiss this appeal with costs.

Appeal dismissed

NOTES.

[See also (1906) 3 A. L. J., 515; (1902) 24 All., 493.]

[20 All. 107]
APPELLATE CRIMINAL.

The 22nd September, 1897.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BURKIT .

Queen-Empress
versus
Yusuf and others.*

Practice—Appeal—Alteration of conviction in appeal.

Where, on appeal against a conviction for one offence, it became apparent that, although there was not sufficient evidence to support the conviction, there was evidence which might have led to the conviction of the appellants for an essentially different offence, with which they had not been charged, the Court declined to consider that evidence with a view to altering the conviction of the appellants. *Queen-Empress v. Parbati*, (Weekly Notes, 1887, p. 130) referred to.

IN this case four persons were tried by the Sessions Judge of Allahabad for an offence under section 302 of the Indian Penal Code, convicted and sentenced, three to death, the fourth to transportation for life. They appealed to the High Court. At the hearing of this appeal the Court, on consideration of the evidence, came to the conclusion that the case under section 302 was not proved against the appellants, and accordingly acquitted them. In the argument it was brought to the notice of the Court that there was evidence on the record which might support, as against some of the appellants, a conviction under section 404 or section 411 of the Code. The Court however declined to enter into that question.

Mr. C. Dillon and Babu Satya Chandar Mukerji, for the Appellants.

The Government Advocate (Mr. E. Hamier), for the Crown.

The judgment of the Court (Knox and Burkitt, JJ.), after discussing the evidence relating to the conviction under section 302 of the Indian Penal Code, thus continued :—

The Government Advocate pressed upon us the fact that there was evidence which in his opinion would bring home to Yusuf, Ghulam Husain and Musammat Paragia an offence falling within either section 404 or section 411 of the Indian Penal Code. A charge under either of these sections was never framed against any of the appellants, and they never pleaded to any such charge. Such a charge is of a nature so essentially different from and foreign to a charge of murder that we do not think it right to try any of the appellants on such a charge in this case. If the magisterial authorities think there is sufficient evidence against them, this acquittal on the charge of murder will not prevent a trial upon a charge under either of the sections mentioned above. This was the course adopted by this Court in the case of *Queen-Empress v. Parbati*, Weekly Notes, 1887, p. 130, a very instructive case in connection with the present, and one which we think we should follow in the present case. For the above reasons we allow the appeal, set aside the convictions and direct that all the four appellants be forthwith released.

* Criminal Appeal No. 1059 of 1897.

[109] APPELLATE CIVIL.

The 3rd November, 1897.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BLAIR.

—
•Brij Lal.....(Applicant) Appellant

versus

The Secretary of State for India in Council.....(Opposite Party)
Respondent.*

Act No. V of 1881, (Probate and Administration Act), section 50 — Revocation of grant of letters of administration no bar to a fresh application.

Where a grant of letters of administration made by a District Judge had been revoked under the provisions of section 50 of Act No. V of 1881, it was held that, the cause of revocation being removed, the Judge had jurisdiction to entertain a fresh application for the same object.

THIS was an appeal from an order of the District Judge of Benares rejecting an application for grant of letters of administration. The facts of the case sufficiently appear from the order of the District Judge which was as follows :—

• “This is an application for grant of letters of administration purporting to come under section 64 of Act No. V of 1881. The circumstances under which it is made are peculiar. Applicant obtained a grant of letters of administration from this Court on the 13th of June 1896, but that grant was revoked under section 50 of Act No. V of 1881, on the application of the opposite party on the 5th of September last ‘for just cause.’ That order has not been appealed against and has, therefore, become final. Having regard to the wording of sections 34 and 86 of Act No. V of 1881, I am of opinion that, so far as this Act goes, this Court is *functus officio* and that applicant’s remedy now lies by a regular suit.

• “This application for grant of letters of administration is therefore rejected.”

The applicant accordingly appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the Appellants.

Mr. E. Chamier, for the Respondents.

Knox and Blair, JJ.—We are unable to take the view which the learned Judge has taken that he has no jurisdiction to entertain [110] the present application. The sections upon which the learned Judge purported to act contain no words depriving him of jurisdiction. We set aside the order of the Judge and return the application to be readmitted upon his file and dealt with according to law. The costs will be charged to the estate.

* First Appeal No. 17 of 1897, from an order of C. L. M. Eales, Esq., District Judge of Benares, dated the 23rd January 1897.

[20 All. 110]
FULL BENCH.*The 10th November, 1897.*

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, MR. JUSTICE BLAIR, MR. JUSTICE
BANERJI, MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Sri Gopal.....Plaintiff

versus

Pirthi Singh and others.....Defendants.*

Civil Procedure Code, section 13, Explanation II—Res judicata—Matter which might and ought to have been made ground of defence in a former suit—Mortgage—Prior and subsequent mortgagees.

Held that the holder of three prior mortgages over the same property, who, in answer to suits brought by the holders of other mortgages over that property of dates subsequent to his, had pleaded his rights under one only of the mortgages held by him, was barred by reason of Explanation II to section 13 of the Code of Civil Procedure from afterwards bringing a suit for sale upon one of the remaining mortgages, which he might and ought to have pleaded as an answer *pro tanto* to the suits of the other mortgagees. *Mahabir Prasad Singh v. Macnaghten*, L. R., 16 I. A., 107; S. C., I. L. R., 16 Cal., 682, *Kameswar Prashad v. Raj Kumari Ruttan Kuar*, I. L. R., 20 Cal., 79, *Kailash Mondul v. Baroda Sundari Dasi*, I. L. R., 24 Cal., 711, *Sheosagar Singh v. Sita Ram Singh*, I. L. R., 24 Cal., 616, and *Mata Din Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi Ram Prasad and Babu Jogindro Nath Chaudhri, for the Appellant.
Messrs. Abdul Majid and Abdul Raoof, for the Respondents.The **judgment** of the Court (EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by **Edge, C. J.** :—

This is a suit for sale under section 88 of the Transfer of Property Act, 1882. The plaintiff is the representative of [111] one Ishur Das deceased. Ishur Das obtained three mortgages over the property in question. The first was made on the 21st of July 1871, the second on the 7th of February 1874, and the third on the 16th of July 1874. The present suit is brought on the mortgage of the 7th of February 1874. The mortgagors had also executed the following mortgages of this property, *viz.*, a mortgage to Murli Singh and Sarnam Singh made on the 30th of August 1872, and a mortgage to Bhagwan Das on the 18th of August 1876. On the 11th of July 1883 Ishur Das brought a suit for sale on his mortgage of the 21st of July 1871, and on the 3rd of September 1883 he obtained a decree for sale. To that suit the other mortgagees were not parties. Under the decree in that suit $1\frac{1}{2}$ biswas were sold and were purchased by Ishur Das. Murli and Sarnam brought a suit for sale on the 15th of August 1883 on their mortgage of the 30th of August 1872, and got a decree on the 13th of December 1883. The other mortgagees were not made parties to that suit. In execution of that decree $1\frac{1}{2}$ biswas were sold, and were purchased by Murli and Sarnam. On the 27th of July 1888, Ishur Das being dead, his representatives brought a suit for sale on Ishur Das'

* Second Appeal No. 1028 of 1894, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 12th June 1894, confirming a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 12th August 1893.

mortgage of the 16th of July 1874. They obtained a decree for sale on the 26th of September 1888. The other mortgagees were not made parties to that suit. In execution of that decree 1 biswa $7\frac{1}{2}$ biswansis were sold and were purchased by Bechai Lal, one of the defendants to this suit. On the 18th of August 1888 Sri Ram, the then representative of Bhagwan Das, the holder of the fifth mortgage, brought a suit for sale on Bhagwan Das' mortgage of the 18th of August 1876, and made the representatives of Ishur Das parties to that suit. The representatives of Ishur Das pleaded their rights under the mortgage in favour of Ishur Das of the 21st of July 1871, but made no mention of the mortgage of the 7th of February 1874, nor did they raise any question as to their rights under that mortgage. In that suit Sri Ram, on the 19th of December 1889, obtained a decree for sale, subject to his redeeming Ishur Das' mortgage of [112] the 21st of July 1871. Sri Ram is dead and Musammat Janki, his representative, is one of the defendants to this suit. Murli Singh and Sarnam Singh are also defendants. The other defendants not already mentioned are the representatives of the mortgagors. On the 24th of September 1888 Murli and Sarnam brought a suit for redemption under section 92 of the Transfer of Property Act, 1882, against Ishur Das' representatives in respect of the $1\frac{1}{4}$ biswas which they had purchased in execution of the decree of the 13th of December 1883. On the 25th of July 1889 Murli and Sarnam got a decree for redemption on payment of the proportionate amount due to Ishur Das' representatives in respect of the sale of the $1\frac{1}{4}$ biswas under the mortgage of the 21st of July 1871. In that suit the representatives of Ishur Das did not plead their rights under the mortgage of the 7th of February 1874.

The first Court dismissed this suit. The plaintiff appealed, and the Court of First Appeal dismissed the appeal, holding that the suit was barred by the operation of section 43 of the Code of Civil Procedure and also by the operation of section 13 of that Code. From that decree this appeal has been brought.

The contention as to the application of section 43 of the Code of Civil Procedure is that Ishur Das when he brought his suit on the 11th of July 1883, on the mortgage of the 21st of July 1871, should have also claimed to sell the mortgaged property under the mortgages of the 7th of February 1874 and the 16th of July 1874. We do not think it necessary to express any opinion upon that question further than this, that we are not prepared to endorse the decision of the Court of First Appeal so far as it applied section 43 to this case.

The real point upon which, in our opinion, this case turns is whether or not section 13 of the Code of Civil Procedure applies. It is quite certain that in order to make section 13 applicable it is not necessary that the matter of the subsequent suit should have been heard or have been finally decided by a competent Court in the former suit, when the case is one to [113] which Explanation II applies. Indeed Explanation II to section 13 of the Code would be meaningless if it were necessary in a case which was covered by it that the matter should have been heard and finally decided in the previous suit. Their Lordships of the Privy Council in *Mahabir Parshad v. Macnaghten*, L. R., 16 I. A., 107; S. C., I. L. R., 16 Cal., 682, applied section 13 of the Code of Civil Procedure where the matter raised in the second suit had not been directly or indirectly raised, heard or decided in the previous suit. In that case they held that the matter of the second suit was matter which ought to have been made ground of defence in the former suit between the same parties, and that the appellants before them, who were defendants in the former suit, were barred from insisting on it "*exceptione rei judicatæ*." In *Kameswar Parshad v. Raj Kumari Ruttan Kuar*, I.L.R., 20 Cal., 79, their Lordships took the same view of section 13

and of the effect of Explanation II to that section. In referring to the matter to which it was sought to apply the doctrine of *res judicata*, their Lordships say (at page 85):—"That it might have been made a ground of attack is clear. That it ought to have been, appears to their Lordships to depend upon the particular facts of each case. Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' would become important; in this case the matters were the same. It was only an alternative way of seeking to impose a liability upon Run Bahadur, and it appears to their Lordships that the matter ought to have been made a ground of attack in the former suit, and therefore that it should be deemed to be a matter directly and substantially in issue in the former suit and is *res judicata*."

That decision also shows that it is not necessary for the application of section 13, when Explanation II applies, that the matter in question should have been heard and finally decided in the previous suit. The decisions to which we have referred appear to us to be inconsistent with the decision in *Kailash Mondul v. Baroda Sundari Dasi*, I. L. R., 24 Cal., 711. We do not [114] consider that their Lordships intended to depart in *Shebsagar Singh v. Sitaram Singh*, I. L. R., 24 Cal., 616, from the interpretation of section 13 of the Code of Civil Procedure which they had adopted in the two cases before their Lordships to which we have referred. In the last mentioned case in I. L. R., 24 Cal., 616, their Lordships had not to consider the effect of Explanation II.

As we have said, Sri Ram on the 18th of August brought a suit for sale on Bhagwan Das' mortgage of the 18th of August 1876. That mortgage was the last mortgage of the series. All the other mortgages had priority: consequently the holders of the prior mortgages were entitled to plead their mortgages as a bar to a decree for sale without prior redemption of their mortgages. Now the representatives of Ishur Das pleaded one only of their mortgages, viz., that of the 21st of July 1871. They might have pleaded the mortgage now in suit, viz., that of the 7th of February 1874. If they had pleaded that mortgage, Sri Ram could only have obtained a decree for sale subject, before the decree became operative to effect a sale, to his redeeming not only the mortgage of the 21st of July 1871, but that of the 7th of February 1874. It was held by this Court in Full Bench in *Mata Din Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432, that a decree for sale under the Transfer of Property Act is a decree for sale of the mortgaged property, and that a decree for sale under that Act cannot be made for sale of property "subject to a mortgage." Before the passing of the Transfer of Property Act decrees for sale were made of all sorts of interests in properties mortgaged. Properties were sold subject to one, two, three, four and six mortgages. Persons interested were not made parties to the suits, and endless litigation was the result. One reason for the passing of the Transfer of Property Act was to strike at the shameful abuses which had arisen by reason of the procedure allowed by some of the Courts in the enforcement of mortgages, procedure which often only benefited the legal profession—no doubt a very deserving body of men—and ended in the ruin [115] of the unfortunate mortgagor, if not of one or more of the mortgagees. In order to strike at that system section 85 of the Transfer of Property Act was introduced to bring all persons interested before the Court in one suit, so that their rights might be dealt with and disposed of. The causes which led to the passing of that section and of other sections of the Transfer of Property Act are fully explained in *Mata Din Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432, *Janki Prasad v. Kishen Dat*, I. L. R., 16 All., 478, and *Bhawani Prasad v. Kallu*, I. L. R., 17 All., 537, at p. 559. In our opinion not only might the representatives of Ishur Das have pleaded their mortgage of the 7th

of February 1874, but they ought to have done so, and if they had done so, no decree for sale could have been made without these rights being protected by the decree. They not having done what they might and ought to have done as an answer *pro tanto* to the suit of Sri Ram, we are of opinion that section 13 of the Code of Civil Procedure applies and that the present suit for sale is barred. A decree for sale as against Murli and Sarnam would be useless, for the property could not legally be sold so long as there was no right to sell as against Musammatt Janki, the representative of Bhagwan Das.

For the above reasons we dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[The Privy Council affirmed this decision in (1902) 24 All., 429. See also 35 Cal., 979; 23 M. L. J., 543.]

[20 All. 116]

APPELLATE CIVIL.

The 11th November, 1897.

PRESENT :

MR. JUSTICE AIKMAN. •

Pokhpal Singh.....Defendant

versus

Bishan Singh.....Plaintiff.*

* Act No. XV of 1877 (*Indian Limitation Act*), Sch. ii, Arts. 144, 148—
Limitation—Mortgage—Suit by a mortgagor for recovery of possession from a mortgagee holding over after expiry of the term of a usufructuary mortgage.

When a mortgagee in possession under a usufructuary mortgage, holds over after the time limited in the mortgage deed for surrender of the property, his [116] possession does not, by that fact alone, become adverse to the mortgagor, who still has a period of sixty years within which to sue for recovery of possession. *Juggurnath Sahoo v. Syud Shah Mahomed Hossein*, 14 B. L. R., 389, referred to.

In this case the plaintiff mortgaged to the defendant by a usufructuary mortgage certain zamindari property on the 4th of July 1873. The conditions of the mortgage were that the defendant should return the mortgaged property to the plaintiff on the expiration of four and a half years, the profits during that period being taken to discharge the mortgage debt and interest. The defendant, instead of returning the property, remained in possession. On the 27th of February 1895 the plaintiff brought his suit for possession and for mesne profits.

The Court of First Instance (Subordinate Judge of Mainpuri) decreed the claim. On appeal by the defendant the Lower Appellate Court (Officiating District Judge of Mainpuri) dismissed the appeal, holding that the possession

* Second Appeal No. 892 of 1896, from a decree of Lala Piari Lal, Officiating District Judge of Mainpuri, dated the 23rd July 1896, confirming a decree of Maulvi Muhammad Masbar Hussain Khan, Subordinate Judge of Mainpuri, dated the 13th June 1895.

of the defendant was not adverse and that the suit was governed by the limitation prescribed by Article 148 of the second schedule to Act No. XV of 1877.

The defendant appealed to the High Court.

Mr. *R. Malcomson* (for whom *Babu Satya Chandra Mukerji*), for the Appellant.

Pandit Sundar Lal, for the Respondent.

Aikman, J.—Bishan Singh, the plaintiff in the suit out of which this appeal arises, executed, in favour of the defendant Pokhpāl Singh, a deed of usufructuary mortgage on the 4th of July 1873. The terms of the mortgage were that the mortgagee was to remain in possession of the property for four and a half years and surrender it at the expiry of that term, the usufruct for that period being held to discharge both the principal and the interest of the loan which was given. The period expired in 1878, but the mortgagee continued in possession of the property. On the 27th of February 1895, the mortgagor brought the present suit to recover possession of the mortgaged property. He got a decree from the Subordinate Judge, which was confirmed on appeal [117] by the District Judge. The defendant comes here in second appeal contending that plaintiff's suit is barred by limitation. It is argued that as soon as the term of four and a half years expired the possession of the defendant became adverse, and that the suit is barred by the limitation provided in Article 144 of the second schedule of the Limitation Act, 1877. That article can only apply if a suit like the present is nowhere specially provided for in the schedule. Reliance is placed on the decision of this Court in *Gobardhan v. Sujan*, Weekly Notes, 1894, p. 72.

In my opinion the appeal must fail. The lower Courts were, I hold, right in thinking that this suit is one under Article 148 of the schedule, namely, a suit against a mortgagee to recover possession of immovable property mortgaged, a suit for which a period of sixty years is allowed, reckoning from the time when the right to recover possession accrued. The circumstances of the case cited differ from those in the present case, inasmuch as there the suit was one between co-mortgagors and could not therefore fall under Article 148. In the case of *Jugurnath Sahoo v. Syud Shah Mahomed Hossein*, 14 B. L. R., 386, their Lordships of the Privy Council observe, at page 391 of the report:—"The law, wisely or unwisely, has given to mortgagors the long period of sixty years within which to bring their suit, and no Court of Justice would be justified in diminishing that period on the ground of the *laches* of a party in the prosecution of his rights." The mere fact that the mortgagee held on in possession of the mortgaged property after he ought to have given it up, would not alter the character of the suit, which is clearly one between mortgagor and mortgagee and falling within the terms of Article 148. For the above reasons I am of opinion that this appeal must fail, and I dismiss it with costs.

Appeal dismissed.

NOTES.

[The decision in (1912) 34 All., 261 is similar.]

[118] *The 13th November, 1897.*

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Shuja Ali Khan.....Judgment-debtor

versus

Ram Kuar.....Decree-holder.

*Civil Procedure Code, section 596—Appeal to Her Majesty in Council —
Substantial question of law—Succession certificate not
produced at the proper time—Act No. VII of 1889
(Succession Certificate Act), section 4.*

The representative of a decree-holder applied for execution of the decree without producing before the Court a certificate of succession as required by Act No. VII of 1889, section 4. The Court to which the application was made granted execution. The judgment-debtor appealed to the High Court, by which the order of the lower Court was sustained upon production before it (the High Court) of the necessary certificate of succession. *Held* that an objection that the said application for execution was improperly granted by reason of the non-production of the succession certificate before the lower Court did not raise a "substantial question of law" within the meaning of section 596 of the Code of Civil Procedure, so as to warrant the High Court in granting leave to appeal to Her Majesty in Council.

THIS was an application for leave to appeal to Her Majesty in Council from a decree of the High Court passed in an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The opposite party obtained a decree against the applicant on the 28th of June 1878 for Rs. 16,477. Application was made to the Subordinate Judge of Moradabad for execution of that decree on the 4th of August 1890, which application was allowed. Against the order allowing that application an appeal was presented to the High Court. The appeal was dismissed by a single Judge on the 6th of January 1896, and a further appeal under section 10 of the Letters Patent was dismissed by a Division Bench of the Court on the 21st of January 1897.

The grounds of appeal as set forth in the application under section 596 of the Code of Civil Procedure were as follows :—

(1) Because the respondent's application for execution of decree was not entertainable, inasmuch as it was not accompanied by a succession certificate as required by section 4 of Act No. VII of 1887 (Succession Certificate Act).

[119] (2) Because all the proceedings relating to the execution of decree are manifestly opposed to the express provisions of section 4, clause 6 of Act No. VII of 1889. They are null and void.

(3) Because such an application as filed by the respondent is of no effect and cannot be considered by the Court.

(4) Because the decree sought to be executed is therefore barred by limitation.

Babu Jogindro Nath Chaudhri, for the Applicant.

Knox and Banerji, JJ.—This is an application for leave to appeal to Her Majesty in Council. The subject-matter of the appeal is valued above ten thousand rupees, but, as the decree appealed from affirmed the decision of the Court immediately below, we have to see before granting the certificate that the appeal, if admitted, would involve some substantial question of law. The

grounds set out in the application do undoubtedly involve questions of law, but in our opinion the questions raised are not substantial questions of law? The question briefly put is whether this Court was right in affirming a decision of the Court below which granted execution without the production of a succession certificate, upon its being shown to this Court that such succession certificate had been obtained by the decree-holder before the order appealed from had been passed, and upon the certificate being produced in this Court before the appeal was determined. The objection of non-production of the certificate, though raised in the Court below, was not pressed before that Court, and the reason to our mind is obvious: the judgment-debtor knew of the existence of the certificate and saw no advantage in sustaining an objection which would at once be removed and would only lead to unnecessary delay. In his appeal to this Court again the judgment-debtor, the present applicant, did not raise the objection, and no doubt for the same reason. Whatever irregularity there was in the Court below was not an irregularity affecting the merits or jurisdiction of the Court to entertain the application [120] for execution. It was cured by the production in the Court of the certificate which had already been obtained. No objection could have been taken if this Court in dealing with the appeal had set aside the order appealed from and directed the Court below to cause the production of the succession certificate and proceed to execution after the said production. Such a course would have been harassing, and needlessly harassing, both to the judgment-debtor and the judgment-creditor, and would have been a pure sacrifice to the observance of technicalities in proceedings. We hold that no substantial question of law is involved. We dismiss the application with costs.

Application dismissed.

NOTES.

[See also (1902) 24 All., 236.]

[20 All. 120]

The 15th November, 1897.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Goswami Ranchor Lalji.....Plaintiff

versus.

Sri Girdhariji.....Defendant.*

*Act No. XV of 1877 (Indian Limitation Act), Sch. II, Art. 47—Limitation
—Criminal Procedure Code, section 146—Suit for possession of property
attached by a Magistrate under section 146.*

Article 47 of the second schedule to Act No. XV of 1877 does not apply to a suit brought by one of the two claimants against the other to recover possession of property which has been attached by a Magistrate under the provisions of section 146 of the Code of Criminal Procedure. *Chuj Mull v. Khyrates*, N.-W.P. H.O. Rep., 1868, p. 65, and *Akilandammal v. Periasami Pillai*, I. L. R., 7 Mad., 309, referred to.

To such a suit as above Government is not a necessary party.

* Second Appeal No. 828 of 1895, from a decree of H. G. Pearce, Esq., District Judge of Agra, dated the 22nd June 1895, reversing a decree of Babu Durjan Lal, Munsif of Muttra, dated the 25th February 1895.

THE facts of this case sufficiently appear from judgment of the Court.

. Mr. D. N. Banerji, Babu Jogindro Nath Chaudri, Pandit Sundar Lal and Babu Satya Chandra Mukerji, for the Appellant.

Messrs. T. Conlan and B. E. O'Connor, for the Respondent.

Banerji and Aikman, JJ.—The suit out of which this appeal has arisen was brought by the appellant to recover [121] possession of a piece of land and a house, together with the materials of the house and the trees standing on the land, by establishment of his right thereto. Disputes having arisen between the parties concerning the said property, proceedings were held by the Magistrate of Muttra under Chapter XII of the Code of Criminal Procedure, 1882. The Magistrate, being unable to satisfy himself as to which of the parties was in actual possession, made an order under section 146 of that Code for the attachment of the property. This order was passed on the 13th of September 1887. The present suit was instituted on the 7th of September 1893. The Court of First Instance decreed it, but the Lower Appellate Court dismissed it as barred by limitation. The only question which we have to determine in this appeal, therefore, is whether the suit was brought after the expiry of the period of limitation prescribed for it.

The learned Judge of the Court of First Appeal was of opinion that, as the Government was not made a party to the suit, it could only be deemed to be one for a declaratory decree merely, and, applying Art. 120 of the second schedule of the Indian Limitation Act, 1877, held the claim to be time barred.

It is conceded by Mr. Conlan, the learned counsel for the respondent, that this view of the Court below is erroneous. It has, in our opinion, been rightly contended that the applicability of the law of limitation depends upon the frame of the suit as brought, and not upon the form in which it should have been instituted. We are also of opinion that the Government was not a necessary party. By virtue of the order passed by the Magistrate under section 146 of the Code of Criminal Procedure, the property was to remain under attachment until a competent Civil Court had determined the rights of the parties thereto or the persons entitled to possession thereof. The object of the order is to prevent a breach of the peace, and the effect of it is to hold the property for the rightful owner until he has established his title.

[122] Mr. Conlan contends that the suit is governed by Art. 47 of sch. II of Act No. XV of 1877, and that as it was brought after the lapse of three years from the date of the order passed under section 146 of the Code of Criminal Procedure, it is beyond time.

Article 47 provides a limitation of three years for a suit "by any person bound by an order respecting the possession of property made under the Code of Criminal Procedure, Chap. XL * * * or by any one claiming under such person, to recover the property comprised in such order." Chapter XL of the Code of 1872, corresponds to Chap. XII of the present Code. An order under section 146 is an order made under Chap. XII. It is also an order binding on the parties to the proceeding in which it was made. Is it "an order respecting the possession of property?" For, if it is so, Art. 47 applies, and the present suit is barred by limitation. We are of opinion that an order made under section 146 for the attachment of the property in dispute is not an order respecting the possession of such property. An order for attachment may be passed either when the Magistrate decides that none of the parties is in possession or when he is unable to decide which of them is in possession. The order contemplated by Art. 47 is, in our opinion, an order whereby one of the parties is adjudged to be in possession and is maintained in possession until

evicted in due course of law, that is to say, an order which is in favour of one of the parties and adverse to the other. It could not have been the intention of the Legislature that where the Magistrate, by reason of his inability to satisfy himself as to the possession of either of the parties, or by reason of his deciding that neither of them is in actual possession, attaches the property in dispute, in order to prevent a breach of the peace, neither party would be entitled to get back the property unless he instituted a suit within three years from the date of the order, and that in the event of neither of the parties bringing a suit within that period the property would be forfeited to Government. This would be the result were we to hold that an order under section 146 is [123] governed by Article 47. Our view is supported by the ruling of this Court in *Chujmull v. Khyratee*, N.-W. P., H. C. Rep., 1868, p. 65, and of the Madras High Court in *Akilandammal v. Periasami Pillai*, I. L. R., 1 Mad., 309. In the former case it was held that where the Magistrate found that neither of the parties at issue was in possession, and for that reason directed the attachment of the property, the order was not one respecting the possession of property to which the three years rule of limitation applied. In the latter case, a similar conclusion was arrived at in respect of an order of attachment made by reason of the Magistrate's inability to satisfy himself as to which of the parties was in possession. Those cases were decided, respectively under Act No. XIV of 1859, and Act No. IX of 1871, the provisions of which in this respect were the same as those of Article 47 of schedule II of Act No. XV of 1877. Had the Legislature intended to lay down a different rule from that enunciated in the two rulings referred to above, Article 47 would have been worded in terms different from the corresponding provisions of the Acts of 1859 and 1871.

It may be that an order under section 147 of the Code of Criminal Procedure is intended to be governed by Article 47 and that may be the reason why that article was not in express terms limited to orders under section 145. We, however, do not decide the point. In our opinion Article 47 does not apply to an order under section 146, and we hold that the claim is not barred by the provisions of that article. The article applicable is either 142 or 144.

We allow the appeal with costs, and, setting aside the decrees below, remand the case to the Lower Appellate Court, under section 562 of the Code of Civil Procedure for trial on the merits.

Appeal decreed and cause remanded.

NOTES.

[For similar decisions, see also (1903) 26 Mad., 410 ; (1901) 28 Cal., 86 ; (1912) 16 C.W. N., 1073.]

[124] REVISIONAL CRIMINAL.*The 16th November, 1897.*

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE AND MR. JUSTICE BURKITT.

Gauri Shankar

versus

Mata Prasad*

*Act No. XIII of 1859 (Fraudulent Breaches of Contract by Workmen)**Section 9—Criminal Procedure Code Section 83—Warrant.*

Held that section 83 of the Code of Criminal Procedure is applicable to warrants issued under Act No. XIII of 1859. *Queen-Empress v. Kattayan*, I. L. R., 20 Mad., 235, followed.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the District Magistrate of Mirzapur. The complainant applied for warrants under section 1 of Act No. XII of 1859, for the arrest of men to whom he had advanced money for shellac operations, and who were at the time of his so applying resident in Ranchi in the Bengal Presidency. The Magistrate, being in doubt as to whether such warrants could be sent under section 83 of the Code of Criminal Procedure for execution to a Magistrate outside his jurisdiction, made this reference. The following order was passed :—

Edge, C. J. and Burkitt, J.—We hold the same opinion as that expressed by the High Court at Madras on a similar reference in *Queen-Empress v. Kattayan*, I. L. R., 20 Mad., 235. Section 83 of the Code of Criminal Procedure is in our opinion applicable to warrants issued under the provisions of Act No. XIII of 1859.

NOTES.

[See also (1898) P. R., 11 ; 20 Mad., 235 ; 457.]

[20 All. 124]**APPELLATE CIVIL.***The 17th November, 1897.*

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Fazal Huseen.....Decree-holder

versus

Raj Bahadur.....Objector.

Act No. XV of 1877 (Indian Limitation Act), Sch. II, Art. 179—Execution of decree—Limitation—Starting point of limitation where appeal has abated.

Held that the order of an appellate Court abating an appeal, because no representative of the appellant was on the record, was not the " final order or [125] decree of the appellate

* Criminal Revision No. 597 of 1897.

* Second Appeal No. 804 of 1895, from a decree of Babu Jai Lal, officiating Subordinate Judge of Farrukhabad, dated the 5th April 1895, modifying a decree of Khan Zada Muhammad Musbarraf Ali Khan, Munsif of Kayamganj, dated the 2nd June 1894.

Court" within the meaning of clause 2, article 179 of the Second Schedule to the Indian Limitation Act, 1877, but that limitation would run from the date of the original decree.

THE facts of this case are as follows :—

Niaz Begam and Gul Begam brought a suit for redemption of mortgage and for mesne profits against Hazar Mir Khan, Bahadur Ali Khan and Har Dyal in the Court of the Munsif of Farrukhabad. On the 24th of December 1889, the Munsif gave a decree for redemption of a certain area of muafi land as against Hazar Mir Khan and Bahadur Ali Khan and for redemption of a certain area of resumed land as against all three defendants. From this decree the plaintiffs appealed, and each of the defendants also appealed separately. The plaintiffs' appeal as against Har Dyal and Har Dyal's appeal abated, Har Dyal having died, and no representative having been brought on to the record in his place. On the 16th of February 1894, that is more than three years from the date of the original decree, though less than that period from the date of the order abating the appeals by, and against Har Dyal, Fazal Husen, the representative of the decree-holder, applied for execution of the decree as against one Raj Bahadur the representative of Har Dyal. Raj Bahadur objected to the execution of the decree on the ground that it was barred by limitation, the period of limitation running in this case from the date of the original decree of the Munsif.

The Munsif and the Subordinate Judge in appeal both dealt with the objection on grounds relating to the decrees in the appeals of the two other defendants whose appeals were decided on the 13th of April 1891. The Subordinate Judge allowed the objection of Har Dyal's representative so far as it related to possession of the resumed land. The decree-holder appealed to the High Court.

Babu Ratan Chand, for the Appellant.

Pandit Madan Mohan Malaviya, for the Respondent.

Blair and Aikman, JJ :—The appellant is a decree-holder seeking to execute his decree against the interest of one Har Dyal. [126] Har Dyal was one of three persons against whom a Munsif's judgment and decree were passed. Appeals by him and against him were instituted, and by reason of his death and the failure to put upon the record his representatives the appeals abated. The claim of the decree-holder is that he is in time in taking proceedings. The decree-holder claims to execute within three years from the date of that order of abatement. The decree of the Munsif is of a date beyond the three years' period. It appears to us that the appellant has no ground for that contention. According to Art. 179, the starting point for limitation is from the date of the decree or order of the Civil Court. It is the decree of the Munsif which he now seeks to execute: he contends, however, that clause 2 of column 3 of Art. 179 applies; the words are "where there has been an appeal, the date of the final order or decree of the Appellate Court." It is manifest to us that an order by which an appeal abates is not the final decree or order contemplated by that clause; it cannot be executed, and the only extant decree after the making of such an order is the original decree of the Munsif. The application is admittedly presented more than three years after the date of the Munsif's decree. This appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[A different ruling was given in (1909) 32 All., 136, following 34 Cal., 874. See also (1908) 30 All., 385; (1906) 3 A. L. J., 8.]

[20 All. 126]
APPELLATE CRIMINAL.

The 17th November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress
versus
Beer.*

*Act No. VI of 1882 (Indian Companies Act) sections 55, 56—Company—
Register of shareholders—Inspection—Refusal to allow inspection of
register of shareholders.*

Where a person who is entitled under the provisions of section 55 of the Indian Companies Act, 1882, to obtain inspection of the register of share-holders of a Company, applies for inspection during business hours and not at a time when inspection is prohibited, either under section 56 or by reason of any rules framed by the Company under section 55, such inspection must be granted, and even a temporary refusal, based upon grounds of convenience to the Company's business, will render a director responsible for such refusal liable to the penalty provided for by section 55.

[127] THE facts of this case are fully stated in the judgment of the Court.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

Messrs. *D. N. Banerji* and *C. R. Alston*, for the Respondent.

Edge, C. J., and Burkitt, J.—This is an appeal by the Local Government against an order of acquittal passed by the Joint Magistrate of Cawnpore. The respondent A. Beer was a director of the Muir Mills Company, Limited, Cawnpore. Mr. Beer was present at the registered office of the Company on the 18th of March last. He was presiding as chairman at a meeting of share-holders which was held that day. At the termination of the meeting of the share-holders, Mr. McRobert, who was a share-holder of the Muir Mills Company, Limited, asked Mr. Beer if he (Mr. McRobert) could see the register of share-holders. Mr. Beer replied that it was not convenient that he should see the register. After a little Mr. Beer told Mr. McRobert that he could see the register next day. The ground given by Mr. Beer for not allowing Mr. McRobert to see the register when he applied was that they were about to hold a directors' meeting. As Mr. McRobert was leaving the room he said :— "Then you refuse to let me see the register ?" Mr. Beer replied :— "I do not refuse you ; you can see the books to-morrow morning." Mr. McRobert went away. Later on in the afternoon Mr. McRobert received a letter from the Company informing him that the books would be open to his inspection at any hour up to 5. P. M. that day, or upon any day between the hours of 9 A. M. and 12 noon and 2 and 5 P. M. Mr. McRobert in his evidence said that Mr. Beer knew that he (McRobert) was leaving Cawnpore. We do not think that that affects the question in the slightest degree, for we do not think that Mr. Beer intended absolutely to exclude Mr. McRobert from a reasonable inspection of the books. The question is whether Mr. Beer has brought himself within section 55 of the Indian Companies Act. Under section 55 every shareholder, without payment, and every member of the public, on payment, is entitled to inspect the register of Members of the [128] Company during business hours,

* Criminal Appeal No. 1117 of 1897.

except when the register is closed under section 56, and "subject to such reasonable restrictions as the Company in general meeting may impose." The law wisely provides, however, that, where the Company does impose restrictions, the books shall be open to inspection for at least two hours during the business hours of each business day. The section was introduced into the Act not only for the protection of the share-holders, but for the protection of the public. Subject to the restrictions mentioned, it gives every share-holder an absolute right to inspect the register during business hours. If it be inconvenient for the carrying on the Company's business that the register should be kept open for inspection for the whole day during business hours, it is very easy for the share-holders in general meeting to put reasonable restrictions on the right of inspection, and it appears to us that one such reasonable restriction would be that the register should not be open to inspection at any time when the directors of the Company should be in meeting assembled, always provided that on such days two hours within business hours should be appointed for inspection of the register. We can well understand that it might have been exceedingly inconvenient for the directors, whilst their meeting was going on, to have inspection of the registers going on in another room. However, the shareholders in general meeting have not placed any restriction on the right of inspection. If this was a matter of reasonableness or of convenience, we should have come to the conclusion that Mr. McRobert was unreasonable, and that it was not convenient at the moment to grant inspection. However, he was strictly within his rights and he was entitled to inspection there and then, and Mr. Beer as a director made himself liable to a penalty under section 55 by reason of his authorising or permitting a refusal to Mr. McRobert to inspect the registers when he applied for inspection. Companies and directors must comply with the law. This seems to be the first case which has arisen in India on this point, and, although Mr. Beer acted illegally in refusing to give inspection to Mr. McRobert when [129] he asked for it, we do not think it is a case for imposing the full penalty. We find that Mr. Beer did authorize and permit a refusal of inspection of the register of members to Mr. McRobert during business hours on 18th March 1897, and that he was not justified in so doing, and we convict him and fine him the sum of eight annas. It must be remembered that if any case comes before us of a wilful and obstructive refusal when the demand was a reasonable one, we shall impose the full penalty.

NOTES.

[See the Privy Council decision in (1908) 32 Bom., 466, where they considered the right of inspection of documents of the corporation both under the Common Law and under the Statute in question there (the Presidency Banks Act, 1876).]

[20 All. 129]
APPELLATE CIVIL.

The 18th November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Abda Begam.....Decree-holder

versus

Muzaffar Husen Khan.....Judgment-debtor.*

Civil Procedure Code, section 223—Execution of decree—Certificate of execution—Jurisdiction of Court to which a decree is transferred for execution.

The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution, *J. G. Bagram v. J. P. Wise*, 1 B. L. R. F. B., 91, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Baldeo Ram Dave, for the Appellant.

Pandit Moti Lal, for the Respondent.

* Edge, C. J., and Burkitt, J. :—The appellant before us obtained a decree for money in the Court of the Judicial Commissioner of Oudh. On the application of the decree-holder the decree was [130] sent to the District Judge of Cawnpore for execution under section 223 of the Code of Civil Procedure. The District Judge transferred the case to the file of the Subordinate Judge of Cawnpore. The decree-holder applied to the Subordinate Judge for execution of the decree. The application was admitted and property was attached. Thereupon the judgment-debtor, who is respondent here, filed an objection to the execution of the decree on the ground that the application did not comply with sections 235 and 237 of the Code of Civil Procedure. The application with the objection came on for hearing, and the Subordinate Judge on the 11th of April 1896, struck off the application on the ground that it did not comply with sections 235 and 237. Subsequently the Subordinate Judge certified to the Court at Lucknow that "on the objection of the judgment-debtor the application for execution was struck off." Apparently on the very day when that certificate was sent the decree-holder applied again to the Subordinate Judge of Cawnpore to have the decree executed. Her application was dismissed on the ground that the Subordinate Judge of Cawnpore was no longer seised of the case and was *functus officio*. From that order of dismissal this appeal has been brought.

The dismissal of the first application on the 11th of April 1896, was not a dismissal on the merits and was not a dismissal which precluded the decree-

* First Appeal No. 16 of 1897 from an order of Rai Kishan Lal, Subordinate Judge of Cawnpore, dated the 6th December 1896.

holder from applying again to the same Court for execution of her decree. The application was dismissed merely upon the ground of informalities in the application itself. It has been contended before us on behalf of the judgment-debtor that the Subordinate Judge of Cawnpore ceased to have jurisdiction when he forwarded the certificate that the first application had been struck off. The grounds of that contention are that section 243 of the Code provides, amongst other things, that the Court "to which a decree is sent under this section for execution shall certify to the Court which passed it, the fact of such execution, or, where the former Court fails to execute the same, the circumstances attending such failure," and it is contended that the certificate that the case had been struck off was a [131] certifying by the Subordinate Judge of Cawnpore, that his Court had failed to execute the decree within the meaning of section 223. Reference was made to clause (b) of section 224 for the purpose of showing that it was intended by the Legislature that the Court in which a decree was made should give information to the Court to which the decree was sent for execution as to the extent to which the decree had been executed, and as to the part of the decree which still remained unexecuted, and it is argued that similar information, when the decree had been sent to another Court, would be necessary for the Court which had sent the decree for its own guidance in case of further applications for execution of the decree. It has been now decided by their Lordships of the Privy Council that two or more contemporaneous executions of the same decree may be validly held. What might be the result if there were two or more contemporaneous sales of the judgment-debtor's property, say, one in Gorakhpur, another in Allahabad, and another in Meerut, each realizing the full amount due under the decree, is a matter with which we need not concern ourselves. What would become of the purchasers at these sales and what interest they would take, or how it could be arranged between the various Courts that the sales should not be held contemporaneously are further matters with which we need not concern ourselves.

For the appellant it is contended that the Subordinate Judge of Cawnpore must have jurisdiction to execute the decree until the decree had in fact been executed or until there had been an absolute failure to enforce execution of it. The following cases were cited in the argument: *Rangili v. Riyat Husain*, Weekly Notes, 1883, p. 247. *Gajadhar v. Hanuman*, Weekly Notes, 1886, p. 31. *Buboria Ahun Basee Kooer v. Job Raj Singh*, 23 W. R., C. R., 225, and *J. G. Bagram v. J. P. Wise*, 1 B. L. R., F. B., 91.

In our opinion the Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or [132] has executed it so far as that Court has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which sent the decree. Now the Legislature, when it used the words "fails to execute" in section 223 of the Code, could not have meant that a Court which merely strikes off an application on the ground of informality thereby fails to execute the decree. "Fails" must signify a failure after a serious and *bona fide* attempt by the Court to execute the decree. That paragraph in section 223 suggests to our minds that it may have originated in an attempt to assimilate as far as possible the practice in such cases in England where a decree-holder who has obtained his decree for money sues out a writ of *fieri facias* directed to the sheriff to levy on the goods of the judgment-debtor within his bailiwick, and the sheriff's return

(to be a good one) must be, either that he has levied to the extent of the goods of the judgment-debtor within his bailiwick, or that there are no goods of the judgment-debtor within his bailiwick. In our opinion the Court of the Subordinate Judge of Cawnpore did not fail to execute the decree within the meaning of section 223; it merely struck off an application on the ground of informality. We further consider that the case was not a case in which the Subordinate Judge of Cawnpore was justified in sending any certificate to the Court at Lucknow. Neither of the events had arisen which would have justified the Subordinate Judge in sending any certificate under section 223, for there was neither execution nor failure. The case of *J. G. Bagram v. J. P. Wise*, which was a Full Bench ruling of the Calcutta Court, is an authority to show that the Court to which a decree is sent has, even after striking off an application for execution, as here, still jurisdiction in the matter of the execution. It is true that the Full Bench case was decided on section 284 of Act VIII of 1859, but in our opinion it is equally applicable to cases arising under the present Code of Civil Procedure. We have come to the conclusion that the Subordinate Judge wrongly declined jurisdiction when he had it. We set [133] aside the order dismissing the application out of which this appeal has arisen, and we remand the case under section 562 of the Code of Civil Procedure to the Court of the Subordinate Judge for the application to be restored to the file and to be disposed of according to law. The appellant will have her costs of this appeal.

Appeal decreed and cause remanded.

NOTES.

[This was applied in (1901) 4 O. C., 333; (1909) 13 C.W.N., 533. As regards the Court which passed the decree, it was held in (1912) 15 I. C., 738; 23 M. L. J., 236, that it should not order execution itself without the certificate of the executing Court, so long as there was no order for simultaneous execution.]

[20 All. 133]

APPELLATE CRIMINAL.

The 19th November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Maiku Lal and another.*

Evidence—Confession—Value to be attached to confession subsequently withdrawn.

•It does not necessarily follow, because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, that therefore the confession is to be rejected. The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, so far as the person making it is concerned, upon such belief. *Queen-Empress v. Mahabir*, I. L. R., 18 All., 76, and *Queen-Empress v. Rangi*, I. L. R., 10 Mad., 295, referred to.

* Criminal Appeal No. 1073 of 1897.

IN this case two men, Maiku Lal and Nathu, were tried for and convicted of the offence of dacoity under section 395 of the Indian Penal Code. Maiku Lal made a long and detailed confession before the committing Magistrate and there was also other evidence connecting him with the dacoity. Nathu made a similar confession before the District Magistrate. In those confessions both men denied that any undue influence had been used to make them confess, and afterwards they admitted that none of the Police were in the room at the time when the confessions were recorded. Before the Sessions Judge both confessions were retracted, but both the Judge and the assessors believed the confessions to have been voluntarily made and to be substantially accurate. Each accused in his confession implicated the other accused, and, as has [134] been said, in the case of Maiku Lal there was other evidence against him. As against Nathu the only evidence was his own confession subsequently retracted, and the similarly retracted confession of Maiku Lal.

Kunwar *Parmanand*, for the Appellants.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

Edge, C. J., and Burkitt, J.J.—Maiku Lal and Nathu Lal have been sentenced to transportation for life under section 395 of the Indian Penal Code. As against Maiku there was his own circumstantial confession and proof that some of the articles stolen in the dacoity were found in his house. He is also implicated by the confession made by Nathu. As to Nathu Lal the case against him depends upon a statement made by him before the District Magistrate, which was subsequently withdrawn, and further upon the fact that he is named as one of the dacoits in the confession made by Maiku. Kunwar *Parmanand*, for Nathu, has argued that inasmuch as Nathu's confession was subsequently withdrawn, and as there is no evidence in the case against him, we should not accept the confession as sufficient ground for his conviction. Kunwar *Parmanand* has relied upon *Queen-Empress v. Mahabir*, I. L. R., 18 All., 76, and *Queen-Empress v. Rangi*, I. L. R., 10 Mad., 295. It appears to us that every case of this kind must be decided upon its own circumstances, and not upon the amount of credibility which was attached in other cases to confessions made. If a Judge believes that a confession made by a prisoner, although subsequently withdrawn, contains a true account of that prisoner's connection with the crime, the Judge in our opinion is bound to act, so far as that prisoner is concerned, on that confession, which he believes to be true. Courts frequently act, even in the most serious cases, on a simple plea of guilty, although in some cases it is possible that the person pleading guilty was not in fact connected with the crime. Where a confession is not supported by the evidence of witnesses, a Judge must examine very carefully to see whether it gives those details which indicate that it is a natural [135] narrative of what took place in the presence of the man making it and is not at variance with any evidence in the case which is believed, and is not merely a parrot-like repetition of a story put into the man's mouth. In the present case the confession is full of detail. It is very circumstantial, and bears on it, in our opinion, the impress of truth. There is nothing in the evidence to suggest that it was false in any particular, and it was made before a District Magistrate who would take care, so far as he could, that no advantage was taken of the prisoner. Our belief in the truth of Nathu's confession before the District Magistrate is not in the slightest affected by his subsequent retraction of it. In our opinion these men were guilty, and were rightly convicted. Although the dacoits had fire-arms with them, no personal injury seems to have been done to any of the villagers or to the people of the house, and we

think that in this case we may alter the sentence to one of ten years' rigorous imprisonment, and we do so accordingly. In other respects the appeals are dismissed.

NOTES.

[A retracted confession is not of itself either inadmissible or unusable :—(1898) 28 Bom., 316; (1907) 29 All., 434.]

[20 All. 135]
APPELLATE CIVIL.

The 20th November, 1897.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Kandhia Lal.....Defendant

versus

Muna Bibi.....Plaintiff.*

*Guardian and minor—Loans to a minor—Inquiries necessary
to be made by lender—Burden of proof.*

A plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bona fide* belief in the existence of such necessities he can advance his money in safety, even though the sum borrowed by the guardian upon the security of the minor's estate is not in point of fact used for his necessities or his benefit. On the other hand a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt. *Hanuman Pershad Pandey v. Babooee Manraj Kunwari*, 6 Moo. I. A., 393, referred to.

[136] THE facts of this case are fully stated in the judgment of the Court.

Munshi Jwala Prasad (for whom Babu Durga Charan Banerji) for the Appellant.

Pandit Sundar Lal and Pandit Madan Mohan Malaviya, for the Respondent.

Blair and Aikman, JJ.—The plaintiff in this case is described by herself in the array of parties mentioned in the plaint as the widow of Babu Sohan, occupation money-lending. In this case she alleges that she from time to time lent money to one Lachmin Kunwar as guardian of her infant son Kandhia Lal, against whose estate she is now proceeding. Various sums of money so advanced at last amounted to an aggregate of over Rs. 1,600, and for that sum upon the 5th of December 1889 the female defendant executed a bond, by which, in case of non-payment, the plaintiff was to be entitled to have recourse to the property of the defendant. From the contents of the bond it is manifest that the executing defendant represented that the advances so made had been required by the necessities of the estate of the minor defendant. On failure of payment the present suit was brought upon the bond, the mother, guardian of the infant defendant, being herself impleaded as a co-defendant. The allegations

* Second Appeal No. 910 of 1895, from a decree of C. L. M. Eales, Esq., District Judge of Benares, dated the 16th April 1895, modifying a decree of Babu Nil Madhab Roy, Subordinate Judge of Benares, dated the 13th December 1894.

in the plaint upon which the claim is founded are that money was required for the payment of Government revenue due from the minor's zamindari property and for money necessarily expended in suits for protection of the minor's estate. The defendant minor denies his liability. He denies that he received benefit from the loan or loans, and alleges that his property was sufficient to meet all charges upon it without borrowing. He denies that Government revenue was due at the time of the making of the bond, and alleges that none was paid out of the money secured by it, nor was there at that time need for money to carry on litigation. There was a further allegation, now immaterial, that Lachmin Kunwar had been induced by fraud to sign the instrument. The [137] Judge of the Court of First Instance framed certain issues, three of which only are now material. They are:—

- (1) Was the minor benefited by the loan?
- (2) Are the necessities mentioned in the bond correct?
- (3) Is the loan binding upon the minor?

The Judge found all these issues in favour of the minor, holding that there were no necessities and no expenditure for the benefit of the minor and that the loan was therefore not binding upon him. A decree was passed against the female defendant, who did not file a statement of defence, and as against the minor defendant the suit was dismissed. In the Lower Appellate Court, the Judge rightly laid the burden of proof upon the plaintiff appellant, but differed from the Subordinate Judge upon his finding that the plaintiff had produced no evidence of legal necessity. He himself treated as evidence certain decrees produced to him in cases in which the minor was a litigant, and in which on appeal in this Court he had been successful. These cases were also, he says, test cases upon which depended half of the minor's zamindari estate. He also takes as evidence of liability to pay the Government revenue certain unsuccessful applications made to the District Judge by the female defendant for leave to borrow money on the security of the minor's estate. We do not acquiesce in the inference drawn by the Judge from these facts. But it is not upon that that our decision is grounded. There is manifestly no evidence before either Court that the plaintiff had made inquiry as to the necessities of the minor before advancing the money or moneys sought to be secured by the bond, nor was there really any evidence at all that such liabilities, had they existed, could not have been met out of the accumulations or current income of the minor's estate. In the judgment of the Privy Council in *Hanuman Pershad Pandey v. Babooee Munraj Kunwari*, 6 Moo. I.A., 393, the law upon this subject is considered and laid down in much detail. It is there ruled that a plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable [138] inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bond fide* belief in the existence of such necessities he can then advance his money in safety, even though the sum borrowed by the guardian upon the security of the minor's estate is not, in point of fact, used for his necessities or his benefit. On the other hand, a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt.

It is perhaps unfortunate, at all events it is curious, that the plaintiff money-lender should neither have alleged any reasonable inquiry made by herself before effecting the loan or loans, nor upon the hearing should have given any evidence of such inquiry. The Lower Appellate Court, which allowed the appeal of the plaintiff and decreed her suit against the minor defendant, did so without any finding that such inquiries had been made, and indeed the plaintiff had neglected to supply it with materials for doing so, nor does it

appear even to have had before it, in explicit evidence upon the issues which it did try, direct proof that in fact the money borrowed was applied for the benefit of the minor and that there were necessities for borrowing it.

We are asked by the plaintiff-respondent to refer to the Court below an issue as to whether reasonable inquiries had been made by the plaintiff. We do not think we ought to grant her that grace; she certainly is not entitled to it as a matter of law. This is a suit substantially by a money-lender against a minor, and it is not the practice of this Court, or Courts elsewhere, to step out of their way for the purpose of visiting upon a minor liabilities contracted during the period of his minority. We are therefore of opinion that the decree of the Lower Appellate Court is a decree based upon evidence which does not establish a right of suit on the part of the plaintiff as against the minor. We therefore, setting aside the decree of the Lower Appellate Court against the minor and restoring the decree of the Court of First Instance, allow the appeal with costs.

Appeal decreed.

[189] *The 22nd November, 1897.*

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Sadiq Husain..... Objector

versus

Lalta Prasad and another.....Decree-holders.

Execution of decree—Restitution of benefit obtained under a decree which is reversed on appeal—Restitution sought by means of execution of appellate decree against a person not a party to the appeal—

Civil Procedure Code, section 583.

Held, that appellants in the Privy Council who had, antecedently to filing their appeal to Her Majesty in Council, paid to the assignee of the decree appealed against, which was for costs only, the amount then payable under that decree, could not, on succeeding in their appeal, obtain restitution, merely by virtue of and in execution of the order of Her Majesty in Council, of the amount so paid, from the assignee when that assignee had been no party to the appeal to Her Majesty in Council. *Bhagwati Prasad v. Jamna Prasad*, I. L. R., 19 All., 136, referred to.

On the 21st July 1888 Lalta Prasad and Har Prasad obtained a decree for sale on a mortgage from the Court of the Subordinate Judge of Bareilly against Aziz-ud-din Ahmad and Hafiz-ud-din Ahmad. The defendants appealed, and on the 16th of March 1891 the High Court set aside the decree and dismissed the plaintiffs' suit with costs. The defendants assigned their decree for costs to one Sadiq Husain. On the 16th July 1891 Sadiq Husain applied for execution of the decree assigned to him against the plaintiffs, and on the 23rd

* First Appeal No. 15 of 1897 from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 12th December 1896.

July 1891 obtained payment of the amount of costs decreed. On the 24th July, 1891 the plaintiffs applied to the High Court for leave to appeal to Her Majesty in Council. Leave was granted, and ultimately, on the 5th of August 1895, the Privy Council decreed the appeal and restored the decree of the Court of First Instance in favour of the plaintiffs. The plaintiffs did not make Sadiq Husain a party to their appeal to the Privy Council. The decree of the Privy Council was in due course transmitted for execution to the Court of the Subordinate Judge of Bareilly, and thereupon, the plaintiffs filed in that Court an application for execution against the defendants and Sadiq Husain. In that application they prayed, as against the defendants, [140] for sale of the property charged in the decree, and, as against Sadiq Husain, for realization by attachment and sale of his property of the amount of costs realized by him in execution of the decree of the High Court of the 16th March 1891, together with certain interest. To this application Sadiq Husain filed objections, which were disallowed by the Subordinate Judge on the 12th of December 1896. From the order disallowing his objections Sadiq Husain appealed to the High Court.

Mr. A. E. Ryves and Maulvi Ghulam Muftaba, for the Appellant.

Mr. D. N. Banerji, for the Respondent.

Edge, C. J. and Burkitt, J.:—This appeal arises out of an application to the Subordinate Judge of Bareilly made in execution of a decree of Her Majesty in Council. In the suit in which that decree was passed the plaintiffs obtained from the Subordinate Judge of Bareilly a decree for sale on a mortgage with costs. On appeal this Court set aside the decree of the Subordinate Judge and dismissed the suit with costs. That decree of this Court, which was in favour of the defendants, was assigned by the defendants to Sadiq Husain, we presume for consideration. On the 16th of July 1891, Sadiq Husain applied under section 232 of the Code of Civil Procedure for execution of the decree which had been assigned to him for Rs. 4,820, the amount of the costs decreed by this Court in favour of the defendants. Of that application the plaintiffs had notice; they were parties to it. Sadiq Husain obtained an order, and, in execution of the decree assigned to him, he obtained, on the 23rd of July 1891, payment of Rs. 4,820. On the 24th of July 1891, the plaintiffs in the suit applied to this Court for leave to appeal to Her Majesty in Council. The appeal lay as a matter of right. Leave was granted; and finally the appeal came before Her Majesty in Council, with the result that the decree of this Court was set aside and the decree of the Subordinate Judge of Bareilly was restored with costs. That order of Her Majesty in Council was communicated to this Court, and on the application of the [141] plaintiffs this Court transmitted that order to the Subordinate Judge of Bareilly for the execution of the same. After the arrival of the order of Her Majesty in Council in the Court of the Subordinate Judge of Bareilly, the plaintiffs in the suit presented an application to the Subordinate Judge asking for an order of restitution against Sadiq Husain in respect of the Rs. 4,820-13-0 already mentioned and for Rs. 1,390-13-0, interest on that amount, making a total of Rs. 6,211-10-0. Sadiq Husain was no party to the appeal to Her Majesty in Council.

From what we have said it appears, as was the fact, that the plaintiffs had actually satisfied, by payment to Sadiq Husain, the decree for costs before they moved at all in the matter of appealing to Her Majesty in Council. They consequently had full knowledge that Sadiq Husain was the assignee of that decree and that he was a person interested to maintain that decree in its integrity so far as costs were concerned. Notwithstanding that the plaintiffs

knew of Sadiq Husain's interest, they filed their appeal to Her Majesty in Council and proceeded with that appeal without making Sadiq Husain a party to it. When the appeal to Her Majesty in Council came on for hearing, the defendants, apparently through an oversight, were not represented. Sadiq Husain of course was not represented, being no party to the appeal, and the appeal to Her Majesty in Council was decreed in the absence, not only of the defendants but of the assignee of the decree. Sadiq Husain was not even made a party to the application to this Court to put the order of Her Majesty in Council into execution under section 610 of the Code of Civil Procedure. The decree of Her Majesty in Council was against the respondents to the appeal. Sadiq Husain was not a respondent. It was not until the order of Her Majesty in Council arrived in the Court of the Subordinate Judge of Bareilly, that the plaintiffs in the suit sought for any remedy whatsoever against Sadiq Husain. What they seek is an order under which Sadiq Husain's goods and his lands may be seized and sold, and the proceeds up to Rs. 6,211-10-0 be paid over to the plaintiffs. It is contended that [142] because the order of Her Majesty in Council ordered this Court to govern itself according to that order, this Court and the Court of the Subordinate Judge of Bareilly are bound to make Sadiq Husain by the process of the Court, *i.e.*, by execution had against his goods or lands, pay to the plaintiffs the amount they claim. It is admitted that section 583 of the Code of Civil Procedure does not apply to this case. It is obvious that that section does not apply. The decree under which the plaintiffs are seeking a benefit is an order of Her Majesty in Council, and not a decree passed under Chapter XLI of the Code of Civil Procedure. Further, section 583 only applies to parties to the proceedings in the suit and in the appeal, and does not apply to assignees of interests of the parties to the suit when those assignees have not been made parties to the suit or the appeal. Mr. *Dwarka Nath Banerji* is unable to point out to us any section in the Code of Civil Procedure under which we could make an order which would justify the officer of the Court in seizing and selling in execution of the order of Her Majesty in Council, the goods or lands of a person who was no party to the appeal to Her Majesty in Council and who is not even either named or referred to in the order of Her Majesty in Council. Mr. *Dwarka Nath Banerji's* argument went as far as this, that this Court had not even discretion in the matter, that we were merely exercising ministerial functions, and that under the order of Her Majesty in Council we were bound to restore to the successful appellants the moneys they had paid to the assignee of the decree of this Court. According to that contention it would be immaterial whether Sadiq Husain could prove any matter of estoppel between him and these plaintiffs, as, for instance, that he had purchased the decree of this Court on the representation of the plaintiffs that they would not appeal. A somewhat similar case was before this Court last year, *viz.*, *Bhaqwati Prasad v. Jamna Prasad*, I. L. R., 19 All., 126. We have been referred to *Rodger v. The Comptoir d'Escompte de Paris*, L.R., 3 P. C. A., 465, and to *Syed Bazayet Hossein v. Dooli Chand*, L. R., 5 I.A., 411. [143] In our opinion neither of these cases has any bearing on the one before us. If the plaintiffs had desired to obtain a remedy against Sadiq Husain through the medium of an order of Her Majesty in Council, they had ample notice of the assignment to him—they had actually paid him—and they could have made him a party to their appeal: but for reasons best known to themselves they did not do so. The plaintiffs are not asking to follow immovable property decreed to them in the appeal by order of Her Majesty in Council. They are asking to turn this decree against the defendants into a decree against Sadiq Husain, who was no party to the proceedings, and to put it into execution against his goods and his lands as if it had been a decree for

money passed against him. In our opinion we have no jurisdiction to make any order for the execution of this order of Her Majesty in Council against Sadiq Husain. Equally in our opinion the Subordinate Judge had no jurisdiction to make the order which he made and which is now under appeal.

We allow this appeal and dismiss the application to the Subordinate Judge against Sadiq Husain with costs in both Courts.

Appeal decreed.

NOTES.

[This was followed in (1901) 5 C.W.N., 426; in (1906) 28 All., 337, a case of transfer during the pendency of the appeal, this was not applied; in (1902) 24 All., 288, is contained the report of the further stage in this litigation.

Sec. 144, C.P.C., 1908, is in general terms, so that a case like this would fall within it.]

[20 All. 143]

APPELLATE CRIMINAL.

The 23rd November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Tulsha.*

Act No. XLV of 1860 (Indian Penal Code), section 307—Attempt to murder—Intention—Knowledge of probable consequence of act—Presumption.

Where a woman of twenty years of age was found to have administered datura to three members of her family, it was held that she must be presumed to have known that the administration of datura was likely to cause death, although she might not have administered it with that intention.

THE facts of this case sufficiently appear from the judgment of the Court.

[144] Mr. R. K. Sorabji, for the Appellant.

The Government Advocate (Mr. E. Chamier), for the Crown.

Edge, C. J. and Burkitt, J.—Musammat Tulsha has been convicted of the offence punishable under section 307 of the Indian Penal Code, and has been sentenced to transportation for life. She was a young woman of twenty or twenty-one years of age and was a widow, her husband having died before the *gauna* ceremony was performed. She had a lover named Tika Ram, who was of the same caste as herself. She was anxious to live with him, but her father and family were opposed to her taking that course, as in their caste the marriage of widows was forbidden. Musammat Tulsha prepared the family meal, and of that meal her father, her mother and her brother partook. They were afterwards seized with illness and exhibited symptoms of poisoning by datura. A native doctor was called in, who, recognizing what they were suffering from, refused to treat them and communicated with the police. The police arrived that night. The three members of the family who were suffering were removed to the dispensary and ultimately recovered. Musammat Tulsha was taken into custody, and she gave up a packet containing thirty-one datura seeds. She made a statement before the Magistrate in which she admitted that she had administered datura to her father, her mother and her

* Criminal Appeal No. 1153 of 1897.

brother in the food she had given. That statement was subsequently withdrawn, but, as it is entirely consistent with all the evidence in the case which we believe, we accept that statement as true notwithstanding its withdrawal. In the Court of Session her relations, in order to shield her, tried to make out a different case, namely, that what they were suffering from was the result of drinking bhang. We are quite satisfied that Musammat Tulsha administered datura to her father, her mother and her brother. Mr. Sorabji, who appeared for her, has contended that there is nothing to suggest that she intended to commit murder, and that there is no evidence that she knew that datura when administered might cause death. It is probable that Musammat Tulsha did not intend to kill her parents and her [143] brother. No doubt she intended to incapacitate them for the time that she might fly with her lover. There is no evidence that she knew that datura when administered to a human being might cause death. The same might have been said if she had administered arsenic or nux vomica. It appears to us that we must presume that people of her age have the ordinary knowledge of what the results may be of administering datura. It would be dangerous in the extreme to the public in this country if Judges were to hold that it could not be presumed that a woman of twenty years of age in an Indian village was not aware that death might be caused by the administration of datura. If we were to hold that such was the presumption, we fear that poisoning by datura would become more frequent than it is. In our opinion Musammat Tulsha was properly convicted. It was a case to which the sentence of transportation applied, and that was the proper sentence to pass. As the Sessions Judge truly observes, this woman's act might have resulted in the deaths of three persons. We dismiss this appeal.

NOTES.

[This was not followed in (1908) 30 All., 568, a similar case of poisoning by *dhatura*.]

[30 All. 145]

APPELLATE CIVIL.

The 23rd November, 1897.

PRESENT :

MR. JUSTICE BLAIR, AND MR. JUSTICE AIKMAN.

Sultan Muhammad Khan.....Defendant

versus

Sheo Prasad and another.....Plaintiffs.*

Arbitration—Submission to arbitration—Revocation of submission.

A submission to arbitration once made cannot be revoked except for good cause. It cannot be revoked at the mere will of one of the parties to it. *Pestonjee Nussurwanjee v. Manockjee & Co.*, 12 Moo. I. A. 112, referred to.

THIS was an application under section 525 of the Code of Civil Procedure to have an award filed in Court and a decree passed in accordance therewith. The award was made ostensibly by one Chander Sen, the clerk of a pleader, by name

* Second Appeal No. 453 of 1895 from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 19th January 1895, confirming a decree of Maulvi Shah Ahmad-ullah, Subordinate Judge of Meerut, dated the 16th May 1893.

Raghubir [146] Saran, practising at Meerut, but with the advice and assistance of his master. The application was opposed on several grounds, amongst others, on the ground that the objector, having come to know that Raghubir Saran had originally been instructed by the other parties to the reference to file a suit against him in the matter dealt with by the award, had revoked his submission to arbitration. This objection was disallowed by the Court of First Instance (Subordinate Judge of Meerut) which passed a decree in accordance with the award. The judgment-debtor appealed, urging the same objections as he had urged in the first Court. The Lower Appellate Court (District Judge of Meerut) dismissed the appeal. The objector thereupon appealed to the High Court.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the Appellant.

Munshi *Ram Prasad*, for the Respondent.

Blair, J.—This is the appeal of an unsuccessful party to arbitration proceedings. The only point opened in second appeal is whether the award made was in point of law an award. 'It seems to me that the findings of fact by the learned Judge do amount to this, that the award is the expression of the mind and the will of the person who was nominated arbitrator. The award is of course signed by him. It might have been possible for objection to be taken to the arbitration proceedings upon the ground of the interference of the arbitrator's master, a pleader, had not such interference taken place with the full assent of the present appellant. In the face of such consent on his part it would not be open to him to revoke his consent to the arbitration proceedings. It would not lie in his mouth to urge as good cause for such revocation anything done by the arbitrator in the course of the proceedings, if the thing done was what he himself had assented to. I think the finding of the Judge that the award is the award of the arbitrator Chander Sen means, not only that he signed the award but that it was in the fullest legal sense his award, though the conclusions arrived at may have [147] been influenced by another person, who, by the consent of the parties, was an assisting party to the arbitration proceedings. I see no reason to disturb the findings of the Judge. I would dismiss the appeal with costs.

Aikman, J.—I am of the same opinion. The respondent applied under section 525 of the Code of Civil Procedure to have an award filed in Court. The application was resisted by the appellant here, but the Court made an order against him under the provisions of section 526 of the Code. On appeal the order was confirmed by the District Judge. In this second appeal it is urged that there was no valid award. That is the only ground upon which we could interfere. The reference to arbitration shows that the parties appointed one Chander Sen, the clerk of a pleader named Babu Raghubir Saran, as arbitrator to decide the matters in dispute between them. The award on the face of it purports to have been made by the arbitrator chosen by the parties. It is, however, contended that the person who did really make the award was Chander Sen's master Raghubir Saran. It has been found by the Lower Appellate Court that Chander Sen was selected by the parties on his master Raghubir Saran promising to help him in every way. That Chander Sen took more than a nominal part in the proceedings is clear from the evidence of Raghubir Saran, a witness whom the Judge describes as absolutely above suspicion. Even if Chander Sen allowed himself to be unduly influenced by Raghubir Saran, that would not under the circumstances of this case amount to misconduct on his part and would not be a matter with which we could deal in appeal.

The learned counsel for the appellant further contended that the award was "invalid, inasmuch as his client had revoked the submission to arbitration before the award was pronounced. The learned counsel went so far as to contend that a party who refers a question to arbitration can at his pleasure, and without any cause shown, withdraw from the submission at any time before the award has been given. On this point he referred [148] to Russell on the Power and Duty of an Arbitrator. This is a proposition to which I cannot assent. In the case of *Pestonjee Nussurwanjee v. Manockjee & Co.*, 12 Moo. I. A., 112, it was held by their Lordships of the Privy Council that "where parties had agreed to submit the matter in difference between them to the arbitration of one or more specified persons, no party to such agreement could revoke the submission unless for good cause, and that a mere arbitrary revocation of authority would not be permitted." The learned counsel has entirely failed to show that any good cause existed which would have justified his client in withdrawing from the submission, if he withdrew at all which is open to doubt. I think the Lower Appellate Court properly dismissed the appeal.

BY THE COURT.—The order of the Court is that this appeal be dismissed with costs.

Appeal dismissed.

NOTES.

[A submission to arbitration cannot be revoked without good cause :—(1903) 27 Mad., 112; (1911) 14 C. L. J., 188.

On good cause shown, it may be rescinded :—(1909) 33 All., 315.]

[20 All. 148]

The 25th November, 1897.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Muhammad Yusuf Ali Khan.....Defendant

versus

Dal Kuar.....Plaintiff.*

Pre-emption—Wajib-ul-arz—Transfer to plaintiff pre-emptor after sale—Hindu widow in possession for widow's estate.

Held that the daughter of a Hindu widow to whom the widow had relinquished a share in a village, of which share she was in possession for a widow's life estate, was entitled to pre-emption in respect of a sale which had taken place in the village prior to the relinquishment made to her by her mother. *Sheo Narain v. Hira*, I. L. R. 7 All., 536, distinguished.

THIS was a suit for pre-emption based on a *wajib-ul-arz*. One Puran Mal, a co-sharer in the village in which the land sold was situate, died on the 6th of December 1893 leaving a widow Kesar Kuar and a daughter Dal Kuar. On the 22nd of January 1894, one Jagannath sold to the defendant Muhammad Yusuf Ali Khan, who was a stranger, a share in the village in which Puran Mal had been a co-sharer. Subsequently to this sale, [149] Kesar Kuar relinquished in favour of her daughter Dal Kuar all her rights in the property which had been of Puran Mal in his life-time, and mutation of names was

* Second Appeal No. 928 of 1895, from a decree of T. C. Piggott, Esq., Additional Judge of Aligarh, dated the 6th August 1895, confirming a decree of Babu Achal Behari Lal, Munsif of Etah, dated the 19th March 1895.

effected in favour of Dal Kuar on the 2nd of May 1894. On the 21st of January 1895 Dal Kuar brought a suit for pre-emption in respect of the sale to Muhammad Yusuf Ali Khan of the 22nd of January 1894. The plaintiff's claim was decreed by the Court of First Instance (Munsif of Etah). The defendant vendee appealed, and his appeal was dismissed by the Lower Appellate Court (District Judge of Mainpuri). The defendant vendee thereupon appealed to the High Court.

Maulvi Chulam Mujtaba, for the Appellant.

The respondent was not represented.

Blair J. (Aikman, J. concurring):—This is a pre-emption suit based upon the *wajib-ul-arzes* of two villages. The plaintiff is the daughter of one Puran Mal, and the title she alleges is that upon her father's death, the widowed mother, having become entitled to a life estate in the property, relinquished all her rights to the plaintiff, who thereupon entered into possession and was duly recorded as a co-sharer.

The sale which constituted the cause of action took place on the 22nd of January 1894. Puran Mal died on the 6th of December 1893. The appellant represented by Mr. *Mujtaba*, disputes the right of the plaintiff to pre-empt upon the ground that the voluntary relinquishment of the mother to the daughter, after the completion of the sale, could not confer upon her any right of pre-emption. In support of that contention Mr. *Ghulam Mujtaba* cited to us a Full Bench case, *Sheo Narain v. Hira*, 1 L. R., 7 All., 536. That case is not on all fours with the case we have to decide. It was a sale to a person other than a co-sharer, and the plaintiff who claimed to pre-empt was himself a stranger who had purchased a share in the village. The inconveniences which formed the basis of that decision are set forth in detail in the judgment, and no doubt formed a very substantial part of the [150] *ratio decidendi*. Differing from the present case in that very material respect, that case affords no guidance to us in a case where the person claiming to pre-empt is not a stranger who has acquired a share in the village. There is another argument used in the judgment of Mr. Justice MAHMOOD to support the decision, the propriety of which I do not question, which appears to me to be based upon a misconception. It occurs in the following words:—"Now, if at the time of the sale the person who at that time owned the share purchased by the plaintiff had no objection to the sale, that sale gave rise to no cause of action, and nothing which happened afterwards could create one." That observation leaves out of sight that there was ample time still for the original owner of the property, had he lived, to take objection; the period for such objection had not expired, and it seems to me impossible to say that the abstinence from objection for some portion, and a portion only, of that time raised any inference of the abandonment of a claim to pre-empt. It is settled law that a widow holding a life estate, and not holding possession of land in lieu of maintenance, represents the estate in the fullest manner, and such plenary possession seems to me to carry with it the right to pre-empt. I find it difficult to conceive upon what principle applicable to pre-emptive rights, based not on Muhammadan Law but upon the *wajib-ul-arz*, which must be taken to be the basis of the rights of the co-sharers, it would be possible to justify the exclusion of a co-sharer from pre-emption, to whom the widow's life estate has been relinquished, and who herself would have had plenary proprietary rights on the determination of the life estate. There seems to be no doubt that the widow had power to make a good and legal relinquishment. As I have already said, I cannot infer from the fact that the widow took no objection for some brief time before the relinquishment, that there was on her part an abandonment

of pre-emptive rights. It would seem upon general principles that the period within which the pre-emptive rights can be exercised is not limited by a devolution of the estate from one co-sharer to another co-sharer. In the case of a [181] *wajib-ul-arz* I think the expression excluding such a right must be clear and imperative before I could find that so important an incident of proprietary possession could be lost by such devolution. It is to be regretted that the respondent was not represented in the argument upon this appeal, but I feel no doubt that Mr. *Mujtaba* has brought to bear upon the matter all cases which might help to guide the decision of the Bench. On the whole I am of opinion that the Courts below were right in their decision. I would dismiss the appeal.

BY THE COURT.— The appeal is dismissed, but without costs, as no one appeared for the respondent.

Appeal dismissed.

NOTES.

[This was followed in (1906) 28 All., 424; (1904) 7 O. C., 158, and approved by the Full Bench in (1909) 31 All., 623. In (1912) 15 I. C., 570 (Nagpur), the case of a stranger was distinguished, while in (1901) P. L. R., 125, this was disapproved and distinguished.]

[20 All. 151]

APPELLATE CRIMINAL.

The 25th November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Muhammad Ismail Khan.

Act No. XLV of 1860 (Indian Penal Code) Section 177—False information—
Police officer recording a false report.

Held that a Police officer at a police station, who, being as such officer bound to enter all reports brought to him of cognizable or non-cognizable offences in the station diary, refused to enter a report made to him concerning the commission of an offence, and entered instead in the diary a totally different and false report as that which was made to him, had thereby committed the offence punishable under section 177 of the Indian Penal Code.

THE facts of this case are fully stated in the judgment of the Court.

The Government Advocate (Mr. *E. Chamier*), for the Crown.

Mr. *C. Dillon*, for the Respondent.

Edge, C. J. and Burkit, J.—This is an appeal brought by the Local Government against an order of the Sessions Judge of Farrukhabad acquitting Muhammad Ismail Khan of offences punishable under sections 177 and 218 of the Indian Penal Code.

On the 23rd of January last Muhammad Ismail Khan was a head constable stationed at Kaimganj police station. It was [182] his duty to enter all reports made at the station as to cognizable or non-cognizable offences and to enter them in the station diary. On the evening of that day, whilst

* Criminal Appeal No. 143 of 1897.

Muhammad Ismail Khan was on duty, Banwari Lal and Bansidhar with two other men, Balla and Udho, came to the thana to make a report that Banwari Lal had been robbed on that evening of Rs. 454, which his servant Udho was carrying, and that the robbers who had made the attack had succeeded in carrying away the bag in which the money was and had escaped.

Banwari Lal and his companions made their statement to Muhammad Ismail Khan and asked him to enter the report. Muhammad Ismail Khan said that they wanted to get up a case and told them to wait. They waited until 1 o'clock in the morning, and then left. Muhammad Ismail Khan did enter a report in the general diary that night as made by Balla accompanied by Bansidhar. It was not a report of a robbery; it was a report that a milkman had beaten Balla. No such report had been made. It so happened that, at the time Banwari Lal and his companions were at the station, the police were busy with a murder case just reported. Now the Sessions Judge has found that no such report as that alleged by the witnesses for the prosecution was made at all. The assessors suggested that Banwari Lal and his companions wished to hush up the case of the robbery and consequently made a false report which was then entered in the general diary. The Sessions Judge observes that that was a simple explanation, and he accepted it. In one sense of the word "simple" it was simple enough: so foolish that we should have expected the Sessions Judge to have rejected it. It might have struck him that these banias who had taken the trouble to go at that hour of the night more than a mile to the thana to report a robbery, which the Sessions Judge believed to have been committed (and which we have no doubt was committed), and remained there from 8 o'clock in the night until 1 o'clock next morning in order to have the matter reported, had not gone to the thana to make a false report of an assault that had not been committed, and [153] which, if it had been committed, did not concern either Bansidhar or Banwari Lal, the two chief men--a false report which might make them liable to punishment under section 211 of the Indian Penal Code. We are satisfied that the banias did report that a robbery had been committed that night, and that they did not report any assault by a milkman on their porter.

It is easy to understand what happened. The Sub-Inspector at the time was absent investigating another case; there comes in a report of a murder that had taken place; then comes this report of a robbery. We have no doubt that at the police station they did not want to trouble about this case of robbery, in which none of the robbers had been identified, and in which what was carried away was rupees, which could not be traced, and in which there was little chance that an arrest would have been made or a conviction obtained. They thought they would keep the charge out of the books and not spoil their *naqshas* by showing an undetected offence of robbery committed in the street under their noses.

We are of opinion that section 218 of the Indian Penal Code does not apply to this case. No doubt it is injurious to the public that such serious offences as robbery should be hushed up, but unfortunately the definition of "injury" contained in the Penal Code does not cover anything that took place that night at the thana. We can well understand that cases of falsification of reports may occur which come within the purview of section 218. All we decide is that this case does not. There is nothing in this case to show that Muhammad Ismail Khan intended to cause loss or injury to the public or to any person, or that he intended to save, or knew he was likely to save, anyone from punishment or had any of the other intents mentioned in section 218, when he suppressed the real report and entered the false one.

We are of opinion, and we find, that Muhammad Ismail Khan did commit an offence punishable under section 177 of the Indian Penal Code. He was bound by law to enter in the general diary [184] all reports of cognizable and non-cognizable cases made to him at the thana. It is needless to say that this duty involved that he should truthfully enter those reports. One object of that diary is to inform the Magistrate of the District and District Superintendent of Police of the offences which have been reported at the thana. In that sense the diary furnishes them with "information," and at this particular thana it was the duty of Muhammad Ismail Khan to furnish such information to the Magistrate of the District and the District Superintendent of Police by means of the truthful entry of reports made to him. What he did was—he furnished by means of a false entry information which he knew to be false. He suppressed the real report, and entered a report which had not been made. Indeed we would be prepared to hold that Muhammad Ismail Khan is not entering the report which was made to him, even if he had made no entry at all, would have brought himself under section 177, as the result would have been that he would have thereby informed the Magistrate of the District and the District Superintendent of Police that no report of a cognizable offence had been made, which would have been false information. It is absolutely necessary in the interests of the public that Police officers charged with the duty of entering these reports should enter them truthfully. We regard this as a serious case. A grave offence had been committed, and the action of Muhammad Ismail Khan, possibly countenanced by some other Police officer, that night has resulted in no inquiry so far as we are aware, having been instituted in respect of this highway robbery. We are aware that this class of offence is committed in certain districts; that reports made have been minimised and minor offences entered when a graver offence was in fact reported. We cannot pass over this offence lightly. We set aside the order of acquittal, and we convict Muhammad Ismail Khan of the offence punishable under section 177, and sentence him to be rigorously imprisoned for eighteen calendar months; the imprisonment will begin from the time when he is taken into custody to undergo this sentence.

[185] *The 26th November, 1897.*

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Zawar Husen and others.*

Evidence—Prosecution witness examined before the Magistrate but not called in the Court of Session—Witness called by defence—Cross-examination by defending counsel disallowed.

Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness was thereupon placed in the witness-box by counsel for the defence, it was held that counsel for the defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances only admissible by way of cross-examination with the permission of the Court, if the witness proved himself a hostile witness.

* Criminal Appeal No. 1302 of 1897.

THE facts of this case are fully stated in the judgment of the Court.

Mr. C. Dillon, for the appellants Miru and Phullu.

Mr. G. P. Boys, for the appellant Zawar Husen.

The Government Advocate (Mr. E. Chamier), for the Crown.

Edge, C. J. and Burkitt, J.:—Zawar Husen, Miru and Phullu have been found guilty of the offence punishable under section 307 of the Indian Penal Code and have been respectively sentenced to transportation for life. They have appealed.

As to Zawar Husen, his contention is that he established an *alibi*. As to the other two men the contention is that they were not present, and that if Zawar Husen's *alibi* is believed, the case for the prosecution is entirely shaken and the evidence against Miru and Phullu cannot be trusted.

That a deliberate attempt was made to take the life of Imdad Husen some time between midnight and 2 A. M. is beyond doubt. Whoever the persons were who attacked him, they could have had but one intention, and that was to kill him. The question is were these three men, or any of them, members of the party that attacked Imdad Husen?

Zawar Husen's *alibi* is that he was in Allahabad up to 9-30 P. M. on the night in question, and could not have caught a train which would have taken him to Bharwari after that hour, and [156] that he could not have ridden from Allahabad to the neighbourhood of Bharwari, where the crime was committed, in time to be present at its commission.

To prove the *alibi* he called one Muhammad Mehdi, who gave the very vaguest evidence as to time. He said that Zawar Husen called on him at 8, 8-30, 8-45 or 9 o'clock that night, and remained with him until he, Muhammad Mehdi, retired to bed. He fixes that hour at 9-30 by the fact that that is his usual hour for retiring. Another witness (from Benares) is called to prove that Zawar Husen was at Muhammad Mehdi's until after 9-30 that night. We have very little doubt that Zawar Husen was doing, what many others in this country have done before, namely, arranging for an *alibi* in view of his taking part in the commission of a crime of a serious nature. Whether Mr. Muhammad Mehdi was particularly drowsy on the night in question, or whether the other witness' watch, if he had one, was rather fast or inaccurate we care not; nor do we care whether Zawar Husen went to Bharwari by train or on horse-back, for we are absolutely certain that he was present sometime between midnight and 2 o'clock on the following morning and was taking part in the attack on Imdad Husen.

Mr. Boys complains that the course adopted by the prosecution in the Court of Session prejudiced his client. Mr. Boys was anxious to show, apparently, in the Court of Session that Zawar Husen could not have travelled by train from Allahabad to Bharwari that night. Some one or more of the witnesses who had been called before the Magistrate were not called in the Court of Session. Mr. Boys, who was defending Zawar Husen in the Court of Session, called one of those witnesses, with the object, apparently, of getting the witness to say that in the Magistrate's Court he had sworn that he had seen Zawar Husen at or near Bharwari Railway Station that night. However, Mr. Boys called this witness, and thereby made him a witness for the defence. He proceeded to examine him, not by asking him what he knew about the case, but by asking him what he had said in the [157] Magistrate's Court. Neither counsel for an accused person nor his client is entitled to cross-examine a witness called for the accused person, unless it appears that that witness is suppressing the truth or is lying or

is refusing to give information. Mr. *Boys* was not entitled at that stage to ask the witness what he had said in the Magistrate's Court. That, at that point, was immaterial. Mr. *Boys* was entitled to ask the witness as to what he could state of his own knowledge as to the events of that night, and if the witness in giving his evidence showed a hostile spirit in obviously suppressing information or in giving evidence at variance with what he had stated before then Mr. *Boys* would have been entitled to ask the Court for permission to cross-examine his own witness. He was not entitled to begin his examination by a question which could only be put in cross-examination. He had laid no foundation for any right to cross-examine that particular witness. Further, Mr. *Boys* might have found himself in this difficulty, if the evidence had been admitted—we are glad to say the Judge rejected the question—that, having called a witness who was not shown to be hostile or suppressing evidence or contradicting what he had already stated, Mr. *Boys*' client would have been bound by the man's answers and would not have been entitled to call evidence to contradict him. There might have been some difficulty in getting in the evidence of Muhammad Mehdi, if he was only tendered after the evidence to which we have been alluding had been given, if the question had been allowed.

But, indeed, the point was a small one. In our opinion it was immaterial whether the particular witness had or had not seen Zawar Husen at or near Bharwari Railway Station. The real question was—did Zawar Husen take part in the attack upon Imdad Husen? In this country it cannot be assumed that either a criminal or a civil case is false because a witness has lied or has exaggerated. We are satisfied on the evidence in this case beyond any doubt that Zawar Husen, Miru and Phullu did attack Imdad Husen, for the purpose and with the intention of killing him, sometime between midnight and 2 A. M. on the night in [158] question. We say 2 A. M. because the first report was made at the thana at 2-30 A. M. There was moon light. These men were known perfectly well to the witnesses by sight; they lived in the same village. Zawar Husen's identity was also further established by witnesses hearing his voice. It is fortunate for these appellants that they did not succeed in their object that night. This was a planned and deliberate attempt at murder. The sentence of transportation for life passed on these men was the proper sentence. We dismiss these appeals.

[20 All. 159]

REVISIONAL CRIMINAL.

The 20th November, 1897.

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE AND MR. JUSTICE BURKITT.

Queen-Empress
versus
 Himai. *

Act No. VIII of 1897 (Reformatory Schools Act) sections 4, 18 and 16—Order for detention in a Reformatory School under section 8—Revision—Powers of High Court.

Held, that the High Court has no power to interfere in appeal or revision with an order for detention in a Reformatory School passed in substitution for an order of transportation or imprisonment.

THIS was an application for revision made by the Government Advocate in respect of an order of the Joint Magistrate of Jaunpur. The Joint Magistrate convicted five persons, including Himai, of the offence punishable under section 411 of the Indian Penal Code, and sentenced them therefor to various terms of imprisonment. As to Himai the Magistrate recorded:—"Himaj is a boy of fifteen years and shall be sent to the Reformatory for three years in place of going to prison for one year."

Revision of this order was applied for on the ground that Himai, being fifteen years of age, could not be the subject of an order under section 8 of Act No. VIII of 1897.

The Government Advocate (Mr. E. Chamier) for the Crown.

Edge, C. J. and Burkitt, J.—Himai was convicted of the offence punishable under section 411 of the Indian Penal Code and was sentenced to one year's rigorous imprisonment therefor. [159] The Magistrate, purporting to act under section 8 of Act No. VIII of 1897, substituted for that order of imprisonment an order for detention in a Reformatory School. The Magistrate found that Himai was fifteen years of age. Consequently Himai was not a "youthful offender" within the meaning of section 4 of Act No. VIII of 1897 at the time of his conviction. The order substituting detention in a Reformatory School for imprisonment was therefore illegal.

But section 16 of Act No. VIII of 1897†, precludes this Court from interfering in appeal or revision with an order for detention in a Reformatory School passed in substitution for an order of transportation or imprisonment. We can put no other construction upon section 16. We accordingly dismiss this application for revision.

NOTES.

[This was overruled by the Full Bench in 21 All., 391.]

* Criminal Revision No. 578 of 1897.

† Section 16 of Act No. VIII of 1897 is as follows:—"Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorise any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender or the substitution of an order for detention in a Reformatory School for transportation or imprisonment."

[20 All. 160]

The 27th November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Gobinda.

Act No. VIII of 1897 (*Reformatory Schools Act*), sections 8 and 16—

Order for detention in a Reformatory School under section 8—

Revision—Powers of High Court.

THIS case is similar in principle to that of *Queen-Empress v. Himai (supra)*.

The facts of this case are sufficiently stated in the judgment of the Court which was as follows :—

Edge, C. J. and Burkitt, J.—Gobinda was convicted of the offence punishable under section 379 of the Indian Penal Code and was sentenced therefore to one month's rigorous imprisonment. The Magistrate substituted an order of detention in a Reformatory School for four years for the order of [160] imprisonment. The Magistrate found that Gobinda was a Dalera and twelve years of age. Daleras are excluded from the purview of Act No. VIII of 1897 in these Provinces under rules made on the 18th of June 1897, by the Local Government. Consequently the order for substitution was illegal. It was further illegal in that it transgressed the rule which regulates the period for which a youthful offender of that age might be sent to a Reformatory School. Under section 16 of Act No. VIII of 1897, this Court is precluded from altering or reversing that order, as the order was an order for detention in a Reformatory School in substitution for an order of imprisonment. Consequently, even if Gobinda had been a youthful offender who was not excluded from the operation of the Act by the rules made by the Local Government, we could not interfere with that portion of the order which directed him to be detained in a Reformatory School for four years. We dismiss this application.

[30 All. 160]

The 27th November, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Billar. *

Act No. VIII of 1897 (Reformatory Schools Act), sections 8 and 16—Order for detention in a Reformatory school under section 8—Revision—Powers of High Court.

The prohibition contained in section 16 of Act No. VIII of 1897, does not apply to an order for detention in a Reformatory School passed when the person to whom it relates has not been convicted of any offence and has not been sentenced to any term of imprisonment or transportation for which detention in a Reformatory could be substituted.

THIS was an application for revision made by the Government Advocate in respect of an order of the District Magistrate of Gorakhpur.

On inquiring into a charge under section 457 read with section 75 of the Indian Penal Code, the Joint Magistrate of Gorakhpur had recorded the following order :—“ I should have dealt with the case myself, but accused was convicted of an [161] offence under section 454 of the Indian Penal Code in January this year. He is aged about 10. Sarju says his parents are badly off, and I do not think it would be any use binding him over to be of good behaviour. I consider he should be sent to a Reformatory. As I have not been empowered to pass such an order under section 8 of Act No. VIII of 1897, I forward the case with this opinion to the District Magistrate under section 9 of the said Act.”

The District Magistrate, without noticing that the accused had not been convicted and sentenced by the Joint Magistrate, passed an order^c that the accused be confined in a Reformatory for six years.

Revision of this order was applied for on the grounds that the accused could not be sent to a Reformatory without first having been convicted of the offence with which he was charged, and, secondly, that the age of the accused had not been definitely ascertained.

The Government Advocate (Mr. *E. Chamier*), for the Crown. *

Edge, C. J. and Burkitt, J.—A Magistrate investigated a charge of theft in a dwelling house preferred against Billar. Without having convicted Billar of any offence, and of course without having sentenced him, the Magistrate sent the case to the Magistrate of the District. The Magistrate of the District, omitting to notice that Billar had not been convicted and had not been sentenced, and that he had no jurisdiction to make an order for detention in a Reformatory School in his case, ordered that Billar should be detained in a Reformatory School for six years. That order was entirely illegal. There was no jurisdiction to make it. It was not an order for detention in a Reformatory School passed in substitution for an order for transportation or imprisonment; consequently this Court is not precluded by section 16 of Act No. VIII of 1897 from dealing with the order of the Magistrate of the District. We set aside the order of the Magistrate of the District, and direct

* Criminal Revision No. 577 of 1897.

that the Magistrate of the District, or some other competent Magistrate to whom the case may be assigned by him, shall proceed with the investigation of the charge according to law.

NOTES.

[This was overruled by the Full Bench in 21 All., 391.]

[162] APPELLATE CIVIL.

The 1st December, 1897.

PRESENT:

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Sham Krishna and others.....Plaintiffs

versus

Ram Das and others.....Defendants.*

Civil Procedure Code, section 440—Guardian and minor—Suit brought on behalf of a minor by a person other than the minor's certificated guardian.

Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was held, that the suit was wrongly brought, having regard to section 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members. *Beni Ram Bhutt v. Ram Lal Dhukri*, I. L.R., 13 Cal., 189, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. T. Conlan, Pandit Moti Lal Nehru and Munshi Madho Prasad, for the Appellants.

Mr. D. N. Banerji and Babu Jogindro Nath Chaudhri, for the Respondents.

Knox and Banerji, JJ.—The suit out of which this first appeal has arisen is a suit instituted by one Rai Sham Krishna, a major, and two others, who at the time of the institution were minors: they professed to sue under the guardianship of Rai Sham Krishna, the first plaintiff. It is admitted that Rai Sham Krishna was not appointed by any Court guardian of the minor co-plaintiffs, and that there was a person, namely, their mother, who was appointed guardian by a competent Court. No objection was taken in the written statement to the frame of the suit, and the suit proceeded to its first hearing on the 15th of September 1893, when issues were fixed in which no question was raised for decision as to the [163] parties who were arrayed as plaintiffs whether they were or were not properly represented as plaintiffs in the suit. In the face of these facts it is somewhat difficult to understand the opening sentence in the judgment of the Court below, which sets out that the defendants had taken a preliminary objection to the effect that Rai Sham Krishna could not be the next friend of the plaintiffs numbers two and three, as there was a certificated guardian of the minors,

* First Appeal No. 229 of 1895 from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 16th November 1895.

and that the suit failed for non-joinder of parties. This objection could only have been taken orally, and there is no trace of its having been taken till the 15th of November 1895, in other words, till nearly three years had elapsed from the time when the suit was instituted and after the case had been fixed for some score of hearings. The Court below proceeded, however, to treat the objection as a very serious one. It held, under the authority of section 440 of the Code of Civil Procedure, that Rai Sham Krishna could not institute the suit on behalf of the minor co-plaintiffs; that the only person who could institute a suit on their behalf was the guardian appointed by the Court, and that, as the minors were necessary plaintiffs in the case, the suit as instituted was *ab initio* void, failed and must be dismissed. For this view it further relied upon the case of *Har Bilas v. Lachman Das*, Weekly Notes, 1891, p. 42. As regards the case of *Har Bilas v. Lachman Das*, we are of opinion that we need not consider it any further, as the case was decided before the passing of Act No. VIII of 1890, and that Act has made the law, in our opinion, sufficiently clear for us to follow without any regard to the cases decided before it was passed. Section 440 of the Code of Civil Procedure, as amended by Act No. VIII of 1890, provides, first, that every suit by a minor shall be instituted in his name by an adult person, and, secondly, that if a minor has a guardian appointed or declared by an authority competent in this behalf, such suit shall not be instituted on behalf of the minor by any person other than such guardian, except with the leave of the Court obtained in the way provided [164] by that section. In this suit, as it stands at present, we have the fact that the guardian appointed by an authority competent in that behalf has not instituted the suit on behalf of the two minor plaintiffs, and that no application has up to now been made to bring her as guardian upon the record. We have the further fact that Rai Sham Krishna, who posed as guardian, has never obtained the leave of the Court to sue on behalf of his minor brothers. The learned counsel for the appellants attempted to meet this difficulty that was raised in his way by first contending that the mother of the minor co-plaintiffs had not been declared guardian by a competent authority. This contention was based upon the argument that we had before us the case of a joint Hindu family living jointly, the *karta* of which family was the plaintiff Rai Sham Krishna, that as such *karta* he was competent to manage and to institute suits respecting the joint family property, and that no need existed for the appointment of any guardian to the minors. In fact his contention went so far as to maintain that Act No. VIII of 1890 did not apply to the case of a joint Hindu family living jointly. It is not necessary to decide that question in the present case. We have the fact that a Court having jurisdiction to appoint a guardian for the minors has appointed as guardian the mother of the minors. In such a case we hold that section 440 of the Code of Civil Procedure precludes any other person than the guardian so appointed from instituting a suit on behalf of the minors, except in the case pointed out in section 440, i.e., when, after due notice has been given to such guardian and after hearing any objection which such guardian may desire to make with respect to the institution of the suit, the leave of the Court has been granted to another person to institute the suit on behalf of such minors. This being so, we so far agree with the Court below that the suit was not properly instituted on behalf of the minor plaintiffs. This did not, however, entail the dismissal of the suit as brought. There was from the beginning before the Court one plaintiff who was *sui jurs*, and further no [165] objection was taken to the effect that the remaining plaintiffs were not properly represented. If the respondent wished to raise the objection that the minors were necessary parties to the suit, and that, inasmuch as they

were not properly represented, they could not be considered to have been joined as parties, that objection as to non-joinder had by law to be taken at the earliest opportunity, and in any case before the first hearing. Section 34 expressly provides that any such objection not so taken shall be deemed to have been waived by the defendant. In this case, as we have already pointed out, the objection as to non-joinder of the plaintiffs was not taken until two years had elapsed from the date of the first hearing. The Court below was therefore not justified in dismissing the suit on the ground of non-joinder. While the case was slowly proceeding, one of the minor co-plaintiffs came of age and asked the lower Court to be permitted to proceed with the case, but permission was refused, and wrongly refused. The Court should have done what we now direct to be done in this case, and that is that the title of this suit be corrected and read henceforth, so far as that plaintiff is concerned, as "Rai Butte Krishna, late a minor but now of full age." This correction, which should have been made, would have cured the defect of non-joinder so far as Rai Butte Krishna was concerned. In the view we have taken it is immaterial whether the third plaintiff was properly represented or not. This case must, however, go back, and the Court will now have an opportunity of doing that which it should have done at a much earlier stage of the proceedings, namely, of allowing the third plaintiff to be properly represented, and this it can do by following the procedure laid down in section 440 of the Code of Civil Procedure. The view we have just taken is, we find, similar to that adopted by the Calcutta High Court in the case of *Beni Ram Bhutt v. Ram Lal Dhukra*, I. L. R., 13 Cal., 189.

We decree this appeal, and, as the Court below has gone wrong on a preliminary point, we set aside the decree of that Court and remand the case to the Court below with directions to readmit it [166] under its original number on its file of pending cases and to proceed with it according to law. Costs here and hitherto will abide the event.

Appeal decreed and cause remanded.

NOTES.

[See also (1904) 7 O. C., 234 ; (1907) 11 O. C., 159.]

[20 All. 167]

REVISIONAL CRIMINAL.

The 2nd December, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress
versus
Dal Singh.*

Act No. XLV of 1860 (Indian Penal Code), section 498—Enticing away a married woman—Evidence of marriage—Mere statement of the complainant and the woman insufficient.

Where a charge is made under section 498 of the Indian Penal Code of enticing away a married woman, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman.

THIS was a case referred by the Sessions Judge of Mainpuri to the High Court on an application for revision made by Dal Singh. Dal Singh had been convicted by a Deputy Magistrate of the offence punishable under section 498 of the Indian Penal Code, and sentenced to a fine of Rs. 25, or in default to four months' rigorous imprisonment. In his application in revision he contended that there was no sufficient evidence to prove the marriage between the woman he had been convicted of abducting and her alleged husband the complainant. That evidence consisted of the statement of the woman, who was called as a witness before the Deputy Magistrate, and the statement of the complainant. In support of the application the case of *Queen-Empress v. Kallu*, I. L. R., 5 All., 233, was relied on.

The following order was passed by the High Court :—

Edge, C. J. and Burkitt, J.—In any view of this case the sentence was entirely inadequate. In one view the case was merely one under section 498 of the Indian Penal Code; but the woman, if she was the complainant's wife, was, if the evidence is true, enticed away by the accused, who had [167] connection with her and kept her for some time. If her story is true, the accused man must in addition have committed the offence punishable under section 376 of the Indian Penal Code. The case has not been properly tried. In cases of this kind where a false charge may easily be made of enticing away a woman, said to be a married woman, but possibly only a mistress, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman. We set aside the conviction and sentence, and we direct that a further inquiry be held before some competent magistrate of the district, other than Syed Mazhar Ali, who can either deal with the case himself, or, if he should be of opinion that a case under section 376 is made out, will act accordingly.

NOTES.

[This was followed in (1911) 15 I. C., 813 (Sindh). See also (1906) 31 Bom., 218.]

* Criminal Revision No. 457 of 1897.

[20 All. 167]
APPELLATE CIVIL.

The 9th December, 1897.

PRESENT:

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Panchaiti Akhara Kalan Udasi Sri Sat Guru Nanak Nirwan Panch Parmeshwar, in Kydganj, City Allahabad, through Mahant Moti Ram, Mokami Hari Das, Mahant Narain Das, Mahant Soti Prakas, Mahant Gokul Das, Mahants Ganga Ram and Iswar Das, Local Agents and Managers of the said Akhara.....Plaintiffs

versus

Gauri Kuar and another.....Defendants.*

Civil Procedure Code, section 435—Company—Corporation—Unincorporated society—Form of suit.

The corporation contemplated by the Code of Civil Procedure is a corporation as known in English Law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed.

In a suit by an unregistered and unincorporated society the names of the members of the company must be disclosed. If this is not done, and if the society is neither a corporation nor a company authorized to sue or be sued in the name of an officer or of a trustee, so as to make the provisions of the Code of Civil Procedure, section 435, applicable, the plaint is a bad plaint. *Koylash [168] Chandra Roy v. Ellis*, 8 W. R., 45; *The Muhammadan Association of Meerut v. Bakshi Ram*, I. L. R., 6 All., 284, and *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York*, I. L. R., 16 All., 420, referred to.

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi Ram Prasad, for the Appellants.

The respondents were not represented.

Banerji and Aikman, JJ.:—This was a suit for sale brought upon a mortgage, dated the 18th of July 1889, by the plaintiffs-appellants who described themselves in the plaint as follows:—"Panchaiti Akhara Kalan Udasi Sri Sat Guru Nanak Nirwan Panch Parmeshwar, in Kydganj, City Allahabad, through Mahant Moti Ram, Mokami Hari Das, Mahant Narain Das, Mahant Soti Prakas, Mahant Gokul Das, Mahants Ganga Ram and Iswar Das, Local Agents and Managers of the said Akhara." It was stated in the plaint that the loan had been taken from, and the mortgage granted to, "The Panchaiti Akhara Kalan Udasi in muhalla Kydganj in the City of Allahabad, under the management of the plaintiffs." The defendants did not appear at the hearing. The Court of First Instance, however, relying upon the ruling of this Court in *Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York*, I. L. R., 16 All., 420, dismissed the suit. It was of opinion that the "Akhara Panchaiti" was not a corporation, and had no "legal status" to sue. This decree was affirmed by the Court of first appeal.

It was contended in this second appeal that the Akhara Panchaiti was a corporation by prescription and entitled to sue in its corporate name. Having

* Second Appeal No. 236 of 1895 from a decree of W. Blennerhassett, Esq., District Judge of Allahabad, dated the 24th January 1895, confirming a decree of H. David, Esq., Munsif of Allahabad, dated the 8th November 1894.

regard to the importance of the question raised, and to the fact that the decision of it will affect a large number of religious associations similar to that of the plaintiffs, which, we understand, have hitherto sued and been sued in the manner in which the plaintiffs have brought this suit, we took time to consider our judgment. After giving the question our best consideration, we have come to the conclusion that the [169] plaintiffs are not a corporation within the meaning of the Code of Civil Procedure.

The Akhara Panchaiti is, according to the finding of the Lower Appellate Court, an association "formed by the followers of Guru Nanak, who flourished in the 15th century. Certain of his followers are stationary. They carry on money dealings and acquire immoveable property and distribute food and clothing to other followers of Guru Nanak who wander over the country, or they otherwise dispose of their income in charity." Such an association might be a corporation under the Civil Law, but is not a corporation under the English Law.

"Corporations, by the Civil Law seem to have been created by the mere act and voluntary association of their members; provided such convention was not contrary to law, for then it was *illicitum collegium*. It does not appear that the prince's consent was necessary to be actually given to the foundation of them." (Stephen's Commentaries on the Laws of England, Vol. III, p. 8, 8th Edition.) In England, however, "the Sovereign's consent is absolutely necessary to the erection of any corporation, either impliedly or expressly given (*ib. p. 8*)." Such consent is presumed in the case of corporations by prescription, that is, corporations "which have existed as corporations from a time whereof the memory of man runneth not to the contrary, and therefore are looked upon in law to be well created. For though the members thereof can show no legal charter of incorporation, yet in cases of such high antiquity the law presumes there once was one, and that by the variety of accidents which a length of time may produce the charter is lost or destroyed (*ib. p. 8*)." In our opinion the corporation contemplated by the Code of Civil Procedure is a corporation as known in English law, that is, a corporation created with the express consent of the Sovereign or of such antiquity that the consent of the Sovereign may be presumed. It is not alleged that the Akhara Panchaiti was founded with the sanction of the ruling authority, and the learned advocate for the appellants has frankly admitted that he is unable to trace the [170] origin of the plaintiffs' association to royal sanction. Further, the antiquity of the association is not in our opinion such as to make it a corporation by prescription. As the plaintiff's society is neither a corporation, nor has it got itself registered so as to make it "a company authorized to sue and be sued in the name of an officer or of a trustee," we are constrained to hold that the suit has been rightly dismissed.

The decision of PEACOCK, C. J., in *Koylash Chandra Roy v. Ellis*, 8 W. R., 43, is an authority for holding that in a suit by an unregistered or unincorporated company, the names of the members of the company must be disclosed. If this is not done, and if the society is neither "a corporation, nor a company authorized to sue or be sued in the name of an officer or of a trustee," so as to make the provisions of section 435 of the Code of Civil Procedure applicable, the plaint is a bad one. As remarked in Stephen's Commentaries (Vol. III, p. 17, 8th Edition), the rights and privileges of a corporation "do not attach to any bodies of persons unincorporated, however connected they may be in point of social position, or however united by express compact; though a voluntary society of individuals should unite together by mutual agreement for common purposes, should provide a common stock by subscription, and should

subject themselves to laws of their own creation for the Government of their society, yet all this will not entitle them to the privilege of suing or being sued in their social capacity."

As observed in the case relied on by the lower Court—*Yusuf Beg v. The Board of Foreign Missions, &c.*, I. L. R., 16 All., 420, bodies of this nature wishing to claim the privileges and protection which the law assigns to corporations "should take care to have themselves incorporated and registered in such a way that those who deal with them or are brought in contact with them can know whom they are suing and by whom they are sued."

We would also refer to the case, *The Muhammadan Association of Meerut v. Bakshi Ram*, I. L. R., 6 All., 284.

[171] As was held in that case, so it must be held here, that the plaintiff society has *per se* no status in law to warrant its instituting a suit in its own name by some of its members. As the suit was brought in the name of the society itself, and does not purport to be a suit brought by some out of numerous persons having the same interest, section 30 of the Code of Civil Procedure has no application. We may add that in this case permission to sue was not applied for under that section.

For the above reasons we hold that the appeal fails, and we dismiss it, but without costs, as the respondents are not represented.

Appeal dismissed.

[20 All. 171]
PRIVY COUNCIL.

The 10th November and 8th December, 1897.

PRESENT:

LORDS WATSON, HOBHOUSE AND DAVEY AND SIR R. COUCH.

Bindesri Naik.....(Defendant) Appellant
versus

Ganga Saran Sahu and others.....(Plaintiffs) Respondents.

[On appeal from the High Court for the North-Western Provinces.]

Construction of a contract in a mortgage deed as to interest. Also, the absence of requirement to register, under section 17 of Act No. III of 1877, petitions filed in judicial proceedings.

A deed of mortgage stipulated in general terms that interest was to run upon the principal sums advanced, without any limitation as to the period of its currency; and also stipulated that, in default of punctual payment at the end of each year, the mortgagees were to be at liberty to treat unpaid interest as principal, and to recover it from the mortgaged property. According to the tenor of the deed, when all its provisions and conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment.

Mathura Das v. Raja Narindar Bahadur Pal, (1896) L. R., 23 I. A., 188; I. L. R., 19 All., 99, referred to and followed. Section 17 of the Registration Act, III of 1877, does not apply to proper judicial proceedings whether consisting of pleadings filed by the parties, or orders made by the Court.

CROSS appeals from two decrees (9th March 1893) of the High Court, varying a decree (30th June 1888) of the Subordinate Judge of Gorakhpur.

[172] These appeals were consolidated by an order in Council of the 9th March 1893. The plaintiffs were mahajans in Gorakhpur. The defendants were Bharan Naik, deceased during the proceedings in the suit, and his son Bindesri Naik. The claim was brought upon two deeds mortgaging a village, and shares in pattidari villages; the first deed dated the 21st August 1875, securing a loan of Rs. 8,977 to be repaid in two years, with interest at Rs. 1-8-0 a month, and the second, dated the 3rd May 1876 securing Rs. 2,977 to be repaid on the date when the first loan would become due, at the same rate of interest. Both mortgages were by conditional sale, and the provisions in the first deed were made applicable to the mortgage in the second. All the particulars are set forth in their Lordships' judgment.

The principal question determined on this appeal related to the construction of the contract for the payment of interest, and to whether it was payable at the contract rate after the day, fixed for payment originally, had passed. Another question, (the answer to which had been the ground of decision in the High Court,) was whether petitions for further time filed by the mortgagors during proceedings commenced for foreclosure should have been registered in order to be admissible in evidence in this suit, according to section 17 of the Registration Act, 1877.

On the 18th January 1879 the mortgagees applied, under section 8 of Regulation XVII of 1806, for foreclosure, stating in this petition that the unpaid debt was Rs. 21,646. The prescribed procedure, however, was not followed up. Afterwards the mortgagees petitioned for a deduction of Rs. 7,452 from their claim.

On the following dates, viz., 3rd September 1879, 4th December 1879, 5th April 1881, 23rd May 1882, 15th April 1884 and 15th May 1886, petitions were presented to the same Court containing agreements between the parties, by which, in consideration of the amounts for which foreclosure might be obtained, the amounts being agreed upon in each petition, the period of the loan was, from time to time, extended. Interest due, but unpaid, [173] was at those intervals added to the principal, the whole carrying interest at the rate stipulated by the deeds. The last petition stated it to be agreed that Rs. 33,444 were then due for principal and interest together and that the mortgagor should be liable for that sum with interest thereon at the rate of Rs. 1 8-0 a month upon having time granted to him by the mortgagees; that time was three months more; at the end whereof upon default in payment of principal and interest, the mortgagors, by taking proper steps, should become the proprietors of the land mortgaged.

Default made was followed by this suit claiming Rs. 43,450, commenced on the 12th December 1887.

The following were the principal issues:—Whether the mortgage had or had not been foreclosed; whether the whole of the mortgage debt had been satisfied; whether the interest had been properly calculated.

Both the Courts below found that the foreclosure proceedings had had no result, and that principal and interest were still unliquidated. But the

Court of First Instance treated the admissions made in the petitions for further time as the result of advantage taken of the helpless state of the debtors, and decreed only Rs. 24,900 to be due.

On appeals by both parties a division Bench of the High Court referred to the petitions for time, taking the sum stated in the last as agreed upon. They gave the following reasons:—

"The plaintiffs' contention here is that that sum of Rs. 33,444-7-6 should be taken as the principal due. Under the bond of the 21st of August 1875 it was agreed that when interest was in default the mortgagees should be entitled to add such interest to the principal and treat it as principal. The conditions of the first bond were by the second bond made applicable to the latter. Now, although the bonds do not appear to contemplate the payment of *post diem* interest, and although the greater part of that sum of Rs. 33,444-7-6 must have been composed of *post diem* interest, it was in our opinion competent to the parties to agree on the one side that [174] the period when foreclosure should be finally applied for should be extended, and on the other, in consideration of such extension of time, that the original principal amounts should be increased by adding to them interest at the rate stipulated in the bond, treating such interest as principal secured by the bond, and by agreeing that interest on such amount should be paid at such time as they might arrange. On the part of the defendants it was contended here that as the petitions, including that of the 15th May 1886, to which we have referred, were not registered, they could not be considered, or given effect to, in this suit. We do not agree with that contention. The proceedings instituted on the 18th January 1879, were before the Court in which those proceedings were instituted, and it was quite competent to the parties to those proceedings from time to time to present petitions, stating accounts upon the basis of which the Court might act without there being any necessity for those petitions being registered. The Indian Registration Act never could have been intended to make it obligatory upon parties to a proceeding pending in a Civil Court to register statements of accounts agreed upon for the Court's guidance, although those statements of accounts related to charges upon immovable property. In our opinion those petitions may be looked at and effect given them. If the mortgagees had not on the basis of the agreements contained in those petitions granted time, they would have been entitled to recover by foreclosure or other proceedings the principal and interest stipulated in the mortgage contract and damages in the nature of interest for the non-payment of the principal amount on the due date. Here the mortgagors having from time to time obtained extension of time by agreeing to statements as to the amount due, seek to deprive the mortgagees of the consideration upon which the time was so extended, and to confine them to such rights as, having regard to limitation, they would be entitled to on the two mortgage contracts standing by themselves. That was not the intention of the parties at the time. The Subordinate [175] Judge did not take the Rs. 33,444-7-6 as the basis upon which to calculate the amount of the decree. He was of opinion that the mortgagors were helpless, and that the mortgagees took undue advantage of their helplessness, and that as a Court of equity he ought to interfere." No evidence has been brought to our attention to suggest that any undue advantage was taken.

"On the one side the mortgagees were, in 1879, taking proceedings authorized by Regulation XVII of 1806, to obtain foreclosure; and on the other side the mortgagors were desirous of obtaining time. What was done was that time was given on the basis of interest continuing to be payable at

the rate mentioned in the bonds, and that such interest should be added to the principal. In our opinion the Subordinate Judge was not justified in concluding that there had been any undue advantage taken by the mortgagees. In our opinion we shall be giving effect to the arrangement between the parties by making a decree under section 86 of the Transfer of Property Act, and fixing the amount at Rs. 33,444-7-6 with interest thereon at the rate of Rs. 1-8-0 per mensem for three months, from the 15th May 1886, and including in the amount on payment of which redemption will be obtained, the plaintiffs' proportionate costs on the amount decreed by us. The defendants will have time to pay the decretal amount within six months from the date of declaring the amount of the account to be taken in this office. The decree will be prepared under section 86 of the Transfer of Property Act. In preparing the account the proportionate costs in this Court and the Court below of the defendants in respect of that portion of the claim disallowed by us will be deducted from the amount payable by the defendants. The above principle will be applied to the appeal. To the above extent the plaintiffs' appeal is allowed with proportionate costs, and the defendants' is dismissed with costs."

On this appeal.

[176] Mr. G. E. A. Ross, for the appellant, argued that the petitions filed in the foreclosure proceedings, representing transactions between the parties affecting immovable property, were within section 17 of the Registration Act III of 1877. The agreement stated in the petitions being treated as apart from the evidence, the ground of decision in the High Court's judgment was insufficient.

Mr. J. D. Mayne, for the respondents. The petitions in judicial proceedings required no registration. Any argument on the construction of the contract to pay interest, that it ceased on the day fixed for repayment of the loan to be claimable at the rate fixed, was precluded by the decision in *Mathura Das v. Raja Narindar Bahadur Pal*, (1896) L. R., 23 I. A., 138 : I. L. R., 19 All., 39, which disaffirmed the judgment on this point in *Narindar Bahadur Pal v. Khadim Husain*, (1895) I. L. R., 17 All., 581.

Afterwards, on the 8th December 1897, their Lordships' judgment was delivered by Lord Watson :—

The late Bhairon Naik, and his son and heir Bindesri Naik, who is the present appellant, on the 21st August 1875, executed a mortgage, in the form of a conditional sale, in favour of the deceased Debi Prasad, who is now represented by the respondents Ganga Saran Sahu and Ram Saran Sahu, and of the other respondent Goshain Moti Gir. By the terms of that deed, the mortgagors acknowledged "that the sum borrowed is Rs. 8,997 in cash of the current coin; that interest shall be paid on this sum at Rs. 1-8-0 per cent. per mensem"; and that they had, in lieu thereof, given a conditional mortgage of the entire village of Ramnagra, and of certain other shares of lands (which need not be enumerated) "for a term of two years from this day, engaging to redeem the mortgaged shares by paying the entire amount in a single sum within or at the time stipulated." The deed provided that, if they should fail to pay the principal money at the time stipulated, the mortgage of the shares should [177] in lieu of that money only be foreclosed; and they should every year pay the interest; and that on default of payment of interest at the end of the year, "the creditors shall be at liberty to treat it as principal, and to recover it with interest thereon from our person and our other property, and also from the property mortgaged."

By a second deed of mortgage by conditional sale, dated the 3rd May 1876, which recites the previous deed of 21st August 1875, the appellant and his father borrowed from the same lenders "another sum of Rs. 2,997 of the current coin, engaging to pay interest thereon at Rs. 1-8-0 per cent. per mensem; that we tack this money on to the conditions of the former deed of mortgage by conditional sale, engaging to pay it with the amount of the said former deed; that on default of payment of the amount of the former deed or of this one, according to the terms of the former deed, the mortgage of the said shares shall, in lieu of the amount of both deeds, be foreclosed, and the sale shall become absolute."

The time of payment stipulated in the first deed, which was made applicable to both, arrived on the 21st August 1877. No payment having been made, the creditors, on the 18th January 1879, presented an application in the Court of the Subordinate Judge of Gorakhpur, praying that at first the usual process of allowing one year's time should be issued to the mortgagors, and that, if they failed to deposit Rs. 21,066-11-3, the amount of principal and interest then claimed as due, together with future interest and costs of foreclosure, an order might be passed declaring the mortgage to be foreclosed. The record bears under the signature of the Judge, that the application was admitted by the present appellant and his father.

On the 3rd September 1879, the creditors filed an application stating that they had received two sums, together amounting to Rs. 7,452, from two persons, one of whom had purchased the entire village Ramnagra, and the other the 8-anna share of Mauza Tina from the mortgagors. They accordingly prayed [178] that Rs. 7,452 should be deducted from the sum claimed in their original application; that the village Ramnagra and the 8-anna share of Mauza Tina should be exempted from foreclosure; and that the remaining property of the mortgagors should be held liable to foreclosure for the balance of the amount originally claimed by them. The assent of the mortgagors to the application is attested by the signature of the Judge.

After the expiry of the year of grace allowed them for consignment or payment, the mortgagors, between the 4th December 1879 and the 15th May 1886, from time to time presented no less than five incidental petitions to the Court praying for further time. These petitions were, with consent of the creditors applying for foreclosure, confirmed by the Court, and directed to be filed with the foreclosure record. In each of these applications the mortgagors stated the total amount of principal and interest which, at its date, was owing by them under the two mortgage deeds, after deducting the sums paid to account by their vendees. The sum thus stated by them in their last application, on the 15th May 1886, was Rs. 31,444-7-6. Upon that occasion, by consent of the creditors, they obtained an extension of time for three months; but they failed, as usual, either to consign or pay within the time allowed them.

On the 12th December 1887, the creditors filed their plaint in this suit, praying either to have possession on the footing that the prior proceedings had effected a complete foreclosure, or to have the usual foreclosure decree. They claimed that the sum due to them was Rs. 43,450-11-6. In answer, the mortgagors filed a written statement in which they for the first time maintained that the mortgage deeds did not cover interest, at all events beyond the stipulated term of payment, being the 21st August 1877. They did not dispute that, in their repeated applications which have been already referred to, they had constantly admitted and asserted that, under the deeds in question, they were not entitled to redemption, except upon payment of the principal

sums, with interest thereon at Rs. 18 per cent. per annum until [179] paid; and that in respect of such admission and assertion they had got an extension of time with the consent of their creditors. But they contended that none of these proceedings in the Subordinate Court of Gorakhpur could be referred to or founded upon, because they had not been registered in terms of section 17 of Act III of 1877.

It does not clearly appear whether the Subordinate Judge was of opinion that interest was due under the mortgage deeds, and must be paid in order to avoid foreclosure. Had he been of that opinion, it would have been unnecessary for him to consider the effect of the statements and admissions previously made by the mortgagors in order to obtain delay. He held that registration of such proceedings was not compulsory, and that these admissions must receive effect; but, being of opinion that the creditors had taken an undue advantage of the mortgagors' helplessness, he, upon grounds which he describes as equitable, found that the creditors were only entitled to simple interest, and allowed the mortgagors to redeem on payment of Rs. 24,990-15-0, within six months.

Both parties appealed against that judgment to the High Court at Allahabad. In disposing of the cross appeals, the Court, consisting of Sir JOHN EDGE, C.J., and AIKMAN, J., expressed an opinion that the mortgage bonds did not appear to contemplate the payment of interest *post diem*, that is, after the day upon which it was stipulated that the principal of the loans was to be repaid. But they held that the mortgagors, having, from time to time, obtained extensions of the term of payment, by admissions that interest was included in the amount due, could not confine their creditors to such rights as they would have had under the two mortgage contracts standing by themselves. They held that judicial proceedings did not require to be registered under Act III of 1877, section 17; and also that the Subordinate Judge was not justified in finding that an undue advantage had been taken of the mortgagors. They accordingly increased the amount payable for redemption to Rs. 36,492-12-3, taking, as [180] the basis of their calculation, the sum of Rs 33,444-7-6, which the mortgagors had admitted to be due on the 15th May 1886.

The only plea urged for the mortgagors in support of this appeal was that founded upon Act III of 1877, which had been rejected by both Courts below. Their Lordships do not think that, according to the tenor of the mortgage deeds, it was intended that the capital sums should cease to bear interest, upon the arrival of the time stipulated for their payment. The learned Judges in the Courts below appear to have fallen into the error, which was corrected by this Board in *Mathura Das v. Raja Narindar Bahadur Pal*, L. R., 23 I. A., 138, of confining their attention to a single passage, instead of taking into consideration the whole provisions of the deeds with respect to interest. In the present case, by the deed of the 21st August 1875, the whole conditions and provisions of which are made applicable to both loans, it is stipulated, in general terms, that interest at Rs. 18 per cent. per annum is to run upon the principal sums advanced, without any limitation as to the period of its currency. And it is also stipulated that, in default of punctual payment at the end of each year, the creditors are to be at liberty to treat interest as principal, and to recover it from the mortgaged property. It was therefore, in their Lordships' opinion, unnecessary for the creditors, respondents in this appeal, to rely upon the admissions made by the mortgagors in the course of the foreclosure proceedings.

Although, in the view which their Lordships take the question whether those proceedings can be founded on, without their having been registered in

terms of the Act of 1877, does not necessarily arise in this appeal, they think it right to add that, having heard counsel fully upon the point, they are satisfied that the provisions of section 17 of the Act do not apply to proper judicial proceedings, whether consisting of pleadings filed by the parties, or of orders made by the Court.

[181] Their Lordships will, for these reasons, humbly advise Her Majesty to affirm the decrees appealed from, and to dismiss the consolidated appeals with costs.

Appeals dismissed.

Solicitors for the Appellant: Messrs. *Barrow and Rogers*.

Solicitors for the Respondents: Messrs. *Pyke and Parrott*.

NOTES.

[Following this decision, it was held that any compromise dealing with matters within the scope of the suit would be within the exemption:—(1905) 23 All., 78; (1908) 35 Cal., 837; (1909) 33 Mad., 102; 6 M. L. T., 313. See also (1905) 1 C. L. J., 388; (1907) 5 C. L. J., 611; (1900) 4 O. C., 78; (1908) 31 Mad., 330; (1911) 21 M. L. J., 870; (1912) 15 I. C., 741 (All.).]

[20 All. 181]

REVISIONAL CRIMINAL.

*The 11th December, 1897.**

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Fateh Bahadur.*

Criminal Procedure Code, section 555—Jurisdiction—Appellate Court not disqualified by interest from granting permission to a subordinate Court to try a case.

The interest which might disqualify a Court from trying or committing for trial a case, having regard to section 555 of the Code of Criminal Procedure, will not prevent an appellate Court from giving the permission contemplated by that section.

In this case a complaint was lodged against one Fateh Bahadur, a clerk in the employment of the North-Western Provinces Club, of the commission by him of an offence punishable under section 409 of the Indian Penal Code in respect of moneys the property of the members of the Club. The complainant was the Honorary Secretary of the Club. The case came before the Cantonment Magistrate of Allahabad, who, being himself a member of the Club, referred it to the Sessions Judge under section 555 of the Code of Criminal Procedure to obtain his permission to try it. The Sessions Judge was also a member of the Club, and held on this application that the prohibition contained in section 555 inferentially applied to him also and disabled him from giving the permission asked for. He accordingly declined to grant permission to the Cantonment Magistrate to try the case. Against this order of the Sessions Judge the complainant applied in revision to the High Court.

[182] Mr. G. P. Boys for the Applicant.

* Criminal Revision No. 603 of 1897.

Edge, C. J. and Burkitt, J.—A charge under the Indian Penal Code came on for investigation before the Cantonment Magistrate of Allahabad. The person charged had been a servant of the North-Western Provinces Club. He was charged with having committed the offence punishable under section 409 of the Indian Penal Code in respect of moneys belonging to the Club. The Cantonment Magistrate was a member of the Club, and he referred the matter to the Court of the Sessions Judge of Allahabad for permission to proceed with the case. The Sessions Judge was also a member of the Club, and held that as he was interested as a member of the Club he had no jurisdiction. In that he was wrong. There is nothing in section 555 of the Code of Criminal Procedure to suggest that under these circumstances the Sessions Judge of Allahabad had not jurisdiction to grant permission to the Cantonment Magistrate to try the case or commit it for trial.

We set aside the order of the Sessions Judge of Allahabad and direct the present Sessions Judge of Allahabad to consider the reference from the Cantonment Magistrate, as he has jurisdiction to decide whether permission should or should not be given to try, or commit for trial, the accused.

[20 All. 183]
APPELLATE CIVIL.

The 16th December, 1897.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Inayat Husen and others.....Plaintiffs
versus

Ali Husen and others.....Defendants.*

*Limitation—Adverse possession—Possession of usufructuary mortgagees—
Act No. XV of 1877 (Indian Limitation Act), schedule ii, article 144—
Burden of proof.*

The possession of a usufructuary mortgagee being the possession of all the persons who have the right of redemption, that is, of all the persons entitled to the estate, it is only when after redemption possession is taken by some of the persons so entitled that their possession can become adverse as against the others.

[183] In a suit for possession of immoveable property it is for the plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of limitation before the defendant can be called upon to substantiate a plea of adverse possession. *Parmanand Misr v. Sahib Ali*, I.L.R., 11 All., 438, and *Jafar Hussain y. Mashuq Ali*, I. L. R., 14 All., 193, referred to.

In dealing with the question of possession as between brothers and sisters in native families regard must be had to the conditions of life under which such families live, and to the fact that in such families the management of the property of the family is by reason of

* First Appeal No. 238 of 1894 from a decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Meerut, dated the 17th August 1894.

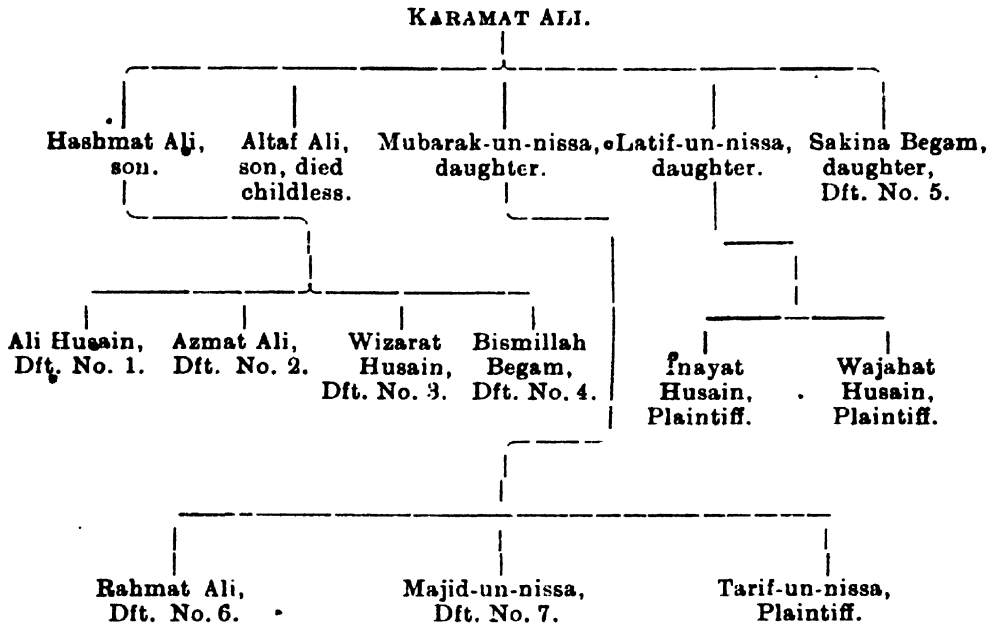
the seclusion of the female members, ordinarily left in the hands of the male members. In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession. *Fazal Karim v. Umda Bibi*, Weekly Notes, 1884, p. 171, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal and *Maulvi Ghulam Mujtaba*, for the Appellant.

Pandit Moti Lal, for the Respondent.

Banerji and Aikman, JJ. :—The following pedigree shows the relationship between the principal parties to the suit out of which this appeal has arisen :—



[184] The property in suit originally belonged to Karamat Ali, who died about fifty years ago, leaving him surviving his two sons and three daughters, who were heirs to his estate. The names of his sons alone, however, were entered in the revenue papers, and on the death of Altaf Ali the name of Hashmat Ali alone was recorded, although the right to his share devolved on his surviving brother and sisters. Upon Hashmat Ali's death the names of his sons and daughter, who are the first four defendants to the suit, were entered in respect of the whole property.

The first and second plaintiffs are the sons of Latif-un-nissa, and the third plaintiff is a daughter of Mubarak-un-nissa. The fourth plaintiff is the purchaser from the other plaintiffs of a portion of what is alleged to be their share of the estate of Karamat Ali and she is evidently financing the suit. The extent of the legal share of the first three plaintiffs is 35 sihams out of 140, i.e., one-fourth.

The plaintiffs allege that they have all along been in possession of their share jointly with the other heirs of Karamat Ali, but the first four defendants now dispute their title. The plaintiffs therefore brought this suit for establishment of their right to a fourth share, for possession of that share and for partition of certain houses.

The main defence to the suit was that of limitation. The lower Court has allowed it and has dismissed the claim.

As regards a portion of the property claimed, namely, the resumed *muafi* lands in kasba Khurja, the plea of limitation cannot prevail. Those lands were mortgaged by the ancestor and were in the possession of the mortgagee. The mortgage having been discharged out of the usufruct, it was redeemed by the defendants Nos. 1 to 4 in 1888, when they took possession. The possession of the mortgagee was the possession of all the persons who had the right of redemption, that is, of the persons entitled to the estate. It was only when, after redemption, possession was taken by the first four defendants that their possession became adverse to the plaintiffs. As the suit was brought within twelve [185] years from the date of the defendants' possession, it was, as regards this part of the claim, within time. The Court below has evidently erred in dismissing this portion of the claim as barred by limitation. There is no question as to the title of the plaintiffs and the extent of their share. So far as the *muafi* lands are concerned their title has not become extinct by lapse of time, and they are entitled to a decree.

With regard to the remainder of the property it is contended that the suit is governed by article 144 of the second schedule to Act No. XV of 1877, and that the burden of proof was on the defendants to establish the adverse possession alleged by them. In our opinion in every suit for possession, the plaintiff must prove not only a legal title to possession, but a subsisting title not barred by the law of limitation. The effect of that law is not only to bar the remedy on the expiry of the prescribed period of limitation, but to extinguish the right (*vide* section 28 of Act No. XV of 1877). It is therefore for the plaintiff to show by some *prima facie* evidence that he has a subsisting title not extinguished by the operation of limitation before the defendant can be called upon to substantiate his plea of adverse possession. This was held by this Court in *Parmanand Misr v. Sahib Ali*, I.L.R., 11 All., 432, and *Jafar Husain v. Mashuq Ali*, I.L.R., 14 All., 193.

The quantum of evidence which it will be necessary for the plaintiff to adduce will depend on the circumstances of each case. In some instances very slight evidence may be sufficient to shift the burden of proof on the defendant. We agree with the observation of the learned Judges in *Fazal Karim & Umda Bibi*, Weekly Notes, 1884, p. 171, that in dealing with the question of possession as between brothers and sisters in native families regard must be had "to the conditions of life under which such families live" and to the fact that in such families the management of the property of the family is, by reason of the seclusion of the female members, ordinarily left in the hands of the male members. [186] In the case of such families slight evidence of enjoyment of income arising from the property is sufficient *prima facie* proof of possession. In the suit before us the evidence adduced by the plaintiff hardly amounts to such proof.

[The rest of the judgment in this case deals mainly with the evidence in the case and therefore is not reported—Ed.]

NOTES.

[As regards the onus of proof of possession, see also (1912) 17 I. C., 518 (All.); (1906) 28 All., 760; (1905) 9 O. C., 91.

As regards the presumption of management in the case of female relatives, see also (1911) 10 I. C., 413 (All.); (1901) P. R., 105.]

[20 All. 186]

REVISIONAL CRIMINAL.

The 18th December, 1897.

PRESENT :

MR. JUSTICE BLAIR.

Queen-Empress

versus

Lalta Prasad. *

Act No. XI of 1890 (Prevention of Cruelty to Animals Act), section 6 (1)—Meaning of the word "permit."

Held, that the word "permits" as used in section 6, clause (1), of Act No. XI of 1890, implies knowledge of that which is permitted.

THIS was a reference under section 438 of the Code of Criminal Procedure made to the High Court by the Officiating District Judge of Saharanpur on an application for revision of an order passed by the Joint Magistrate.

The facts of the case are thus stated in the referring order:—"The applicant is a resident of the district of Farrukhabad, and is the sole proprietor of a Company carrying goods and passengers between Saharanpur and Rajpur. He carries on business under the style of Lalta Prasad & Co. The local manager of the business is Lalta Prasad's nephew Janki Das. It is admitted that he has complete control of the management, and that he has various other local managers, clerks and drivers under him. Applicant was prosecuted under section 6 (1) of Act XI of 1890 (The Prevention of Cruelty to Animals Act), and fined Rs. 100, for permitting to be driven in a tonga a horse which was suffering from severe harness galls and excessive weakness. The only point taken by Mr. Vansittart for petitioner is that Lalta Prasad cannot be said to have 'permitted' the unlawful use of the animal. It is admitted that Lalta Prasad is a respectable man, that he usually resides at [187] Farrukhabad and rarely comes here, and that he was at Farrukhabad when the alleged cruelty was committed."

Under these circumstances the Sessions Judge was of opinion that the applicant could not be said to have "permitted" the alleged cruelty within the meaning of the Act.

Mr. A. E. Ryves, in support of the Reference.

The Government Advocate (Mr. E. Chamier), for the Crown.

Blair, J.—This is a case which has been submitted to this Court under section 438 of the Code of Criminal Procedure, with the recommendation that the order of conviction should be quashed. The person convicted is unquestionably a resident of Farrukhabad. He made it his business to let out horses and ponies on hire, and a certain pony, his property, was being used, and cruelly used, on the high road between Saharanpur and Rajpur. The driver who committed the ill-usage was his servant; the nature of the ill-usage was this, that the pony was driven when it was, through collar galls, quite unfit to be so driven. The question is whether the owner "permitted" such illegal employment of the animal. The word "permit" has a well-known meaning, and, unless under very exceptional circumstances, implies knowledge of that which

is-permitted. Such knowledge, it is not suggested, was in the possession of the owner of the pony. Mr. *Chamier* has been instructed to call my attention to two cases in the English Reports, in which a larger meaning has been given to the word "permit" than that which it bears in common parlance. One case is reported in 13 Law Journal, C. P., page 319; the other is reported in Law Reports, 12 Q.B., page 639. In one case the person convicted was the owner of a licensed Music Hall. The other was a case of a Railway Company. I do not think the special circumstances existing in those cases have any parallel in this, and I am not aware of any case arising in an Indian Court in which the word "permit" has been interpreted, in a quasi-criminal case, in any meaning more extensive than that which it obtains in common parlance. No doubt the decision of this case adversely to the conviction will [188] materially limit the usefulness of the Act. That is a conclusion which I cannot obviate if the plain wording of the Act seems to me to make for the more limited construction. I therefore reluctantly set aside this conviction and order the fine, if paid, to be at once returned.

[20 All. 188]

APPELLATE CIVIL.

The 22nd December, 1897.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Tikam Singh and others.....Defendants
versus
Thakur Kishore Ramanji Maharaj, through
Sheo Gopal and others.....Plaintiffs.*

Civil Procedure Code, sections 32 and 108—Powers conferred by section 32 exerciseable even after an order has been passed under section 108.

Held, that the powers conferred by section 32 of the Code of Civil Procedure in respect of the addition of parties were exerciseable even after a suit had been reinstated on an application under section 108 of the Code made by one of the defendants who had not been served with notice of the suit.

IN this case a suit for sale under the Transfer of Property Act was brought by the trustees of a certain temple against Magan Behari Lal, Tikam Singh his son, and other defendants. In that suit a decree for sale was made. Subsequently Tikam Singh, who had not been served with notice of the suit, applied under section 108 of the Code of Civil Procedure to have the decree set aside as against him, and it was accordingly set aside. After the suit as against Tikam Singh had been reinstated on the file of pending suits, the plaintiffs made an application under section 32 of the Code of Civil Procedure praying

* First Appeal from Order No. 112 of 1896, from an order of Maulvi Syed Muhammad Seraj-ud-din, Subordinate Judge of Agra, dated the 18th, November 1896.

that a minor brother of Tikam Singh, and Tikam Singh's two minor sons should be brought upon the record as defendants, they being all members of the same joint Hindu family and parties interested within the meaning of section 85 of the Transfer of Property Act. This application was granted and the names of the minors were put on the record of the suit. Against this order Tikam Singh appealed to the High Court.

[189] *Munshi Ram Prasad*, for the Appellants.

Mr. D. N. Banerji, for the Respondents.

Edge, C. J., and Burkitt, J.:—A suit for sale under the Transfer of Property Act was brought against Tikam Singh and others. A decree for sale was made. Subsequently Tikam, who had not been served with notice of the suit, presented an application under section 108 of the Code of Civil Procedure to have the decree set aside as against him, and it was accordingly set aside. Thereupon the plaintiffs applied to have Tikam's minor brother and his two minor sons brought on under section 32 of the Code of Civil Procedure as defendants, they being all members of a joint Hindu family and parties interested within the meaning of section 85 of the Transfer of Property Act. The Court made an order bringing the minors on the record. From that order this appeal has been brought. It appears to us that, as the suit was still at hearing before the Court of First Instance, so far as the plaintiffs and Tikam Singh were concerned, the Court could exercise its discretion under section 32 of the Code and add these defendants. We cannot say that the Court exercised its discretion wrongly. Such a case as this can but seldom occur, but in similar cases a Court should be cautious in making an order under section 32 of the Code of Civil Procedure. Here the parties brought on were all in the same interest. Other cases might occur in which the interests might be conflicting. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See also (1905) 32 Cal., 493.]

[20 All. 189]

The 23rd December, 1897.

PRESENT :

MR. JUSTICE AIKMAN.

Pran Nath Ghose.....Petitioner

versus

Jado Nath Bhattacharji.....Opposite Party.*

Act No. V of 1881 (Probate and Administration Act), section 9—Application for probate by an executor.

Although under section 85 of the Probate and Administration Act, 1881, it is within the discretion of the Court to refuse to grant an application for [190] letters of administration, no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. *Heera Coomar Sircar v. Doorgamoni Dasi*, I. L. R., 21 Cal., 195, referred to.

*First Appeal from Order No. 79 of 1897, from an order of C. L. M. Eales, Esq., District Judge of Benares, dated the 10th July 1897.

THIS was an appeal arising out of an application for probate of a will under section 9 of Act No. V of 1881. The applicant, Babu Pran Nath Ghose, and the opposite party, Babu Jado Nath Bhattacharji, were the two executors of the will of Musammat Sonamani Dasi. Jado Nath took out probate of the will in the Court of the District Judge of Benares on the 9th May 1896. Pran Nath seems to have declined to take any part in carrying out his duties as executor, and in fact seems to have been sued by Jado Nath in the Court of Small Causes for the recovery of moneys in his possession belonging to the estate of the testatrix. Subsequently, on the 17th of March 1897, Pran Nath applied to the Court of the District Judge for probate to be granted to him of the will of Musammat Sonamani. This application was opposed by Jado Nath and was dismissed by the Judge, chiefly, it would appear, on the ground that the applicant had been sued by the opposite party in his capacity as executor and a decree had been passed against him in the Benares Small Cause Court. From this order the applicant appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the Appellant.

Babu Satish Chandra Banerji, for the Respondent.

Aikman, J.:—This appeal arises out of an application made under the Probate and Administration Act of 1881 for probate of a will. On the 20th of December 1895, Musammat Sonamani, a Hindu lady, executed a will, in which she named the appellant Pran Nath Ghose and the respondent Jado Nath Bhattacharji executors of the will. On the 9th of May 1896, the latter applied for and obtained probate of the will from the District Court of Benares. On the 17th of March 1897, the appellant also applied for probate of the will. This application was refused by the learned District Judge, and the applicant appeals to this Court. The appeal must succeed. Section 9 of the Act provides [191] that when several executors are appointed probate may be granted to all simultaneously or at different times. If the applicant is an executor named by the will and is under no legal incapacity to act, the Court has no option but to grant him probate. Section 85 of the Act enacts that it is within the discretion of the Court to refuse to grant an application for letters of administration, but no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. The case of *Heera Coomar Sircar v. Doorgamoni Dasi*, I. L. R., 21 Cal., 195, is in point. I decree the appeal, with costs here and in the Court below, and direct the District Judge to grant the application.

Appeal decreed

[20 All. 191]

The 23rd December, 1897.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Raghunath Kuari and another.....Defendants

versus

Munnan Misr.....Plaintiff.*

Hindu law—Mitakshara—Succession—Sister's son.

Held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. *Thakoorain Sahiba v. Mohun Lall*, 11 Moo. I. A., 386; *Rao Kurun Singh v. Nawab Mahomed Fyz Ali Khan*, 14 Moo. I. A., 187; *Amrita Kumari Debi v. Lakee Narain Chakrabutty*, 10 W. R., F. B., 76; *Girdhari Lall Roy v. The Bengal Government* 12 Moo. I. A., 448; *Naraini Kuar v. Chand Din*, I. L. R., 9 All., 467; and *Umaid Bahadur v. Udoi Chand*, I. L. R., 6 Cal., 119, referred to.

THIS was a suit to set aside a deed of gift. The plaintiff was the nephew—sister's son—of one Nand Gopal Pande. Nand Gopal died some twenty years before suit and his widow Raghunath Kuari succeeded to the property left by him. On the 29th of April 1894 the widow executed a deed of gift of the property left by Nand Gopal in favour of one Hub Lal, a stranger to the family. The plaintiff thereupon sued to have the deed of gift [192] executed by the widow set aside on the grounds that the property with which it dealt was ancestral and that he (this plaintiff) was the reversioner to the estate of Nand Gopal. The Court of First Instance (Subordinate Judge of Mirzapur) gave the plaintiff a decree so far as the immovable property dealt with by the deed of gift was concerned, but dismissed the suit in respect of the movable property entered in the deed. The defendants appealed. The Lower Appellate Court (Officiating District Judge of Mirzapur) dismissed the appeal.

The defendants thereupon appealed to the High Court.

Mr. W. Wallach, for the Appellants.

Munshi Ram Prasad and Babu Bishnu Chandar, for the Respondent.

Blair and Aikman, JJ.—The appellant Musammat Raghunath Kuari is the widow of one Nand Gopal, who died upwards of twenty years ago leaving certain immovable property. Nand Gopal died without any issue. On the 29th of April 1892, Musammat Raghunath Kuari executed a deed, in which, after a recital that she is in sole and exclusive possession of the above-mentioned immovable property, she declares that after her death one Hub Lal, a minor, who is unconnected with the family, shall be full owner of this property and of certain movable property. This deed was registered on the 6th of May 1892. The plaintiff, who is respondent in this appeal, is the son of Nand Gopal's sister. He came into Court on the allegation that the above deed was invalid, inasmuch as Musammat Raghunath Kuari, a childless widow, had no power to make a transfer of the property. He prayed for the cancellation of the deed. He obtained a decree from the Subordinate Judge declaring that the deed, so far as it related to the immovable property, should be of no effect after the death of Musammat Raghunath Kuari. The deed, so far as it related to the movable property, was upheld. On appeal this decree was affirmed by

* Second Appeal No. 63 of 1895, from a decree of Kuar Juala Prasad, District Judge of Mirzapur, dated the 2nd May 1895, confirming a decree of Rai Pandit Indar Narain, Subordinate Judge of Mirzapur, dated the 20th September 1894.

the learned District Judge. This second appeal has been brought by Musammat Raghunath Kuari and the minor Hub Lal, who was made a defendant to the suit.

[193] The learned counsel who argued the case on behalf of the appellant, put forward two contentions. The first of these was that the execution of the deed in question gave the plaintiff no right of action. We are of opinion that this contention cannot be sustained. We consider that it is immaterial whether the deed be regarded as a deed of gift or as a will. In this deed Musammat Raghunath Kuari undoubtedly asserts a full ownership to the property to which the plaintiff claims he is entitled to succeed on her death. The deed was registered by her in a public office. We consider that there is no doubt that the action of Musammat Raghunath Kuari threw a cloud upon the plaintiff's title, and that it is open to the Court under the provisions of section 42 of the Specific Relief Act, 1877, to make the decree which it did make as against Musammat Raghunath Kuari. But we are so far with the learned counsel in that we hold that the plaintiff had no cause of action against the minor Hub Lal, inasmuch as the latter had done nothing to assert any title or claim under the deed in his favour. We think that the decree of the lower Court must be modified by dismissing the minor from the suit.

The next contention upon which the learned counsel* for the appellant relied in assailing the decree of the Courts below was that a sister's son is no heir according to the Mitakshara law, by which the parties are governed. It is found by the lower Courts that the deceased Nand Gopal left no nearer heirs than the plaintiff. The learned counsel for the appellant contends on the authority of two rulings of the Privy Council, namely, *Thakoorain Sahiba v. Mohun Lall*, 11 Moo. I. A., 386, and *Rao Kurun Sing v. Nawab Mahomed Fyz Ali Khan*, 14 Moo. I. A., 187, that a sister's son is no heir according to the Hindu law. The former of these rulings was considered by a Full Bench of the Calcutta High Court in the case of *Amrita Kumari Debi v. Lakee Narain Chakrabutty*, 10 W. R., F. B., 76, and it was held that it could not be looked on as an authoritative [194] decision against the rights of the sister's son. We entirely concur in the view which was taken by the Calcutta High Court as to the effect of the decision of their Lordships of the Privy Council. In the second case relied on by the learned counsel, it is true that their Lordships observed, at page 196 of the judgment:—"It is clear that the sister and her descendants find no place in the tables of succession according to the law of the Mitakshara." But it is clear from the judgment that it was not necessary for the Privy Council in this case to decide as to the rights of a sister's son, inasmuch as the point had not been taken in the lower Court. This cannot, in our opinion, be looked on as an authoritative decision binding upon us adverse to the rights of the sister's son. It is true that the sister's son is not mentioned in the Mitakshara, amongst other relatives capable of taking by inheritance the property of a deceased Hindu in preference to the king. But, as was held by their Lordships of the Privy Council, in the case of *Girdhari Lal Roy v. The Bengal Government*, 12 Moo. I. A., 448, at p. 465, the text of the Mitakshara "does not purport to be an exhaustive enumeration of all Bandhus who are capable of inheriting, nor was it cited as such, or for that purpose by the author of the Mitakshara; it is used simply as proof or illustration of his proposition, that there are three kinds of classes of Bandhus." In the case just referred to it was held that a maternal uncle is an heir. Their Lordships observed that such an inference, i.e., that a maternal uncle was incapable of taking the property of a deceased Hindu "in the teeth of the passages which say that the king can take only if there be no relatives to the deceased, seems to be violent and unsound." We are of opinion that this observation applies with equal

force to the case of the sister's son? In the judgment just quoted their Lordships referred, if not with approval, at all events without disapproval, to the Full Bench decision of the Calcutta High Court which has been mentioned above. In the case *Naraini Kuar v. Chandi Din*, I. L. R., 9 All., 467, this Court, referring to the Full Bench case of the Calcutta [195] High Court, and to another case—*Umaid Bahadur v. Udoi Chand*, I. L. R., 6 Cal., 119,—observed:—"All that these authorities, as it appears to us, establish is that, according to the Mitakshara, which is the law prevailing in these Provinces as to inheritance among Hindus, a sister's son may be heir to his mother's brother, a proposition which appears at one time to have been doubted."

On a review of all the authorities we have no hesitation in coming to the conclusion that, in the absence of nearer relatives, a man may be heir to his mother's brother as regards property which is governed by the Mitakshara law of inheritance. This disposes of the second contention of the learned counsel for the appellant. The result is that we modify the decree of the Lower Appellate Court by dismissing the suit as against the minor Hub Lal. As the appeal has substantially failed, the respondent will have his costs in this Court.

Decree modified.

NOTES.

[As regards the test of *sapindaship* the latest authority is the decision of the Privy Council in (1914) 42 Cal., 384.]

[20 All. 195]

The 23rd December, 1897.

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Shankar Dat Dube.....Applicant

versus

Radha Krishna.....Decree-holder.*

Civil Procedure Code, section 108—Decree ex parte—Appearance—Pleader retained in suit but not instructed.

A party defendant retained a pleader to defend the suit against him, and the pleader filed a vakalatnamah and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically, that he had retired from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff.

Held that this decree was a decree *ex parte* within the meaning of section 108 of the Code of Civil Procedure. *Bhagwan Das v. Hira*, I. L. R., 19 All., 355, and *Jonardan Dohy v. Ramdhons Singh*, I. L. R., 23 Cal. 738, referred to. *Sahibzada Zein-ul-abdin Khan v. Ahmad Raza Khan*, L. R., 5 I. A., 238, distinguished.

THE facts of this case are fully stated in the judgment of the Court.

[196] Pandit Sundar Lal and Munshi Kalindi Prasad, for the Appellant—Messrs. T. Conlan and D. N. Banerji, for the Respondent.

Edge, C. J., and Blair, J.:—Rai Radha Krishna brought a suit against Shankar Dat Dube, then Raja of Jaunpur, on a bond alleged to have been given

* First Appeal No. 2 of 1897, from an order of Munshi Mata Prasad, Subordinate Judge of Benares, dated the 8th October 1896.

by the Raja's deceased elder brother. • The Raja entered an appearance, filed a written statement and appointed pleaders to act for him. One of those pleaders was one Satish Chandar, a pleader practising at Benares. The suit in question was filed in the Court of the Subordinate Judge of Benares, and the vakalatnamah which was given by the Raja authorised Satish Chandar and the other pleaders therein named to conduct the suit on behalf of the Raja, and to answer any questions, &c. Satish Chandar obtained more than one adjournment, and on the 31st of January 1896, he obtained an adjournment until the 19th of March in that year. On the 19th of March when the suit was called on for hearing and disposal, Satish Chandar stated that no one had come near him on the part of the Raja, and that he had no instructions. Thereupon the Subordinate Judge proceeded to dispose of the suit upon the evidence on the record, and, arriving at a finding in favour of the plaintiff, made a decree for the plaintiff. Raja Shankar Dat Dube subsequently applied to the Subordinate Judge under section 108 of Act No. XIV of 1882 for an order to set aside the decree. The Subordinate Judge, without considering whether Raja Shankar Dat Dube was prevented by sufficient cause from appearing and maintaining his defence at the hearing on the 19th of March 1896, dismissed the application on the ground that the decree in question which he had passed against Raja Shankar Dat Dube was not a decree passed *ex parte*. He appears to have arrived at that conclusion because he considered that on the 19th of March 1896, the Raja was represented by Satish Chandar having instructions. This is an appeal from that order.

Although Satish Chandar was still the wakil of the Raja, and under his vakalatnamah had full authority to act in the suit [197] within the limits of that vakalatnamah for the Raja he stated that he had no instructions. We understand from that, that he had practically retired from the case. It is difficult to understand how a pleader, even in the Court of the Subordinate Judge of Benares, can conduct a case for the defendant without instructions. It appears to us that the decisions of the Court in *Bhagwan Dai v. Hira*, I. L. R., 19 All., 355, and of the High Court at Calcutta in *Jonardan Dobey v. Ramdhone Singh*, I. L. R., 23 Cal., 738, are authorities in favour of the contention of the appellant that an application lay in this case under section 108 of Act No. XIV of 1882. On the other hand we have been pressed by the learned counsel for the plaintiff decree-holder with the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan v. Sahibzada Ahmad Raza Khan*, L. R., 5 I. A., 233; s. c., I. L. R., 2 All., 67. The procedure which the Subordinate Judge must, in our opinion, have adopted was that under section 157 of Act No. XIV of 1882. That section makes applicable, so far as may be, to cases coming within the section the procedure of Chapter VII of the Code. Section 157 apparently relates to a later period in the litigation than the sections which are to be found in Chapter VII, but there is no difficulty in ascertaining the rule to be followed in cases under section 157 by reference to Chapter VII. It has been contended for the plaintiff decree-holder that the effect of the decision of their Lordships of the Privy Council in *Sahibzada Zein-ul-abdin Khan v. Sahibzada Ahmad Raza Khan*, L. R., 5 I. A., 233; s. c., I. L. R., 2 All., 67, is that there can be no decree which can be called a decree *ex parte* against a defendant who has at any time and on any occasion before the decree is made put in an appearance in the suit, although at the hearing he may have been absent and unrepresented, or may have had present merely a pleader who had no instructions. In our opinion the decision of their Lordships of the Privy Council merely referred to the opening paragraph of section 119 of Act No. VIII of 1859. That section itself shows quite

clearly that [198] there can be *ex parte* decrees against defendants whether or not they have put in appearances in the suit. The prohibition of an appeal in the earlier part of section 119 is limited, to apply the decision of their Lordships of the Privy Council, to a case in which the defendant had not put in any appearance at all. In our opinion the decision of their Lordships of the Privy Council has no bearing on the case before us here.

We hold that this was a decree passed *ex parte* against a defendant within the meaning of section 108 of Act No. XIV of 1882 for, although the defendant's pleader was physically present in Court, he was not there representing the defendant in the suit. We set aside the order under appeal, and we remand this case under section 562 of Act No. XIV of 1882 to the Court of the Subordinate Judge to be disposed of on the merits. We make this order with costs to the representative of Raja Shankar Dat Dube.

Appeal decreed and cause remanded.

NOTES.

[The Privy Council affirmed this decision in (1900) 23 All., 220.

In accordance with the explanation of 'appearance' herein are these decisions :—(1898) 23 Bom., 414; (1899) 22 All., 66; (1907) 34 Cal., 403; (1908) 31 Mad., 505; (1907) 1 S. L. R., 115; see also (1893) 20 All., 294.]

[20 All. 198]

The 4th January, 1898

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Udit Narain Singh and others.....Defendants

versus

Shib Rai.....Plaintiff.*

Cause of action—Suit for damages for removal of crop—Defendant entitled to possession under decree of a competent Court of Revenue—Plaintiff in actual possession under an illegal decree of a Civil Court—Trespass.

A held a decree of a competent Court of Revenue for possession of certain land as against B, and obtained under that decree formal possession of the land. B, however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. B removed his crop, and thereafter sued in a Civil Court for a declaration that he was A's tenant of the land in question holding occupancy rights. A did not defend the suit, and the Civil Court passed a declaratory decree in favour of the plaintiff, and further proceeded to execute that declaratory decree by putting B in possession. Subsequently B sued A for damages in respect of the alleged removal by A of a second crop, which he asserted that he (B) had sown upon the said land.

Held that B had no cause of action, and that even if in fact he had sown the crop in respect of which damages were claimed, he did so at his own peril and as a trespasser.

[199] THE facts of this case are sufficiently stated in the judgment of the Court.

Mr. A. E. Ryves, for the Appellants.

Munshi Gulzari Lal, for the Respondent.

Edge, C. J. and Burkitt, J. :—This was a suit for damages based upon an allegation that the defendants wrongfully cut and appropriated the plaintiff's

* First Appeal No. 50 of 1897, from an order of J. W. Muir, Esq., District Judge of Farrukhabad, dated the 12th May 1897.

crop. The facts of the case, so far as they are material, are as follows :—The principal defendant, namely, Raja Udit Narain Singh, obtained an order or decree from a competent Court of Revenue establishing his title to possession of the land and establishing the fact that the plaintiff had got no title, and, the plaintiff being in possession, the Court of Revenue decreed possession to the Raja and gave him formal possession. At that time a crop of the plaintiff's was growing on the land, and the amin, apparently overlooking the fact that section 42 of the Rent Act (Act No. XII of 1881) did not apply to the case, allowed the plaintiff to continue in such necessary possession as would be requisite for gathering and removing the crop: possession of the land was given to the Raja. The plaintiff gathered and removed the crop, and thereafter brought a suit in a Civil Court for a declaration that he was a tenant of the Raja of the land in question holding occupancy rights. That suit did not lie in the Civil Court, which had no jurisdiction to entertain it. The suit was one which came under section 95 of Act No. XII of 1881. It was liable to be defeated also on another ground, namely, that, if the plaintiff was entitled, he was not in possession and could have sought consequential relief. For some reason the suit was undefended, probably through an oversight, or through indifference as to what the Civil Court might do in a suit which was not within its jurisdiction. This plaintiff got a decree declaring that he was entitled as an occupancy tenant. The Civil Court, having granted him a declaration of title in a suit in which it had no jurisdiction to interfere, next proceeded to execute its declaratory decree by giving this plaintiff possession, overlooking the fact that the only execution [200] of a declaratory decree is for such costs as may be decreed and may not have been paid. This plaintiff alleges that he sowed the crop in respect of which this action is brought. If he sowed the crop, he sowed it as a trespasser. He had got neither title nor lawful possession. The first Court dismissed this suit. The Court of first appeal set aside the decree of the first Court, and made an order under section 562 of the Code of Civil Procedure. From that order this appeal has been brought. The plaintiff had no cause of action. If in fact the plaintiff did sow the crop in question, which is disputed, he did so at his own risk and as a trespasser. We allow this appeal, and, setting aside the order of the Court of first appeal, we dismiss the appeal to that Court and restore the order of the first Court. The appellant here will have his costs of this appeal and of the appeal to the Court of first appeal.

Appeal decreed.

[20 All. 200]

The 12th January, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

The Municipal Board of Cawnpore.....Defendants
versus

Lallu and another.....Plaintiffs.*

Customary right—prescription—Ghat dedicated to the public—Right to occupy specific portion of ghat not susceptible of acquisition by prescription—Gangaputras.

Held that no exclusive right of occupation could be acquired by prescription in any specific portion of a bathing ghat the use of which was dedicated to the public. *Husain Ali v. Matukman*, I. L. R., 6 All., 39, followed. *Tyron v. Smith*, 9 A. and E., 406, and *Turner v. Ringwood Highway Board*, L. R., 9 Eq., 418, referred to.

THE facts of this case are fully stated in the judgment of the Court.

The Government Advocate (Mr. E. Charnier) and subsequently the officiating Government Advocate (Mr. A. E. Royve), for the Appellants.

Pandit Moti Lal, for the Respondents.

[201] Blair, J.—This suit is brought by Lallu and Murli Dhar, two brothers, for the relief that, by a declaration of the rights of the plaintiffs and removal of the illegal interference offered by the defendants and the invalidation of the orders of the Municipal Board of Cawnpore, a decree may be passed in favour of the plaintiffs allowing them to sit whenever they please at their old seats mentioned below at the Sarsaiya ghat on the bank of the Ganges in the city of Cawnpore to attend to their jajmans at the time of bathing and other religious performances, and to receive their dues and presents, &c., as usual from them with their consent.

The plaintiffs are Gangaputras, and have no doubt themselves, as have, it is alleged, their ancestors, exercised their functions upon the Sarsaiya ghat. Others of the same class have done the same. What they claim is a right as Gangaputras to occupy to the exclusion of all other persons certain particular defined and measured spots upon the ghat. Their claim is based exclusively upon prescription. The defendants are the Municipal Board of Cawnpore, and, in the absence of proof to the contrary, must be presumed to have been acting within their jurisdiction in relation to the matters complained of, unless their right of control and interference is limited by some right acquired by the plaintiffs. No argument has been addressed to us questioning their general jurisdiction. The history of the ghat is not absolutely clear, but this much we can gather from the pleadings and the admissions of the parties, that there has been at some time, probably remote, a dedication of the ghat to the use of pilgrims desiring to perform their spiritual ablutions in the sacred river. Beyond doubt for the proper performance of those ablutions and accompanying ceremonies the services of Gangaputras would be required. We have nothing before us to show that the plaintiffs claim any interest in the soil upon which the ghat stands. Their allegation amounts simply to this:—"We and our ancestors as Gangaputras, and for the performance of our functions of Gangaputras,

* Second Appeal No. 891 of 1895, from a decree of Babu Madho Das, Additional Subordinate Judge of Cawnpore, dated the 2nd May 1895, reversing a decree of Babu Banke Bihari Lal, Munsif of Cawnpore, dated the 27th September 1894.

have continuously and for an indefinite time occupied, [202] to the exclusion of all other Gangaputras and of all other persons whatsoever, the particular spots which we claim. We are, therefore, they say, entitled as of right now and in the future to use those spots as we have done heretofore." It was upon that ground that the Subordinate Judge in appeal decreed their suit, which had been dismissed upon the ground of limitation in the Court of First Instance.

The judgment, the appeal against which we are now hearing, is one of the most inadequate and perfunctory performances that has ever come before us. It deals with and discusses none of the questions of law, serious and important as they are, raised in this case. It assumes that the user alleged by the plaintiffs would, if proved, be a sufficient basis of title in the present and for the future. The defendants in their written statement alleged, and it is nowhere denied, that the land of the ghat belongs to Government, and that the management and protection of such lands as are situate within the limits of the Municipality are under their control. The interference of which the plaintiffs complain was, the defendants allege, an arrangement by them of the seats to be occupied by the Gangaputras at such places as the defendants thought proper, and they contend that the plaintiffs have no right to object to such arrangement.

The defendants also, in answer to the claim by virtue of prescription, allege that the plaintiffs have not had uninterrupted user or user, as of right, upon the ghat, but that such user has periodically been prohibited by them one day per year from 1870 up to the present date.

That is one of the important pleas which appeared unworthy of the notice of the Subordinate Judge, and yet, if that were established, coupled with the absence of proof that such interruption had ever been contested by any person interested, the strongest presumption would have been raised that the occupation by the plaintiffs of the part of the ghat occupied by them was permissive only and was not an occupation as of right. Indeed, it would have been possible upon that single plea to have dismissed the suit of the plaintiffs. [203] There are, however, questions raised in this case of larger scope, which may well be decided in this appeal, inasmuch as they may affect other similar claims in which particular incidents to be found in this case are absent. It is only fair to say that Mr. *Moti Lal*, for the respondents, frankly admitted that the claim of the plaintiffs could not in point of law be described as an easement. It is enough therefore to say that, inasmuch as the claim of the plaintiffs was not based upon any allegation of right either in the soil of the ghat or in any other soil to which their user of the ghat was appurtenant, and inasmuch as neither the English nor the Indian law recognizes such a right as an easement in gross, the plaintiffs have to establish their claim upon some other basis.

Mr. *Moti Lal* contended then that the right of the plaintiffs was of the nature of a customary right and fell within the scope and meaning of section 18 of the Easements Act of 1882. We fail to see the applicability of that section to the facts of the case. The illustrations given both imply some right of ownership, occupation or habitation of some particular place. A number of cases have been brought to our attention, of which perhaps the most important one is that of *Tyron v. Smith*, 9 A. and E., 406. That was a suit in which the lord of the manor sued in trespass a person who had erected or begun to erect a booth upon some part of his estate. The defendant's statement was, put shortly, that by ancient custom a public fair was held upon that manor, and that for the convenience of persons frequenting it all victuallers were

allowed from time immemorial to erect booths for the supply of refreshments. It was held that the custom had been proved and that it was a reasonable custom. That case in no way helps the contention of the respondent. The right pleaded was really the right of the public to have stalls erected for their refreshments and not an exclusive right claimed by one of the victuallers to occupy any particular spot. And it may be taken generally that the English law recognizes no right of the nature of easements, and not being easements, other than public as distinct from private rights, though such rights may be [204] limited to the inhabitants of a manor or township, but within that limit they are *publici* and not *privati juris*. In the present case it appears manifest, indeed it is not denied, that the dedication of the ghat must have been a dedication to the use of the public desiring, according to their religion, to use the water of the river, and such right conveyed by such dedication does not seem to carry with it any restriction upon the number of Gangaputras who might wish to perform their functions upon their disciples, nor does it imply a right of any particular Gangaputras to occupy to the exclusion of other Gangaputras any particular spot. A case has been decided in this Court by two Judges which seems to us a sufficient authority for the contention of the appellants in this appeal. It is the case of *Husain Ali v. Matukman*, I. L. R., 6 All., 39. The plaintiff's suit in that case was dismissed on the ground that no right of any sort to the soil of the ghat or any portion thereof was asserted by the plaintiff or shown. The *dictum*, broadly laid down, is in our opinion equally applicable to the facts of the present case, which do not substantially differ from those of the reported case. Now in this case also no right to the soil of the ghat or any portion thereof is asserted by the plaintiffs or shown, and under such circumstances, following the decision above cited, we hold that the plaintiffs cannot maintain a claim to the exclusive use of the ghat for the purpose of collecting alms or fees to the exclusion of other persons. The *ratio decidendi* in *Husain Ali v. Matukman* appears to us open to no exception. It matters not in our opinion that the claim in this case refers only to a part of the ghat, and that opinion is amply supported by authority. I see no reason to find that there is any difference in principle between the dedication of a ghat to the public use and the dedication of a high road. It has been held, and the principle appears indisputable, that where a dedication has been established of a high road and where a portion only out of the land so dedicated has been used for that purpose, no person could by occupation or other user of any part of the road establish a right as against the public over any part of the [205] land, even had it never been used for the purpose for which it was dedicated. I refer to *Turner v. Ringwood Highway Board*, L. R., 9 Eq., 418. That is a decision of one of the most eminent Judges of the century, and the judgment itself is founded upon reasoning which has been, as far as I know, universally applied in all cases of this kind. Now here the dedication to the public could not be limited by invasion of any of the members of the public, nor could they by such invasion, however prolonged, gain for themselves a title to the land or to the exclusive user of the land which was the subject of the invasion. And the reason is manifest, that such user by them was a licensed user; they had a right to be there, but their right of user could carry with it no right to exclude other persons—Gangaputras, pilgrims or others, for whose use the ghat had been originally dedicated.

The result is that I would allow this appeal, and, reversing the decision of the Lower Appellate Court, dismiss the suit of the plaintiffs with costs.

Aikman, J. :—I concur in thinking that this appeal must be allowed. The learned advocate who appears on behalf of the respondents admitted that the

right claimed by the plaintiffs, his clients, was not an easement; he said that, if put to a definition, he would describe it as an assertion of a customary right. But the relief which the plaintiffs asked for and the decree which they have obtained amount to much more than this. The decree gives them possession of certain spots on a public ghat to the exclusion of all other members of the public. No instance of such a relief having been granted has been cited to us. There are, it is true, cases in which plaintiffs have successfully asserted a title to enjoy customary rights, but the decrees in those cases did not interfere with the enjoyment of the other members of the public or section of the public entitled to the customary right. In my opinion this case is not distinguishable from the case of *Husain Ali v. Matukman*, I. L. R., 6 All., 39, which, as my brother BLAIR has shown, is in accord with the law as laid down in England. I concur in the decree proposed.

[206] BY THE COURT—The decree of the Court is that the appeal is allowed, the decree of the Lower Appellate Court is set aside and that of the Court of First Instance restored. The appellants will have their costs here and in the Lower Appellate Court.

Appeal decreed.

NOTES.

[This was followed in (1898) 2 O. C., 1. See also (1899) P. R., 7; (1909) 20 M. L. J., 699.]

[30 All. 206]

REVISIONAL CRIMINAL.

The 12th January, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE.

Queen-Empress

versus

Rahim Bakhsh.*

*Criminal Procedure Code, section 110 et seq.—Security for good behaviour—
Object of demanding security—Discretion of Magistrate in accepting
or refusing sureties tendered.*

The object of requiring security to be of good behaviour is, not to obtain money for the Crown by the forfeiture of recognizances, but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. *Narain Soobodhee*, 22 W. R., Cr. R., 37, not followed.

RAHIM BAKHSH was found by the Joint Magistrate of Saharampur, acting under section 110 of the Code of Criminal Procedure, to be an habitual burglar and receiver of stolen property, and was called upon to enter into a bond for Rs. 500, with two sureties each in Rs. 250, to be of good behaviour for one year. From this order he appealed to the Magistrate of the district, who,

* Criminal Revision No. 679 of 1897.

after adverting to the evidence upon which the Joint Magistrate's order was based and signifying his approval of that order, went on to say:—"The security offered was that of persons living at a distance from Saharanpur where appellant lives. If the security is to be of any value for the purpose for which it is demanded, it must be offered by a person living near appellant's home where he can exercise efficient supervision over him. If such is offered it will be accepted." Against this order Rahim Bakhsh applied in revision to the High Court.

[207] Mr. N. L. Paliologus, for the Applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

Edge, C. J.:—This is an application in revision. An order was made that a certain person proceeded against by a Magistrate under section 110 and the following sections of the Code of Criminal Procedure should give security himself and should obtain two sureties for his good behaviour for one year. It is obvious that the man Rahim Bakhsh was a man against whom such an order should have been made. His own witness, who is a respectable man, gave him an exceedingly bad character. It was proved to the satisfaction of the Magistrate that he was an associate of professional burglars and a receiver of stolen property. He lived and carried on an ostensible business of a milk seller (which in itself is an innocent occupation for a gentleman of his character), in the city of Saharanpur. The sureties whom he tendered lived in the Roorkee tahsil. One had been rejected when first offered. On his own examination he showed that he knew practically nothing of the man for whom he was coming from Roorkee to act as surety. The Magistrate considered that sureties at Roorkee would probably have but little influence over a gentleman like Rahim Bakhsh residing at Saharanpur. In my opinion the Magistrate came to a proper conclusion. The object of requiring security to be of behaviour is, not to obtain money for the Crown by the forfeiture of recognizances, but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It seems to me to be reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. Of course magistrates must not act arbitrarily in these cases: they must be guided in each case by the facts of the case. I am certainly not prepared to follow the decision of the Calcutta Court in the case of *Narain Soobodhee*, 22 W. R., Cr. R., 37. I dismiss this application.

NOTES.

[This was followed in (1898) A.W.N., 199; 24 All., 471; 8 A.L.J., 785; 10 A.L.J., 354, —though the Calcutta High Court did not insist on the ability to control the principal, in 6 C.W.N., 598; 35 Cal., 400; 37 Cal., 446. See, however, 36 Cal., 562.]

[208] APPELLATE CIVIL.

The 17th January, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Sharf-ud-din Khan.....Judgment-debtor

versus

Fatehyab Khan.....Decree-holder.*

*Mesne profits—Execution of decree—Objection to assessment of mesne profits—
Trespasser not allowed expenses of obtaining decrees for rent during
the term of his possession.*

Held, that a trespasser, who, after having been for some time in possession of immoveable property, was ejected in execution of a decree obtained by the rightful owner, could not have allowed to him in reduction of mesne profits expenses incurred by him in obtaining decrees for rent against tenants on the property in suit.

THE respondent to this appeal obtained against the appellant a decree for possession of immoveable property and for mesne profits, the mesne profits to be ascertained in execution of the decree. The decree-holder applied to the executing Court for ascertainment for the mesne profits, claiming Rs. 1,248-5-0. The judgment-debtor filed objections to this application urging that the mesne profits were wrongly calculated by the decree-holder, and that certain expenses of collection and expenses incurred in bringing suits against tenants during his occupation of the land ought to be deducted from the amount of mesne profits awarded. The Court (Subordinate Judge of Moradabad) disallowed the judgment-debtor's objections and assessed the mesne profits at the amount claimed by the decree-holder. From this order the judgment-debtor appealed to the High Court.

Munshi Ram Prasad and Maulvi Ghulam Muftaba, for the Appellant.

The respondent was not represented.

Edge, C. J., and Burkitt J. :—This appeal arises out of an assessment of mesne profits. The appellant complains, firstly, that he was deprived of the benefit of evidence in the suit which was on the record in the High Court at the time when the mesne profits were being assessed. In order to support that ground, it [209] would be necessary to show that the evidence he desired to have was material. He has not taken the trouble to procure the production of that record here, and he has failed to prove that one word of that evidence was material. He also complains that in taking the account for mesne profits he was allowed an insufficient sum for expenses. His claim for expenses was made up of, amongst other things, a claim for the salary of two karindas. That portion of the claim alone would have brought the expenses on the amount collected to something near 12 per cent., an allowance which we could never sanction in favour of a wrong-doer. It would be excessive in any case. However, his main complaint as to expenses relates to the fact that he was disallowed the expenses he was put to in suing tenants on the estates, who were not his tenants, who owed him no rent, but against whom he obtained decrees for rent. The result shows that the appellant was

* First Appeal No. 21 of 1897, from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 10th November 1896.

never entitled to those decrees. He was a wrong-doer. He was not entitled to the possession of the land, nor was he entitled to the receipt of rents and profits. It may well be, and certainly the contrary has not been shown, that if the decree-holder, the rightful owner, had not been disturbed in possession by the appellant and had been in possession, all his tenants would have paid their rents and there would have been no necessity for a single suit against any of them. Expenses of decrees for rent obtained under such circumstances by a wrong-doer who is not entitled to them certainly cannot be allowed to him in the assessment of mesne profits. We dismiss this appeal.

Appeal dismissed.

[20 All. 209] •
PRIVY COUNCIL.

The 16th November and 15th December, 1897.

PRESENT :

LORDS WATSON, HOBHOUSE, AND DAVEY AND SIR R. COUCH.

Narain Das.....Plaintiff (Appellant)

versus

Ramanuj Dayal.....Defendant (Respondent.)

[On appeal from the High Court for the North-Western Provinces.]

Intention as to future action, expressed between parties, not amounting to a contract.

A mutual expression of intention between parties caused expectation on either side that the intention would be carried out, but no contract was made.

[210] A childless person, since deceased, expressed to the father of the minor son of his sister his intention to make the boy his heir, and that if he, the intending donor, should have children of his own he would give the boy a share of his property. The father assented, and made over charge of the boy.

• The widows, and mother, of the deceased, taking his estate for their lives, admitted the boy to joint possession with them; and on being sued by the reversioners of the family estate expectant upon their deaths, defended, as co-defendants with the boy, on the ground that they had, in obedience to the known wishes of the deceased, recognized the boy as heir to him.

Held, that the reversioners could only be deprived of the inheritance after the death of the widows, who could not transfer any estate to last beyond their own lives, by the act of the deceased in contracting with the father of the boy to make the boy the heir, if such contract had been made. And that the substantial question was whether the representations made between the two had amounted to a contract to that effect.

On evidence, wholly oral, it was found that no such contract had been made. Only enough had been said between the two to give rise to the expectation on either side that the boy would, the then intended course being followed, get the inheritance.

APPEAL from a decree (9th February 1893) of a Divisional Bench of the High Court, reversing a decree (29th September 1892), of the Subordinate Judge of Meerut.

This suit was brought on the 31st July 1888 by six plaintiffs, among whom was the present appellant, for a decree declaring their title as reversionary heirs after the deaths of the two widows of their deceased kinsman Durga Prasad, a zamindar, and village shareholder, in the Meerut district, who was killed in an affray on the 1st August 1882, at the age of twenty-nine years. He had no children, and had made no will. The plaintiffs claimed a declaration that their rights were not affected by the acts of the widows in setting up Ramanuj Dayal, a minor son of the sister of the late Durga Prasad as the heir to the property of the deceased, and in putting him into possession of it jointly with themselves.

The widows, and the mother of the deceased, were made co-defendants with Ramanuj, now the only respondent on this appeal. The only appellant was Lala Narain Das, the fifth plaintiff, who represented Kishen Sahai, the first of them, the [211] latter having been found by the High Court to stand in lieu the more remote agnates of the deceased.

The substantial question raised by this appeal was whether the late Durga Prasad had contracted with the respondent's father, acting on the respondent's behalf, when a minor, to make the latter his heir, if he, Durga Prasad should die childless, and if not, but having had children, to give a portion of his property to the boy. And whether such a disposal of the inheritance was binding upon the appellant.

The prayer of the plaint was for a declaration that Ramanuj was not the heir of Durga Prasad, or entitled to the possession of his estate, and for an order that the widows should invest the surplus income of the property for their benefit.

It was admitted by the plaint, that the deceased proprietor was absolute owner of all his estates, and that therefore he might have disposed of them as he chose, by deed or by will.

The defendants put in written statements, all substantially to the same effect. Their case was, that Durga Prasad had brought up Ramanuj Dayal from childhood in his own house, and had promised his father to make him his heir; that he had died suddenly before he could carry out his intentions, and that the widows, in obedience to his known wishes, had put the boy in possession of the property, and recognised him as heir.

The Subordinate Judge, Rai Piari Lal, fixed an issue as to the fact of the making, and as to the legal validity of a contract between Durga Prasad and Ganga Saran, the boy's father, to the above effect. He considered the evidence, and the law of contract, citing several of the cases afterwards referred to in the argument of this appeal, and concluded that no such contract had been made. In his opinion the elements of a binding contract were wanting. He found so far as the boy was concerned no duty or obligation was cast upon him to remain with Durga Prasad. His status was never altered, wherein this case was distinguishable from *Bhala Nahana v. Parbhu Hari*, (1879) I. L. R., 2 Bom., 67, nor did the relation of father [212] and son ever cease between Ganga Saran and the boy. Durga Prasad could not have prevented the father from taking the boy away. Also, he found that the widows, though they had caused to be entered in the proprietary register the name of Ramanuj Dayal together with their own names, had not conveyed their life interests to him by any formal act.

He therefore made a declaratory decree that the reversioners of Durga Prasad, on the death of his widows, would be entitled to succeed to his property, and that the rest of the claim should be dismissed. Ramanuj Dayal

appealed to the High Court against the conclusion of the Subordinate Judge as a matter of law, that no contract had been made which was legally binding so as to affect the inheritance. But no appeal was made against the finding of facts as stated in his judgment.

The observations of the Divisional Bench (TYRBELL and BLAIR, JJ.), so far as they are material to this report, appear in the judgment of their Lordships. The judgment of the Subordinate Judge was reversed.

On this appeal—

Mr. A. Cohen, Q. C., and Mr. C. W. Arathoon for the appellant, argued that the whole case for the respondent had been based upon an alleged promise which had never reached the stage of contract, and, in fact, had gone no further than the representation of the then present intention on the part of Durga Prasad. There had been no evidence that the latter had bound himself to accept the boy as his heir under all circumstances, or to deal with his estate, or any part of it, so that it should pass, on his death, to Ramanuj.

Nor had Ganga Saran, the father of the boy been shown to have effectually parted with his son, or to have relinquished all right to parental control over him. The result had been only to signify the intention existing at the time on either side. The Subordinate Judge had rightly decided that the appellant, amongst the other plaintiffs, was entitled to a decree declaring his right to succeed to the family estate on the death of the widows of [213] Durga Prasad. No sufficient reason had been assigned in the judgment of the High Court for reversing that decree in favour of the present appellant. Section 42 of the Specific Relief Act, I of 1877, was referred to, within which came the appellant as a person entitled to a right, and therefore by that section empowered to institute a suit against a person denying it. It was true that the Court had a discretion to refuse a declaratory decree; but here there were no grounds for such refusal.

Reference was made to *Jorden v. Money*, (1854) 5 H.L. Ca., 185; *Alderson v. Maddison* *; *Citizens' Bank of Louisiana v. The first National Bank of New Orleans*, (1873) L. R., 6 Ap. Ca., (H. L.), 352, where the rule in *Jorden v. Money* was approved, as to the distinction in effect between representation of intention, and representation of fact; *Coverdale v. Eastwood*, (1872) L.R., 15 Eq., 12, where it was decided that expression of intention did not amount to contract to settle and to *Rani Anand Koer v. The Court of Wards*, (1886) L.R., 8 Ind. Ap., 14: I. L. R., 6 Cal., 764, where the appeal was presented by the nearest reversioner's heir.

Mr. M. Crackanthorpe, Q. C., and Mr. J. D. Mayne, for the Respondent, argued that from the evidence, the promise by Durga Prasad to make the boy his heir had been based on a consideration proceeding from Ganga Saran, the father, completed when the boy was made over to Durga Prasad. That this promise had been made had been found by both the Courts below, although the first Court had held that it created no legal obligation. It was submitted that the consideration supported the promise, and that the latter was legally binding, so that it had become the duty of the widows, who for this purpose represented the estate, to carry this promise into effect. Ganga Saran had not only agreed to allow, but had allowed the boy for years to remain free from his control, and the boy had been maintained and educated, at first by Durga Prasad, and then by the widows. There was no such abandonment by Ganga

* (1880) 5 Exch. D., 293; and on appeal, (1881) 7 Q. B. D., 174; and on appeal, (1881) 8 Ap. Ca., (H. L.) 467.

Saran [214] of his parental authority and responsibility as to make the consideration supplied by Ganga Saran illegal. Reference was made to *Lyons v. Blenkin*, (1821) Jacob, 245, one of the cases, where the custody of children was refused to the father, and to *Bhala Nahana v. Parbhu Hari*, (1879) I. L. R., 2 Bom., 67, where the gift of a boy was made by his parents on the express promise to settle property on him, and that he had by their permission altered his status, and foregone his claim to inherit from them, did not render it altogether inapplicable here. Also was cited—*The Queen v. Smith, in re Boreham*, (1853) 22 L. J., Q. B., 116.

Mr. A. Cohen, Q. C., replied.

Afterwards on the 15th December 1897, their Lordships' judgment was delivered by **Sir R. Couch** :

Durga Prasad who died childless on the 1st of August 1882, leaving two widows Ram Dei and Hira Dei was the grandson of Bakhtawar Singh, the son of Jawahir who had also three other sons Dilawar Singh, Kishan Sahai and Har Sahai. Dilawar died leaving an adopted son Chanda Lal, Har Sahai died leaving four sons, Anand Sarup, Jugal Kishore, Narain Das and Ram Saran Das. The suit was brought by Kishan Sahai, Chanda Lal and the four sons of Har Sahai against the respondent and the widows and the mother of Durga Prasad. The plaint stated that in order to defeat the rights of the reversioners the widows had caused the name of the respondent to be entered in respect of most of the properties left by Durga Prasad along with theirs, and his name alone in respect of some, on the false allegations that Durga Prasad left them and Ramanuj Dayal the minor son of his sister as his heirs; that he owing to his having no issue kept Ramanuj Dayal with him as his adopted son and heir promising that in case of his having no male issue he and his descendants should succeed as owner to the entire property left by him, but that they should have no right to waste the property; and that in case of his having a son of his own [215] Ramanuj Dayal should get an equal share with him; that he had brought him up, educated him and celebrated his marriage as if he was his own son; that the widows in their own right and as guardians of the minor were heirs in possession of his estate. And the plaintiffs prayed that it might be declared that these allegations being false the transfers of the estate of Durga Prasad made on them in favour of Ramanuj Dayal were void as against the plaintiffs or the persons who at the death of the widows would be reversioners, and that the statement that Ramanuj Dayal or his descendants were entitled to the estate of Durga Prasad by virtue of any declaration falsely attributed to him was of no effect and false. The widows in their written statement said that as their husband was killed suddenly he could not execute any document in favour of Ramanuj Dayal, and they therefore in accordance with his promise and order made over the entire property to him. The mother in her written statement said the same. Ramanuj Dayal in his written statement said that Durga Prasad had a great affection for him from his childhood and constantly kept him with him and eventually entered into a contract with him through his father, his guardian, to make him proprietor of and heir to all his property; from that time he lived with Durga Prasad as his son and the widows in pursuance of the stipulations and directions of their husband continued to maintain and bring him up during his minority and gave him possession of all the estate left by Durga Prasad. Upon these pleadings the following issue was settled by the Subordinate Judge :—

“Did Lala Durga Prasad covenant with defendant's father on his behalf to make the defendant his heir and owner of the property, and in the

event of his having issue to give a portion of the property to the defendant? Is such a covenant, if proved, good and binding upon the plaintiff?"

This was the substantial question in the suit. Durga Prasad having died childless the widows were entitled to his property during their lives and could dispose of their interest in favour [216] of Ramanuj Dayal, but they could not go beyond that. If the reversioners were to be bound, it must be by the act of Durga Prasad. There was no issue whether the allegations of the widows were false. It was not necessary, as if they were true they would not justify the action of the widows if there was no contract by Durga Prasad as was alleged by Ramanuj Dayal. The evidence of the widows as to what was said by Durga Prasad and Ganga Saran when the alleged covenant or agreement was made is only hearsay and, to use the language of the Indian Evidence Act, is not relevant. It was admitted by the Subordinate Judge and is in the record, but it ought now to be disregarded. The evidence of Jwala Prasad another witness is too vague and uncertain to have any weight. The principal witness is Ganga Saran, the father of the respondent, who is corroborated in some respects by Diwan Singh, but without that his evidence may be considered trustworthy. Their Lordships have considered the whole of his evidence which is material to the question of a contract, but it is sufficient to state the part which is directly applicable to it. At page 255 of the Record he says that Durga Prasad said to him:—"My property is for this boy, I have no dearer relation in this world than this boy. I will give my property to this boy. He goes to members of the brotherhood on my behalf and does my household business. If you will take him with you how shall I manage these affairs." At last Durga Prasad uttered these words:—"I would make him my heir and he would get sufficient education at Meerut for my business." I said to him:—"Two years have elapsed since your marriage. It is hoped that you may get an issue and your own son may soon be competent to manage your affairs." Thereupon he said:—"Even if a son be born, mind that I would give a share to Ramanuj Dayal. It is by no means my intention that I may in any way deprive him, but give up this hope that I would ever part with him and allow him to go with you." Lala Jwala Prasad made me understand that my object was the welfare of the boy, [217] that he could not remain with me, for if I got him admitted into the college or sent him to England he could become separated from me, and that I should do what Durga Prasad liked. I, thinking that he will be recompensed here for education in England and that it was impossible to take the boy without complete displeasure of Durga Prasad and that I did not like to displease him, told Durga Prasad that the boy was his if he wished to keep him, and that I would not interfere in this affair. Up to that time there was no other son of mine. I finally left the boy saying that I waived all claim to the boy and the thought of taking him did not remain in my mind." The reference to the college and England is explained by Ganga Saran having said in the previous part of his evidence that he told Durga Prasad that he wanted to take the boy to Agra (where there is a college) and there educate him, and that he wished he should be educated in England "either for service or for the Bar." At this time the respondent was nine years old; and, being the son of a sister, Durga Prasad could not according to Hindu law have adopted him. The only way by which the respondent could be made his heir was by a deed of gift or by a will. Diwan Singh in his evidence said that Durga Prasad about two months before his death asked him to write out a deed of gift in favour of Ramanuj Dayal and, upon his saying it was not proper to do so and asking him whether he should write out a will, told him

to do so, that the matter was put off from time to time and the will was not written.

Upon the evidence in the case their Lordships are of opinion that there was no contract or agreement, there was only an expectation on each side, on the part of Durga Prasad that if the respondent continued to live with him and was brought up and educated under his care and control the respondent would be induced by the prospect of becoming his heir to continue to live with him, and on the part of Ganga Saran that if he gave up the boy Durga Prasad would have him educated and make him his heir. Ganga Saran could according to any view only bind the [218] respondent during his minority, and it is very difficult to believe that it was their intention that Durga Prasad should be bound in all events to make the boy his heir when upon the respondent attaining majority Durga Prasad would have no control over him and he might determine to leave him. Gratitude would be a very weak obligation upon the respondent if he knew that the estate must become his. The Subordinate Judge found that Durga Prasad made a promise to Ganga Saran that he would make the respondent his heir if he had no male issue or would give him a share in his property if he had such, but that it did not amount to a contract and was not binding on the reversioners. He made a decree declaring that the reversioners of Durga Prasad deceased should after the death of the widows and the mother of the deceased be entitled to get the estate of the deceased by right of inheritance, and that the rest of the plaintiffs' claim should be dismissed. Ramanuj Dayal appealed to the High Court at Allahabad, and that Court ordered the decree of the Subordinate Judge to be set aside and the suit to be dismissed. Their Lordships are quite unable to agree in the reasons of the two learned Judges of the High Court for making this decree. They appear to their Lordships to have entirely disregarded the question in the suit (whether what passed between Durga Prasad and Ganga Saran amounted to a contract) and indeed in the former part of their reasons to have misconceived the real question in the case, and in the latter part to have conceded that there was a contract, and only considered whether it was illegal or opposed to public policy. Their Lordships will therefore humbly advise Her Majesty to reverse the decree of the High Court and to order the appeal to it to be dismissed with costs and to affirm the decree of the Subordinate Judge. The respondent will pay the costs of this appeal.

Appeal allowed.

Solicitors for the Appellant : Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondent : Messrs. *Borrow and Rogers.*

NOTES.

[The case of a family arrangement to avoid litigation was distinguished in (1906) 8 C. L. J., 458 : 13 C. W. N., 201.]

[219] FULL BENCH.

The 17th December, 1897.

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BLAIR, MR. JUSTICE BANERJI,
MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Kashi Prasad.....Defendant

versus

Kedar Nath Sahu and others.....Plaintiffs.*

Act No. IX of 1872 (Indian Contract Act), section 23—Void contract—Agreement to relinquish ex-proprietary rights—Partition—Act No. XII of 1881 (N.-W. P. Rent Act), sections 7 and 9—Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 125.

By a mutual agreement entered into between the parties to a private partition of certain villages held by them jointly the parties agreed that, if either party at the time of the partition was holding *Sir* land in a village which upon partition fell into the share of the other party, he would relinquish his rights in such *Sir* land in favour of the party into whose share the said village had fallen.

Held that under such private partition the holder of the *Sir* land became, on partition being effected, an ex-proprietary tenant in respect of the land previously held by him as *Sir*, and that consequently the agreement to relinquish his rights in such land was not enforceable in law.

Held also that section 125 of Act No. XIX of 1873 does not apply to a partition by private agreement. *Gaya Singh v. Udit Singh*, I. L. R., 13 All., 396, referred to. *Ram Prasad v. Dina Kuar*, I. L. R., 4 All., 515, dissented from by KNOX and BANERJI, JJ.

THE facts of this case are briefly as follows :—

The parties were co-sharers in a number of villages. By an instrument dated the 20th of May 1891, they partitioned their shares, and some entire villages were allotted to the share of the plaintiffs and other villages to that of the defendant. It was agreed that each party should surrender to the other the *sir* lands held by him in the villages assigned to the share of the other. The plaintiffs performed their part of the agreement, and surrendered to the defendant the *sir* land held by them in the village Sehri, which fell to the defendant's share, but the defendant, whilst retaining in his possession the *sir* lands of the plaintiffs, refused to deliver up to the plaintiffs the *sir* lands held by him in the village Barghat which was assigned on partition to the plaintiffs. The [220] plaintiffs brought the present suit to recover from the defendant the *sir* lands in the village Barghat. The defendant asserted that he had acquired the rights of an ex-proprietary tenant in respect of those lands and that the agreement to relinquish was void as it was forbidden by law. The Court of First Instance (Subordinate Judge of Gorakhpur) decreed the plaintiffs' claim. The defendant thereupon appealed to the High Court.

Pandit *Sandar Lal*, for the Appellant. By the deed of partition the defendant lost his proprietary rights in the village in question within the meaning of section 7 of Act No. XII of 1881. He therefore became in respect of the land held by him as *sir* in that village an ex-proprietary tenant. Being an

* First Appeal No. 111 of 1895, from a decree of Kunwar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 25th March 1895.

expropriary tenant any agreement by him to transfer his expropriary rights was prohibited by section 9 of the said Act. These sections (*viz.*, 7 and 9) apply to a loss of proprietary rights resulting from a partition amongst co-sharers. Section 125 of Act No. XIX of 1873 applies only to partitions effected by the Revenue authorities for Revenue purposes and will not apply to a case such as the present where the partition was by private agreement. Besides the case of *Ram Prasad v. Dina Kuar*, I. L. R., 4 All., 515, cited in the judgment of BANERJI, J., the advocate for the appellant referred to *Indar v. Khushk*, Weekly Notes, 1886, p. 88; *Hanuman Rai v. Kariman*, Weekly Notes, 1888, p. 185; and *Gulab Rai v. Indar Singh*, I. L. R., 6 All., 54.

Mr. W. Wallach, for the Respondents. The agreement to partition was *per se* a valid agreement enforceable in law. The proviso for the mutual exchange of *sir* land was added as an after-thought after all the substantive provisions of the agreement had been completed, and as a matter of convenience, so that each party should hold the whole of the villages that had fallen to their share on partition. The whole agreement was purely voluntary, no money consideration passing. Each party before the agreement possessed 50 per cent. of the property, and by the agreement the parties exchanged certain of their interests, so that in the result they still possessed 50 per cent. of the whole, and under section 9 [221] of the Rent Act, 1881, a voluntary transfer is lawful between persons "in favour of whom as co-sharers such right originally arose." Under section 125 of Act No. XIX of 1873 *sir* land belonging to one co-sharer can be assigned on partition to another co-sharer if the co-sharer cultivating it consents. In this case the co-sharer consented by the agreement. "There is nothing in the Act to show that the proviso contained in section 125 is not meant to apply to private partitions. Counsel for the respondents relied on *Abhai Pande v. Bhagwan Pande*, I. L. R., 3 All., 818; *Indar Sen v. Naubat Singh*, I. L. R., 7 All., 847; and *Gaya Singh v. Udit Singh*, I. L. R., 13 All., 396.

Pandit Sundar Lal replied.

The following judgments were delivered :—

Banerji, J. (Knox, J., concurring) :—I agree with my learned colleagues in holding that the defendant acquired the rights of an expropriary tenant in the land held by him as *sir* in the villages which have been assigned by partition to the share of the plaintiffs. The parties were co-sharers in a number of villages. By an instrument dated the 20th of May 1891, they partitioned their shares, and some entire villages were allotted to the share of the plaintiffs and other villages to that of the defendant. It was agreed that each should surrender to the other the *sir* lands held by him in the villages assigned to the share of the other. The plaintiffs performed their part of the agreement, and surrendered to the defendant the *sir* land held by them in the village Sehri, which has fallen into the defendant's share, but the latter, whilst retaining in his possession the *sir* lands of the plaintiffs, has refused to deliver up to the plaintiffs the *sir* lands held by him in the village Barghat, which has been assigned by partition to the share of the plaintiffs. He asserts that he has acquired the rights of an expropriary tenant in respect of those lands and that the agreement to relinquish them is void, as it is forbidden by law. Upon this contention two questions arise :—First, whether the defendant has acquired the rights [222] of an expropriary tenant in regard to his *sir* land, and, secondly, whether, if he has acquired such rights, the agreement made by him to surrender them is legally enforceable.

In my opinion both these questions must be decided in favour of the defendant. Under the partition of the 20th of May 1891, the share which the defendant had in the mahal in which he held *sir* lands, has been assigned to the

plaintiffs, and he has obtained in exchange for that share villages in other mahals. He has therefore "lost or parted with his proprietary rights" in the mahal in which he held the *sir* lands. By section 7 of Act No. XII of 1881, "every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as *sir* in such mahal at the date of such loss or parting" at a favourable rate of rent, and he shall be called an ex-proprietary tenant. The defendant therefore has under this section acquired the rights of an ex-proprietary tenant in the land held by him as *sir* in the villages which have under partition passed into the share of the plaintiffs. The language of section 7 is wide enough to apply to transfers of every description by which a proprietor may lose or part with his proprietary rights, and there is nothing in it to exclude from its operation the case of a partition effected by the co-sharers by mutual agreement. It has been contended that the Legislature never intended section 7 to apply to an exchange of shares by partition, and reference has been made in support of this contention to the provisions of section 125 of the North-Western Provinces Land Revenue Act, 1873. The intention of the Legislature must be gathered from the language employed by it, and I find nothing in the provisions of section 7 to warrant the supposition that it was not intended to apply to a private partition. The words used in that section are only consistent with the policy which dictated it, namely, that no proprietor whose rights as such have passed away from him should be wholly denuded of everything he had in the mahal in which he held those rights, and that he should be secured in the occupation of the *sir* lands held by him in that mahal. That policy in my opinion [223] applies as much to the transfer of proprietary rights under a private partition as to any other description of transfer of such rights, and therefore there is no reason in my judgment for holding that the Legislature did not intend the provisions of section 7 to be applicable to private partitions. Section 125 of Act No. XIX of 1873, it is true, provides in its second paragraph that if under the partition of a mahal the *sir* land of one co-sharer be assigned to another co-sharer, the former will have the rights of an occupancy tenant in respect of such land if he continue to cultivate it. There cannot be any doubt that under the North-Western Provinces Rent Act the rights of a mere occupancy tenant are different in their incidents from those of an ex-proprietary tenant, and it seems that the Legislature in that Act regarded an ex-proprietary tenancy as of a higher status than the tenancy of a mere occupancy tenant. I am therefore unable to agree with the learned Judges who held in *Ram Prasad v. Dina Kuar*, I. L. R., 4 All., 515, that a co-sharer whose share has been assigned to another co-sharer acquires under section 125 the rights of an ex-proprietary tenant in respect of his *sir* lands. Section 125 is, in my judgment, an exception to the general rule laid down in section 7 of the North-Western Provinces Rent Act, 1881. That section has taken the place of a similar section in Act No. XVIII of 1873, which was passed on the same day as Act No. XIX of 1873. Reading the two Acts together, and having regard to the fact that both of them were under the consideration of the Legislature at one and the same time, it seems to me that the intention of the Legislature was to enact a general rule in section 7 of Act No. XVIII of 1873 and provide an exception to that rule in Act No. XIX of 1873 in the case to which section 125 of that Act applies. What the policy of the Legislature may have been in conferring on an ex-proprietor in respect of his *sir* land the rights of a mere occupancy tenant in the case of a partition held under Act No. XIX of 1873, and the rights of an ex-proprietary tenant in the case of a private partition by mutual agreement, it is not easy to conceive. But I am [224] unable to hold

that the Legislature did not intend section 7 of Act No. XII of 1881 to include within the scope of its operation a partition effected by the co-sharers by private arrangement. I am therefore of opinion that the defendant acquired the rights of an ex-proprietary tenant in the *sir* lands held by him in the villages which have been allotted to the plaintiffs' share.

By the terms of the deed of partition the defendant agreed to surrender his *sir* lands to the plaintiffs upon the latter's doing the same in regard to their own *sir*. The terms are these:— "According to this partition the *sir* lands and the houses of a party situated in a village shall go to the other party's share along with the village in which they are situated; consequently the party who will get possession of the village shall be considered by reason of its falling to his lot to be the proprietor of the *sir* lands, and the houses situate in such village. Should any party fail to give up possession of the houses and the *sir* lands the proprietor of the village shall have the said person's possession removed from the houses and the *sir* lands." In pursuance of this agreement the plaintiffs have delivered possession of their *sir* lands to the defendant, and it is certainly an act of bad faith on the part of the defendant to retain in his own possession the *sir* lands of the plaintiffs and to refuse to give them in exchange his own *sir* lands. But what we have to consider is whether the defendant can be compelled in law to surrender his *sir*. The agreement referred to above is nothing more than an agreement to relinquish the ex-proprietary rights which would accrue under the provisions of section 7 of Act No. XII of 1881. Such an agreement would, in my opinion, defeat the object of that section, which is to prevent a proprietor from divesting himself by his own improvidence of every interest owned by him in his zamindari, and to afford him some protection against the effect of a complete transfer of his rights therein. No doubt an ex-proprietary tenant, like any other occupancy tenant, is competent to relinquish his ex-proprietary rights after he has acquired them; but an agreement to relinquish in the future the [225] ex-proprietary rights which would be acquired after the transfer of his proprietary rights is virtually an agreement to transfer the ex-proprietary rights. Such an agreement is within the prohibition of section 9 of Act No. XII of 1881. The agreement in question, therefore, is one forbidden by law, and is also of such a nature that, if permitted, it would defeat the provisions of law. The object of the agreement is consequently unlawful under section 23 of the Indian Contract Act, and the agreement is void. This case may be distinguished from that of *Jaya Singh v. Udit Singh*, I. L. R. 13 All., 396, as it appears from the judgment of one of the learned Judges that in that case a relinquishment had already taken place, and it was on that ground that it seems the relinquishment was upheld. If, however, it was intended to hold in that case that every agreement to relinquish an ex-proprietary holding in the future is a valid agreement, I must say with due deference that I am unable to agree with that view. Such an agreement, if sustained, would certainly defeat the object of section 7, and would be resorted to as a device for evading the operation of that section. It has been said that in this case the object of section 7 would not be defeated, as the defendant was to get, and has already obtained, the *sir* lands of the plaintiffs. But it must be borne in mind that it is extremely doubtful whether the land which was once the *sir* of the plaintiffs would be *sir* land in the hands of the defendant, within the meaning of *sir* land as defined in Act No. XII of 1881. I am accordingly of opinion that the agreement relied upon by the plaintiffs is void under section 23 of the Indian Contract Act and cannot be enforced, and on these grounds the claim for

possession of the lands which were once the *sir* of the defendant must fail. I may observe that the plaintiffs have failed to make out any case in respect of their claim for the lands in the village Abraula which has fallen to the share of the defendant under the partition.

As for the claim to which relief (3) of the plaint relates, the appeal must, for the reasons given by my brother AIKMAN, be sustained.

[226] I agree in the decree proposed by my brother AIKMAN.

Blair, J.—The plaintiffs were the owners of a one-half share in certain zamindari villages, and the defendant was the owner of the other half share. A deed of partition was executed by the parties and registered, the effect of which was that, instead of their half shares in the zamindari villages, each party should become sole proprietor of certain of the villages and abandon in consideration all right to those allotted to the other. In two villages, one of which was allotted in the deed of partition to the plaintiffs and one to the defendant, there was certain land theretofore held by the parties respectively as *sir*, with houses thereon. One of the terms of the agreement was that "the *sir* lands and the houses of a party situated in a village shall go to the other party's share along with the village in which they are situated; consequently the party who will get possession of the village shall be considered, by reason of its falling to his lot, to be the proprietor of the *sir* lands and the houses also situate in such village. Should any party fail to give up possession of the houses and the *sir* lands, the proprietor of the village shall have the said person's possession removed from the houses and the *sir* lands." The defendant entered on the possession of the village or villages assigned to him. He also took possession of the *sir* and house appurtenant thereto and which had been relinquished by the plaintiffs. The plaintiffs took possession of the zamindari property allotted to them, but the defendant refused to give up to them the possession of the *sir* and house which formed part of such zamindari property, claiming to be entitled to continue in occupation as ex-proprietary tenant. This suit is brought to recover possession of such *sir* and house in accordance with the terms of the deed of partition, and for certain subsidiary reliefs. The defendant sets up in his defence his right of occupancy as an ex-proprietary tenant, within the meaning of section 7 of Act No. XII of 1881. That section is couched in the following terms:—

"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy [227] in the land held by him as *sir* in such mahal at the date of such loss or parting, at a rent which shall be four annas in the rupee less than the prevailing rate payable by tenants-at-will for land of similar quality and with similar advantages.

"Persons having such rights of occupancy shall be called ex-proprietary tenants and shall have all the rights of occupancy tenants."

The section in express terms applies to every person who "shall lose or part with his proprietary rights." Indeed I am unable to suggest any form of dispossession, voluntary or involuntary, which those terms are not large enough to cover. It is the contention of the defendant that a contract to abandon his right of occupancy as an ex-proprietary tenant conferred by that section is illegal and unenforceable in law. That he did so promise in the partition agreement seems beyond doubt, and also that such promise made by him formed an integral and inseparable part of the consideration for the reciprocal promises of the plaintiffs. I do not think there is any conflict of opinion as to whether there has been, as a matter of fact, any abandonment or relinquishment by the defendant of his ex-proprietary rights. Indeed the suit is brought upon the

basis of a possession admitted and justified by himself. The only question now at issue is whether the provisions of section 7 and section 9 of Act No. XII of 1881 are a bar to the maintenance of this suit. If the words of section 7 are to be taken in their simple and natural meaning, they clearly include, without any distinction whatever, all alienations of whatsoever nature. Upon this construction I fail to see any ground for distinction between alienation by partition and voluntary alienation by sale, or by exchange, or by proceedings *in invitum* conducted in execution of a decree. The words "proprietary rights" include the rights of a shareholder as well as those of a single exclusive owner. Nor does it appear to me that the nature of the consideration affects the applicability of the section. The zamindar is equally a person who "may lose or part with his proprietary rights" in a mahal, whether the consideration for the alienation be [228] money, land in some other mahal or some other person's share in a mahal. The result would be precisely the same in all cases. He would, but for the operation of section 7, have denuded himself of all interest in the mahal, and, if the land or share parted with or lost was spread over a score of mahals, in each one the right of ex-proprietary tenancy in relation to the *sir* therein would at once arise. This seems to me to be the plain and obvious construction of plain words, the comprehensiveness and generality of which I cannot doubt were deliberately intended by the Legislature. In my opinion the *onus* of establishing an unexpressed exception to the wide language of the section lies upon those who contend for such an exception. On behalf of the respondents I understand it to be urged that provisions in relation to partition do not lie within the scope and purview of the Rent Act, and do lie within the scope and purview of the Land Revenue Act, No. XIX of 1873, as amended. The object of the Rent Act is, generally speaking, to define and control the rights and remedies of landlords and tenants arising out of that relation. The creation of a new relation of landlord and tenant arising from expropriation would be apparently as much within the scope of that Act, whether such expropriation arose through voluntary partition, or through sale or execution proceedings. In the same way the Land Revenue Act in its provisions in respect of partition deals with the duties of revenue officers therein engaged in the formation of areas for the collection of revenue and the re-arrangements of such areas consequent upon and rendered necessary by partitions. All the sections on the subject, from section 108 of Act No. XIX of 1873 up to and exclusive of section 125, deal with partitions effected by the revenue officers, and appear to me to exclude partitions effected solely by the private consent of the parties. The words of that latter section limit its application to land "assigned on partition and with the consent of the co-sharer." The section then dealing with land, the subject both of such assignment and of such consent shall be held by the co-sharer as an occupancy tenant. That is not a general enactment of the status of the [229] cultivating co-sharer on partition, and does not in my opinion apply to any case in which the partition is not effected by the revenue officers. If this interpretation of section 125 be correct, then I am unaware of any extant provision of law defining the status of a person, who, by private and voluntary partition, has divested himself of his proprietary rights in the *sir* of which before partition he was a co-sharer, unless it be section 7 of the North-Western Provinces Rent Act. I hardly think it possible to contend that a co-sharer in effecting a voluntary partition may wholly, unreservedly and absolutely part with his proprietary right, while in the case of partition by authority the law reserves for him an inalienable right of occupancy. That seems to me to involve a much graver anomaly than to suppose that the Legislature intended by section 125 of the Land Revenue Act to differentiate the status of a

co-sharer proceeding in partition by means of the revenue officers from that of an ex-proprietary tenant created by section 7 of the North-Western Provinces Rent Act. If this section of the Rent Act does not apply to voluntary partitions it would then be possible for two co-sharers to partition the property in such a way that the *sir* would remain entirely with one co-sharer, while the other would possess a zamindari property which he might himself alienate, or of which he might be deprived in execution of a decree without retaining a single particle of interest in it. To prevent such a consummation was in my judgment the object of the Legislature in calling into existence the ex-proprietary tenant. The opinion which I have formed as to the inclusion in section 7 of the Rent Act of expropriation by partition is largely based upon the consideration that the joint possession of land by joint families is the normal and characteristic type of proprietary possession among Hindus. The numerical importance of and the extent of property held by that constituent of the population seems to me to exclude the suggestion that the every day method of redistribution by partition should have been entirely outside the purview of the Legislature when it enacted section 7 of the Rent Act. It seems to me that [280] nothing short of express words, excluding or excepting expropriation by partition from the scope and operation of the section, would justify us in declining to apply it to the present case. I would hold, therefore, that the contract between the parties by which each promised to divest himself of all right of occupancy in the *sir* is in respect to that promise unenforceable in law. The result is that I would allow the appeal and dismiss the suit of the plaintiff, except as to the sum of Rs. 287-8-0, but without costs. I would give the plaintiffs their costs in proportion to their success in both Courts.

Barkitt, J. :—There can be no doubt that the wording of section 7 of the North-Western Provinces Rent Act is sufficiently wide to include the present case. I nevertheless entertained great doubts as to whether the Legislature had in its contemplation the case of a transfer by partition. I have, however (though with no little hesitation), come to the conclusion that my doubts were not well founded, and I concur with the remainder of the Court in holding that the appellant did acquire the status of an ex-proprietary tenant in the *sir* land formerly his, which is now included in the village wholly transferred under the partition to the respondents. I have come to this conclusion with the greatest reluctance because of the glaringly dishonest manner in which the appellant acted towards the respondents. I concur in the judgment just delivered by my brothers KNOX and BANERJI.

Aikman, J. :—The parties to this suit, or their predecessors in title, were joint owners of several villages in the Basti and Gorakhpur districts. On the 20th of May 1891, they entered into an arrangement by which this joint ownership was put an end to, each party taking certain villages in sole proprietorship. It was agreed between them that, if either party had *sir* land in any village which fell to the lot of the other, the *sir* land was to be relinquished by the party to whom it had belonged. The plaintiffs owned *sir* land in a village named Sehri, which village fell to the defendant's lot. The plaintiffs carried out their part of the bargain by surrendering to the defendant possession of [281] this *sir* land. A village named Barghat, in which the defendant owned *sir* land, fell to the plaintiff's lot, but the defendant, although, as said above, he had got from the plaintiffs the *sir* land in the village of Sehri, with singular bad faith refused to carry out his part of the bargain by resigning to the plaintiffs the *sir* land in Barghat. The plaintiffs accordingly brought this suit to recover possession of this *sir* land and mesne profits for the time during which possession had been withheld. The lower Court has given the plaintiffs

a decree, from which the defendant has appealed. It is contended on behalf of the appellant that the bargain which the plaintiffs seek to enforce is one which the Courts cannot, with reference to the provisions of section 23 of the Contract Act, give effect to. I have reluctantly come to the conclusion that this contention must be sustained. The defendant was at one time joint owner with the plaintiffs in the village of Barghat. The partition deed shows that the whole of that village was transferred to the plaintiffs; consequently the defendant by that partition lost or parted with the proprietary rights which he formerly had in the village. He therefore, under the provisions of section 7 of the North-Western Provinces Rent Act, 1881, at once acquired a right of occupancy in the *sir* lands he held in the village and became an ex-proprietary tenant thereof.

It would be absurd to hold that an ex-proprietary tenant cannot, if he chooses, relinquish his tenancy in *sir* land after he has by virtue of section 7 acquired a right of occupancy in it. To hold otherwise would be to convert him into a serf attached to the soil, and would moreover be in contravention of section 31 of the Rent Act, which gives a right of relinquishment to all tenants not holding under a lease. But the question we have to consider is:—Can a Court enforce specific performance of a contract, such as that on which the plaintiff relies, to relinquish a right of occupancy which is created and conferred by section 7 of the Rent Act? In my opinion this question must be answered in the negative. It is true that a contrary view appears to [232] have been taken in *Gaya Singh v. Udit Singh*, I. L. R., 13 All., 396, and the performance of a similar contract enforced. But, with all respect to the learned Judges who decided that case, I am of opinion that they overlooked the difficulty created by reading section 23 of the Contract Act in the light of section 7 and section 9 of the Rent Act. In the course of the argument in this case, it was contended that section 7 of the Rent Act was never intended to apply to a case like the present. The defendant's case here undoubtedly falls within the four corners of section 7. If I could find any clear indication that it was not the intention of the Legislature that section 7 should apply to a case like the present, I would be only too glad to give effect to the respondent's contention. But I can find none. In supporting this contention much reliance was placed upon section 125 of the North-Western Provinces Land Revenue Act, 1873, the second paragraph of which provides that where, in carrying out a partition, the *sir* land of one co-sharer has been included in the mahal assigned to another co-sharer, the former shall be an occupancy tenant of the land. The Legislature recognizes a distinction between an ex-proprietary tenant and occupancy tenant. See section 10 of the Rent Act. Now if section 125 of the Revenue Act had provided that the co-sharer whose *sir* was transferred in effecting a partition was to be an ex-proprietary tenant, there would have been some force in the contention that section 7 was not intended to cover cases of partition, as, if section 7 were intended to be of general application, such a provision as that contained in the second paragraph of section 125 of Act No. XIX of 1873 would have been unnecessary. But there is nothing to show that the second paragraph of section 125 was not intended to be an exception to the general rule. If it be held, as I think it must be, that the appellant by the arrangement come to on the 20th of May 1891, became an ex-proprietary tenant of his *sir* land in the village in which, by that arrangement, he parted with his proprietary rights, it would, I hold, entirely defeat the provisions of section 7 and section 9 [233] of the Rent Act were a Court to enforce a contract to surrender the occupancy rights so acquired. If such contracts were enforced, the beneficent provisions of section 7 of the Rent Act would, I fear, be rendered almost entirely nugatory.

For the above reasons I am of opinion that that portion of the decree of the lower Court awarding to the plaintiffs possession of the *sir* land in mauza Barghat and mesne profits thereof should be set aside. The plaintiffs also sued to recover possession of *sir* land in another village named Ahraula. In their plaint they make out no cause of action as to the *sir* land of this village. An inspection of the partition proceedings shows that, with the exception of a plot of 144 bighas, the whole of Ahraula was assigned to the defendant. There is nothing to show that the clause in the agreement of the 20th of May 1891, on which the plaintiffs rely, applies in the case of Ahraula. On this ground alone the claim as regards Ahraula ought to have been dismissed. But if the clause did apply, it was, as in the case of the Barghat *sir*, a contract which tended to defeat the provisions of section 7 of the Rent Act, and which cannot therefore be enforced. The above findings dispose of the first five grounds in the memorandum of appeal. The last ground refers to a portion of the plaintiffs' claim in which they sought to recover money they had paid out for the defendant. The defendant put in a counter-claim on account of a bond payable by the plaintiffs which the defendant had discharged. The Court below gave the defendant credit for the amount he had paid to the extent of the principal money secured by the bond and interest for one year, but refused to allow the defendant credit for the amount he had paid as *post diem* interest, holding that this was not recoverable under the bond. With reference to the terms of the bond and the decision of their Lordships of the Privy Council in the recent case, *Mathura Das v. Raja Narindar Bahadur Pal*, L. R., 23 I. A., 138; I. L. R., 19 All., 39, *post diem* interest was due under the bond. The defendant was therefore entitled to credit for the sum he paid on that account. [234] When credit is given him for this, the amount due to the plaintiffs is reduced to Rs. 287-8-0. The result of the above findings is that the plaintiff's suit for possession of the *sir* land and mes ne profits should be dismissed, and a decree passed for Rs. 287-8-0, instead of Rs. 3,009-8-0, with costs proportionate to their success.

I would allow the appeal and vary the decree of the lower Court as set forth above. But, to mark our sense of the bad faith displayed by the defendant, I would not allow him any costs here or in the Court below.

BY THE COURT:—The appeal is allowed; the decree of the lower Court is varied, and the plaintiffs' suit dismissed, except as regards the sum of Rs. 287-8-0. The plaintiffs will get costs in this Court and the Court below proportionate to their success. The defendant will pay his own costs throughout.

Decree modified.

[20 All. 236]

APPELLATE CIVIL.

The 18th January, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE AND MR. JUSTICE BURKITT.

Oochi and another.....Defendants

versus

Ulfat and others.....Plaintiffs.*

Maha-brahmans—Agreement as to distribution of offerings—Contract—Cause of action.

Amongst the Maha-brahmans of a particular village an agreement obtained that some of them should collect and receive offerings during certain months ; that during those months the others should refrain from receiving any offerings, and that in certain other months the other Maha-brahmans should collect and receive the offerings and they should refrain from collecting offerings.

Held that this was a good agreement and sufficient to support an action for damages by the persons entitled to the offerings in a particular month as against the persons who had received those offerings contrary to the agreement.

THIS was a suit of the nature of a suit for damages for breach of contract. The parties to the suit were Maha-brahmans. The plaintiffs' case was as follows :—They alleged that at a time long anterior to suit an arrangement had been come to amongst the [236] Maha-brahmans of Mainpuri by which each of them took it in turn to receive the offerings made on an *ekadasha* (eleventh day ceremony), that is to say, if such a ceremony took place during the turn of a particular Maha-brahman the offerings made were taken by him. The turn of the plaintiffs' maternal grandfather as Maha-brahman fell in the months of Jeth, Bhadon, Aghan and Phagun and he used to receive the Maha-brahman's dues in respect of any *ekadasha* occurring during those days. After his death his widow Mithua continued to receive the dues which had fallen to his share. By a deed of gift of the 9th of December 1885 she gave that right of a Maha-brahman to the plaintiffs who held it since then. The plaintiffs further alleged that in the village of Deopura, which is attached to Mainpuri, one Thakur Tribhawan Singh died, and his *ekadasha* was performed on the 8th Jeth Badi, Sambat 1953, corresponding to the 5th of May 1895. That day belonged to the plaintiffs' turn as Maha-brahmans, but the defendants took without any right the offerings made on that occasion to the value of some Rs. 200. The plaintiffs therefore sued to recover the offerings or their value.

The defendants pleaded, *inter alia*, that such a suit would not lie.

The Court of First Instance (Munsif of Mainpuri) upheld this contention and dismissed the suit on the ground that it was not cognizable by a Civil Court.

The plaintiffs appealed. The Lower Appellate Court (Subordinate Judge of Mainpuri) held that the suit would lie, and made an order of remand under section 562 of the Code of Civil Procedure. From that order the defendants appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the Appellants.

Pandit Sundar Lal, for the Respondents.

* First Appeal No. 59 of 1897, from an order of Maulvi Muhammad Mazhar Hussain Khan, Subordinate Judge of Mainpuri, dated the 29th June 1897.

Edge, C.J., and Burkitt, J.—The plaintiffs sued the defendants to recover money and offerings received by the defendants in breach of an agreement between the parties. The parties were *Maha-brahmans*, and it is alleged that an agreement [236] had been come to between the predecessors of the parties, the effect of which now, as applied to the present parties, is that the plaintiffs should collect and receive offerings during certain months; that during those months the defendants should refrain from receiving any offerings, and that in certain other months the defendants should collect and receive the offerings and the plaintiffs should refrain from collecting offerings. The first Court dismissed the suit on the ground that such a suit would not lie. The second Court set aside the decree of the first Court, and made an order of remand under section 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought.

In the course of the argument we have been referred to *Doorga Parshad v. Budree*, 6 N.-W. P., H. C. Rep., 189; *Lala v. Guneshee*, S. D. A., N.-W. P., S. C. Vol. 2, p. 448; *Durga Prasad v. Genda*, Weekly Notes, 1889, p. 169; *Jhummun Pandey v. Dinoo Nath Pandey*, 6 W. R., 171; *Har Lall v. Jeorakhun Lall*, S. D. A., N.-W. P., 1862, p. 314; *Deonath v. Mussumat Guneshee*, S. D. A., N.-W. P., 1860, p. 78; *Bindhu Lal v. Sampat Misr*, Weekly Notes, 1883, p. 163; and *Muddun Mohan Ghossal v. Nuboram Chuckerbutty*, 2 W. R., C. R., 69.

Few of these authorities have any bearing on this case. The decisions in others of them, so far as they would apply here, were *obiter*. This suit is based on an alleged contract, which of course must be proved. For present purposes, and those only, we assume that the alleged contract can be proved. It is not against public policy that such a contract should be entered into, and we know no reason in law which would make such a contract bad. The cause of action would apparently be for damages for breach of the contract. The measure of these damages probably would be the amount proved to have been received by the defendants in breach of the contract. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See also (1902) 5 O. C., 252.]

[237] *The 19th January, 1898.*

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Kishen Sahai.....Defendant

• *versus*

Bakhtawar Singh and others.....Plaintiffs.*

Suit to recover compensation in respect of property sold under a decree—Decree not reversed or superseded.

A zamindar applied to a revenue officer to commute the rent hitherto paid in kind by certain of his tenants to a fixed money rent to be paid in future. The Assistant Collector made the order asked for and fixed the money rent to be paid in future. After that order had been made the zamindar brought a suit for arrears of rent against the tenants in a Court

* First Appeal No. 78 of 1897, from an order of Babu Jai Lal, Officiating Subordinate Judge of Meerut, dated the 15th July 1897.

of Revenue and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. Against this decree the tenants did not appeal, and it became final. The decree was put into execution: property of the tenants was attached and sold, and the decree was partially satisfied out of the sale proceeds. Subsequently to the passing of the decree for rent the Board of Revenue set aside the order of the Assistant Collector commuting the rent in kind to a fixed money rent. The tenants thereupon sued to recover compensation on account of the sale of their property under the decree for rent.

Held that the suit would not lie, inasmuch as the decree for rent under which the plaintiff's property was sold was unreversed and not superseded by any competent Court. *Marriot v. Hampton*, 7 T. R., 269; S.C., 2 Smith L. C., 409, 10th Ed.; *Shama Parshad Roy Chowdhery v. Hurro Parshad Roy Chowdhery*, 10 Moo. I. A., 203; *Jogesh Chunder Dutt v. Kali Churn Dutt*, I. L. R., 3 Cal., 30, and *Raja Nilmoney Singh Deo Bahadoor v. Sharoda Parshad Mookerjee*, 18 W. R., C. R., 494, referred to.

THE facts of this case are as follows:—

The plaintiffs were occupancy tenants of the defendants of some 20 bighas and 6 biswas of land in the town of Meerut. The plaintiffs used to pay their rent in kind. The defendant sued them for enhancement of rent (describing his suit as one for determination of the rent payable by the plaintiffs) and got a decree on the 13th of September 1889. This decree was set aside by the Board of Revenue on appeal on the 14th of October 1890. Between the 13th of September 1889 and the 14th of October 1890 the defendant sued the plaintiffs for rent at the enhanced rate allowed by the decree of the 13th of September 1889 and got [238] a decree for Rs' 1,960-2-0 on the 18th June 1890. Notwithstanding the order of the Board of Revenue of the 14th of October 1890, the defendant executed his decree for rent and realized Rs. 1,010.

The plaintiffs sued for cancelment of the decree of the 18th of June 1890 and the case went up to the Board of Revenue on appeal. The Board held that the decree of the 18th of June 1890 could not be cancelled by them and directed the plaintiffs to seek their remedy in the Civil Court. The plaintiffs accordingly brought a suit for a declaration that the decree of the 18th of June was incapable of execution; but their suit was dismissed by the Subordinate Judge on the 28th of September 1893.

The plaintiffs thereupon brought the present suit in which they claimed to recover the amount realized in execution of the decree of the 18th of June 1890 on the allegation that the said decree had been superseded by the order of the Board of Revenue of the 14th of October 1890.

The defendant pleaded, *inter alia*, that the decree in question was still subsisting and that therefore the defendant could not recover any thing realized under it.

On this issue the Court of First Instance (Munsif of Meerut) found that the decree in favour of the defendant for rent at the enhanced rate had not been set aside, and dismissed the plaintiffs' suit.

On appeal by the plaintiffs the Lower Appellate Court (Subordinate Judge of Meerut) found that the "main decree of the 13th of September 1889 being reversed by the Board of Revenue and that being the basis of the decree of the 18th of June 1890, this latter decree being a dependent decree must be taken as superseded." The Subordinate Judge accordingly set aside the decree of the Munsif and made an order of remand under section 562 of the Code of Civil Procedure. From this order the defendant appealed to the High Court.

Pandit *Moti Lal*, for the Appellant.

Pandit *Sundar Lal*, for the Respondents.

[239] **Edge, C. J., and Burkitt, J.**—The plaintiffs, who are respondents here, brought their suit against their landlord, who was the zamindar, the appellant here, to recover compensation for their property which was sold in execution of a decree for rent made by a competent Court. The first Court dismissed the suit, holding that the suit did not lie. The Court of First Appeal set aside the decree of the first Court and made an order of remand under section 562 of the Code of Civil Procedure. From that order this appeal has been brought.

The facts of this case are these:—The zamindar applied to a revenue officer to commute the rent theretofore paid by these plaintiffs as his tenants in kind to a fixed money rent to be paid in future. The Assistant Collector made the order, and fixed the money rent to be paid in future. After that order had been made, the zamindar brought a suit for arrears of rent against his tenants, these plaintiffs, in the Court of Revenue and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. That decree was put in execution; property of these plaintiffs appellants was attached and sold; and the decree was partially satisfied out of the sale proceeds. This suit is brought to recover the money so realized, the Board of Revenue having, before the commencement of this suit and subsequently to the passing of the decree for rent, set aside the order commuting the rent in kind into a fixed money-rent.

For the defendant appellant reliance has been placed on the principle of the decision in *Marriot v. Hampton*, 7 T. R., 269; s. c., 2 Smith L. C., 409, 10th Ed., and it has been contended that, as the Board of Revenue had not jurisdiction to interfere in appeal or otherwise with the decree for rent, the decision of their Lordships of the Privy Council in *Shama Parshad Roy Chowdhery v. Hurro Parshad Roy Chowdhery*, 10 Moo. I. A., 203, the decision of the majority of the Full Bench of the High Court at Calcutta in *Jogesh Chunder Dutt v. Kali Churn Dutt*, I. L. R., 3 Cal., 30, and of the Calcutta Court in *Raja Nilmoney Singh Deo Bahadoor v. [240] Sharoda Parshad Mookerjee*, 18 W. R., C. R., 434, did not apply, as in all these cases the Court which passed a subsequent decree, which had the effect of reversing or superseding the decree under which the money was paid which was sought to be recovered, had jurisdiction over the suit in which such last mentioned decree was made.

On the other hand for the plaintiffs respondents it has been contended that the setting aside in revision by the Board of Revenue of the order of the Assistant Collector commuting the rent in kind into a fixed money rent had the effect of superseding the decree for rent of the Court of Revenue, as that decree was based on the order of the Assistant Collector commuting the rent.

As a matter of fact it is questionable whether in this case the Assistant Collector had any jurisdiction to make his order commuting the rent in kind to a fixed money rent. The Board of Revenue had absolute jurisdiction in revision over that order of the Assistant Collector. The decree for rent made by the Court of Revenue being for a sum exceeding Rs. 100 was one over which the Board of Revenue had no jurisdiction of any kind, and was one the appeal from which lay exclusively to the District Judge. No appeal in fact was made from the decree for rent. It appears to us that their Lordships of the Privy Council, in the case which was before them and to which we have referred, when speaking of a decree being reversed or superseded, were, as to reversal certainly, speaking of reversal by a competent Court, and as to supersession were referring to such supersession as had taken place in the case before them. That was a case in which the money sought to be recovered had been paid under decrees which were based solely on a decree between the same parties which was

subsequently reversed by their Lordships of the Privy Council. We think the supersession to which their Lordships were referring must have been a superseding by a decree of a Court which had competent jurisdiction to reverse the decree under which the money had been paid, if it had been brought before them. It is quite plain to our minds that if there had been no order made [241] at all for a commutation of the rent in kind into a fixed money rent, but a Court of Revenue had erroneously made a decree for a money rent and that decree was executed and was not reversed in appeal or superseded by a Court competent to reverse it, a tenant whose goods had been sold in execution of such decree for rent or who had satisfied that decree by payment, could not recover so long as the decree for rent was not reversed or superseded by a Court competent in that respect. The defendants had a remedy against this decree for rent, and that was by appealing. Of that remedy they did not avail themselves, and it may be observed that, as the Assistant Collector apparently acted without jurisdiction in making his order of commutation, the defendants had a good ground of appeal. The fact that the order of the Board of Revenue in revision set aside the order of the Assistant Collector commuting the rent cannot, in our opinion, put the plaintiffs in a better position than they would have been in, if, as we think is probable, the Assistant Collector had no jurisdiction to make the order of commutation. In our opinion, as the decree of the Court of Revenue stands unreversed and not superseded by a competent Court, this suit must fail. We allow this appeal with costs in this Court and in the Court below, and, setting aside the order under appeal we dismiss the appeal to the Court of First Appeal and restore and affirm the decree of the first Court.

Appeal decreed.

NOTES.

[See also (1908) A.W.N., 211.]

[20 All. 241]

The 19th January, 1898.

PRESENT :

MR. JUSTICE AIKMAN.

Daulat Ram.....Defendant

versus

Anwar Husen.....Plaintiff.

Jurisdiction—Civil and Revenue Courts—Suit to set aside, on the ground of duress, an agreement by an ex-zamindar for surrender of his sir land.

On the sale of a village the vendor covenanted with the vendee to hold his *sir* land as a tenant of the vendee for a certain term and then to surrender it to the vendee. *Held* that there was nothing to preclude the vendee from suing in a Civil Court for a declaration that the said agreement was void and [242] unenforceable and had been extorted from him by undue influence. *Mahesh Rai v. Chandar Rai*, I.L.R., 13 All., 17; *Ajudhia Rai v. Parmeshwar Rai*, I.L.R., 18 All., 340; and *Husain Shah v. Gopal Rai*, I. L. R., 2 All., 428, referred to,

* Second Appeal No. 969 of 1896, from a decree of T. E. Piggott, Esq., Additional Judge of Aligarh, dated the 5th September 1896, modifying a decree of Munshi Achut Behari, Munsif of Etah, dated the 13th December 1895.

THE facts of this case are fully stated in the judgment of the Court.

Mr. W. Wallach and Munshi Badri Das, for the Appellant.

Maulvi Ghulam Mujtaba, for the Respondent.

Aikman, J.—On the 18th January 1893, the appellant Daulat Ram purchased from the respondent Anwar Husen his proprietary rights in a certain village. On the following day Anwar Husen executed in favour of Daulat Ram a kabuliati by which he undertook to hold his *sir* land as a tenant of Daulat Ram, for a term of three years, at a rental of Rs. 175, and then surrender it. It is found that the rental entered in the kabuliati is far in excess of the rate Anwar Husen would have been bound to pay under the provisions of section 7 of the North-Western Provinces Rent Act. The object of the agreement on the face of it was clearly to defeat the provisions of that section, and the agreement was therefore, under the provisions of section 23 of the Indian Contract Act, unlawful and void. In the following year Daulat Ram sued Anwar Husen to recover rent at the rate agreed upon. The suit was dismissed by the Assistant Collector, but on appeal was decreed by the then District Judge of Mainpuri. I must express my surprise that the District Judge should have given effect to an agreement, the object of which was so clearly unlawful. To the suit for the arrears of rent the defendant Anwar Husen pleaded—"that the kabuliati was unenforceable, as having been extorted from him by undue influence for an exorbitant rent." In his judgment the District Judge said:—"I think that the question as to whether it (that is, the kabuliati) was executed under pressure of undue influence cannot be properly decided in the present suit. If the respondent wishes to have it set aside he can sue in the Civil Court." On the 19th of September 1895, Anwar Husen instituted the suit out of which this appeal arises. [243] He asks for two reliefs, first; that the kabuliati and the decree passed by the Revenue Court on the basis of the said kabuliati might be cancelled and held unenforceable; secondly, that a sum of Rs. 418-10-0, being a balance alleged to be due out of the price of his zamindari estate, should be awarded to him. The Court of First Instance, the Munsif of Etah, gave the plaintiff a decree for Rs. 100 under the second relief set forth above and dismissed the rest of the claim. On appeal, the District Judge gave the plaintiff a decree cancelling the kabuliati and declaring it inoperative. *Quoad ultra* the decision of the Munsif was affirmed. The defendant Daulat Ram comes here in second appeal and impugns the decree of the Lower Appellate Court on two grounds. First, that the claim for the cancellation of the kabuliati was barred by section 13 of the Code of Civil Procedure, and secondly, that the claim for the cancellation of the kabuliati was not cognizable by the Civil Court. The appellant's case has been ably argued by the learned counsel who appears in support of the appeal, but after full consideration I have come to the conclusion that the appeal must fail.

The lower Court has decreed the cancellation of the kabuliati on several grounds, one being that it was extorted from the plaintiff by undue influence. With reference to the extract from the previous judgment which has been set forth above, I cannot hold that the issue as to whether the kabuliati was obtained through undue influence was heard and finally decided in the previous suit.

In support of the second ground of appeal the learned counsel relies on two Full Bench decisions of this Court, *i.e.*, *Mahesh Rai v Chandar Rai*, I. L. R., 13 All., 17, and *Ajudhia Rai v. Parmeshar Rai*, I. L. R., 18 All., 340. For the respondent reliance is placed on a decision of this Court in *Husain Shah v. Gopal Rai*, I. L. R., 2 All., 428. If the cases relied on by the learned counsel for the appellant are in point I am of course bound to follow them and sustain the appellant's contention, but I think the cases are distinguishable from the

[244] present case. In the first case a Revenue Court had held that the defendants were occupancy tenants; the plaintiffs brought a suit in a Civil Court asking for a declaration that the judgment of the Revenue Court in so far as it was injurious to the plaintiff's rights might be declared as set aside and of no effect, and that it should be decided that the defendant's possession was that of sub-tenants. This was clearly a suit of which the cognizance was barred by section 95, clause (a) of the North-Western Provinces Rent Act. In the second Full Bench case, the Settlement Court had entered the defendants as tenants at fixed rates and the plaintiffs as mortgagees of the holding. The plaintiffs asked for a decree for maintenance of possession "by invalidating the proceeding of filling up the columns at the recent settlement." It was held that if a Civil Court exercised jurisdiction in the case by declaring that the plaintiffs were and the defendants were not the tenants at fixed rates of the holding in question, it would be exercising a jurisdiction which section 241 of Act No. XIX of 1873 prohibits the Civil Courts from exercising.

In this case it may be true that the ultimate result of the decree which the plaintiff obtained will be that he may, by adopting proper steps, succeed in establishing his status as an ex-proprietary tenant, but the decree as given does not, in my opinion, trench upon the jurisdiction of the Revenue Courts. Suppose that a landholder by duress obliges his tenant to execute a kabuliat for the land which he holds, undertaking to pay an exorbitant rent, the tenant might, it appears to me, wait until he is sued upon the kabuliat and put forward the defence that it had been extorted from him, and in that case it would be incumbent on the Revenue Court to find whether or not the defendant's plea was good. But in my opinion the tenant would not be bound to wait until he was made defendant in a suit for arrears. He might, I hold, bring a suit to have it declared that the kabuliat was not binding upon him. If he could bring such a suit, there is no provision, so far as I can see, in the Rent Act by which a Revenue Court could [245] entertain it; it would necessarily lie, therefore, in the Civil Court. In this case the tenant has executed a kabuliat by which he undertook to surrender the holding after a certain period. It is stated that the landholder has not as yet taken any steps to enforce the agreement to surrender. I am unable to see what there is to prevent the tenant from maintaining the present suit to have it declared that the agreement is not binding upon him. With reference to the fact that, as I read it, the District Judge in his judgment of the 7th of November 1894, refrained from deciding the question as to whether the agreement to pay an enhanced rent had or had not been obtained under pressure of undue influence, there is, in my opinion, no bar to the tenant maintaining this suit for the cancellation of the kabuliat as a whole. In the case relied upon by the respondent it was held that a suit to set aside a perpetual lease of agricultural land on the ground that the word importing perpetuity had been fraudulently inserted in this lease was "peculiarly within the jurisdiction of the Civil Court." I see no reason why this view should not be extended to a suit to set aside a kabuliat on the ground that it had been obtained by undue influence. For the above reasons I dismiss this appeal with costs.

Appeal dismissed.

[20 All. 246]

The 25th January, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Abdul Majid Khan.....Defendant

versus

Kadri Begam.....Plaintiff. *

Construction of document—Award—Award of the nature of a family settlement directing an annuity to be paid "ta haiyat walidain."

An award drawn by an unprofessional arbitrator in India is not to be construed according to the same principles as an award settled by counsel or a solicitor in England, but in accordance with what may reasonably be supposed under the circumstances of the case to have been the intentions of the arbitrator.

Where an award, which was of the nature of a family settlement between a father, mother and son, of certain property which had been given by the father to the mother in lieu of dower and then by the mother to the son, directed that a certain annuity should be paid out of the property to the father [246] and mother "*ta haiyat walidain*," it was held, that the annuity was to be paid during the joint lives of the father and mother and also during the life of the survivor.

THIS appeal arose out of a suit to recover money in virtue of an award. The plaintiff was the widow of one Nawab Rashid Khan, and the defendant Abdul Majid Khan was her son. Rashid Khan had assigned certain property to his wife, the plaintiff, in lieu of her dower, and she during his minority made a gift of the property so assigned to the defendant. Subsequently the defendant apparently showed a disposition to become extravagant, and thereupon the father, mother and son agreed that a settlement of the property should be made through an arbitrator. An arbitrator was appointed and made his award on the 7th of February 1885, which award was subsequently registered. By this award it was provided that the defendant should pay out of the property the subject of the award Rs. 600 yearly to his father and mother; and it was provided that his payment should be made "*ta haiyat walidain*," which is, literally translated, "to the term of the lives of the two parents." The annuity was duly paid during the lifetime of the father and for a short period after his death. Subsequently, however, the defendant ceased paying anything to his mother, who accordingly sued to recover a certain instalment of the annuity by sale of the property in question.

The Court of First Instance (Munsif of Bareilly) gave the plaintiff a decree for half the amount of her claim, which decree was in substance affirmed by the Lower Appellate Court (Subordinate Judge of Bareilly). The defendant appealed to the High Court, and his appeal coming before a single Judge of the Court was dismissed. From the judgment of the single Judge the defendant appealed under section 10 of the Letters Patent.

Mr. A. E. Ryves and Maulvi Ghulam Muftaba, for the Appellant.

Mr. T. Conlan, for the Respondent.

Edge, C. J. and Burkitt, J. :—In this suit Musammât Kadri Begam sues her son, Abdul Majid Khan, on an award, to obtain [247] a decree for sale. The facts of the case are somewhat peculiar. The plaintiff was the wife of

* Appeal No. 27 of 1897, under section 10 of the Letters Patent.

one Nawab Rashid Khan, who was the owner of the property sought to be sold. He assigned the property to his wife, the plaintiff, in satisfaction of dower due by him to her, and she during his minority made a gift of the property to the defendant. When the defendant came of age he showed a disposition to be extravagant, and thereupon the father, mother and son agreed that an arbitrator should determine what provision should be made for the family. Now the arbitrator made an award, and upon that award this suit has been brought. He awarded that Rs. 600 yearly should be paid out of the property in question to the father and mother, and ordered that the payment should be made "*ta haiyat walidain*" which has been translated "to the term of the lives of the two parents." Nawab Rashid Khan, the husband, has died, and for some time after his death the money was paid regularly to the mother by the son. He has now, however, taken a different view of his legal and filial duties, and he declines to pay his mother anything. Of course, if in point of law he is not liable to make any payment to his mother, the fact that he is her son and the fact that the property in question belonged to her and that she need not have given it to him cannot impose on him any liability in law to make any payment of the kind. It has been contended that the arbitrator intended by his award that this annual payment of Rs. 600 should be made for the joint lives only of the father and mother, and that after the death of either the son should be under no obligation to make any payment to the survivor. It is difficult to conceive that the arbitrator, who at the time was carrying out the wishes of the family, should have entertained any such intention. It is difficult to understand how he could have intended that on the mother's death the father should be left penniless by his dutiful son. And if that was not his intention in the case of the mother dying and the father surviving, his intention must have been that the money should be paid during the joint lives of the father and mother and during the lifetime [248] of the survivor. There is no doubt that the language used in the award is somewhat ambiguous, and we were pressed by Mr. Ryves with the decision of KINDERSLEY, V.C., in *Grant v. Winbolt*, 23 L.J. Ch., 282. In that case the Vice-Chancellor arrived with great difficulty at the conclusion which he expressed. We have not to construe this award as we should have to construe an award settled by counsel or a solicitor in England, but as an award drawn by a plain man of Bareilly, probably of no great business habits, who would know little or nothing about the subtleties of the English system of conveyancing. We have to construe it as we think it was intended by the arbitrator it should be construed, and we hold that it was his intention that the liability to make the payment should continue during the life of the survivor of the parents. .

We have said this was a suit for sale. A decree for sale under section 88 of the Transfer of Property Act was made, treating the award as if it were a mortgage or document creating a charge upon land. It does not appear from anything put before us that the arbitrator had any power to charge the lands in question; consequently a decree for sale was bad. However, the plaintiff is entitled to a decree for money. We set aside the decree for sale, and we give the plaintiff a decree for the Rs. 600 (six hundred) annuity for the year in question, together with interest from the date of suit until realisation at 12 per cent. per annum. We also give her her costs of this appeal.

To the extent above indicated we modify the decree below. In other respects we dismiss the appeal.

Decree modified.

NOTES.

[As regards the liberal interpretation of deeds and contracts of the people of India, see also (1915) 37 All., 369 P.C.]

[20 All. 246]

The 28th January, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Sri Girdhariji Maharaj.....Plaintiff

versus

Chote Lal and others.....Defendants.*

Landholder and tenant—Rights of zamindars in land forming part of the abadi—Custom—Customary law of the North-Western Provinces.

According to the general custom prevalent in the North-Western Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar [249] to build a house for his occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zamindar, he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house. *Narain Prasad v. Dammar*, Weekly Notes, 1888, p. 125, and *Chajju Singh v. Kankia*, Weekly Notes, 1891, p. 114, referred to.

THE facts of this case are as follows :—

The plaintiff came into Court alleging that about twenty-six years previously one Nand Kishore had received from his, the plaintiff's agent, permission to build a house on a piece of land in the village of which the plaintiff was zamindar, on the condition that it should be inhabited by Nand Kishore and his heirs, and alleging further that the house which was built could not legally be transferred. The plaintiff also relied upon a clause in the *wajab-ul-ars*. The house so built by Nand Kishore was sold in execution of a decree against a son of Nand Kishore and purchased by one Chote Lal. The plaintiff zamindar asked for a declaration of his right to the land on which the house stood. Further that he should be put in possession of that land, the auction-purchaser being ordered to remove the materials of the house, or if the Court saw fit, being ordered to receive from the plaintiff the value of those materials.

The Court of First Instance (Munsif of Muttra) gave the plaintiff a decree declaring (what was never seriously contested) that the site of the house had not been and could not be sold in execution of Chote Lal's decree, and dismissed the rest of the plaintiff's suit. This decree was affirmed on appeal by the Subordinate Judge of Agra.

The plaintiff appealed to the High Court, and his appeal coming before a single Judge was dismissed on the ground that no custom of inalienability or

* Appeal No. 29 of 1897, under section 10 of the Letters Patent.

special agreement not to alienate [250] the house had been proved. From this judgment the plaintiff appealed under section 10 of the Letters Patent.

Mr. B. E. O'Connor, for the Appellants.

Pandit Sundar Lal and Pandit Baldeo Ram Dave, for the Respondents.

Edge, C. J. and Burkitt, J.—This appeal has arisen in a suit brought by the zamindar against the occupiers of a house in the *abadi* of his village and against one Chote Lal, who purchased at auction-sale under a decree against the occupiers such rights as the occupiers had in the house. The occupiers made no defence to the suit. Chote Lal only has defended the suit. The plaintiff alleged a special agreement under which the house had been originally built; he also relied upon the *wajib-ul-arz*. He did not specifically set up in his plaint, or apparently in his argument before our brother AIKMAN in this Court, the real point on which this case must be decided, and that is that, according to the general and well known custom of these Provinces, a custom so well established that it may be treated as the common law of the Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar to build a house for his occupation in the *abadi*, obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zamindar, as in this case, he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house. There is good reason why such a custom should have grown up and have been established. If it were otherwise, agricultural tenants or cultivators who, for the purposes of the cultivation of the agricultural lands of the village, were permitted by the zamindar to build or occupy a house in the *abadi* of the particular village might sell the right to occupy the [251] house to some person unconnected with the cultivation of the agricultural land in the village, and thus in course of time the *abadi* provided and reserved by the zamindar for the use of those cultivating his lands would come to be occupied by persons in no way connected with the cultivation of the agricultural lands in the village. In such a case the zamindar would practically lose his rights in the *abadi* and would be compelled to restrict the area of cultivable land in the village so as to provide sites for fresh houses for agriculturists. It might happen that a purely agricultural village, every single site in the *abadi* of which belonged to the zamindar solely, might come to be a village, for example, of weavers, who neither paid rent to the zamindar nor promoted the cultivation of the agricultural lands of the village.

It is contended that it was for the plaintiff to prove a special contract. In our opinion the plaintiff had only to rely on the common custom of the Provinces, and it was for the auction-purchaser, who alone defended this suit, to show that there was some special contract between the zamindar and the person or the predecessor of the person whose interest he had bought which created, contrary to the general custom, an interest which might be attached and sold in execution of a decree against the occupier. If the defendant, auction-purchaser, had set up, not a special contract, but a local custom of the village in question by which an occupier of a house in the *abadi*, holding under no special contract, but merely occupying a house the site of which belonged to the zamindar, could sell his right to occupy or have it sold for him in execution of a decree against him, we should be prepared to hold that such a special custom was bad.

Our attention has been drawn to the decision of this Court, *Narain Prasad v. Dammar*, Weekly Notes, 1888, p. 125. So far as that decision is based upon an assumption that, apart from special contract, the occupier of a house in the *abadi* under the zamindar has any interest in the occupancy of that house which can be sold privately or by auction sale we entirely dissent from it. The [252] occupier's right is a mere personal right of residence. The other case to which we have been referred is *Chaiju Singh v. Kanhia*, Weekly Notes, 1881, p. 114. There the Full Bench held that the zamindars of a village are, as a rule and presumably, the owners of all the house sites in the village, and that a house left unoccupied by a tenant lapses to the landlord in the absence of heirs or of other lawful assignees of the last occupier. "Other lawful assignees" must not be understood to mean purchasers by private or auction-sale from such occupier.

Chote Lal, the only defendant defending this suit, has made out no case. This appeal must be allowed. We give the plaintiff a decree declaring that the occupiers of the house had no right, except to the timber, the wood-work and the roofing, which could be sold in execution of a decree against them, that a right to occupy the house was not transferable by sale either private or in execution of a decree, and a decree that the plaintiff be put in possession of the site claimed. Chote Lal will be allowed thirty days from the notification of this decree in the Court below to remove such of the materials of the house as were not part of the land; that is, he cannot remove the walls of the house if they are constructed of soil belonging to the village. We allow this appeal with costs in all Courts.

Appeal decreed.

NOTES.

[This was followed in (1902) 22 A.W.N., 140; (1900) 20 A.W.N., 182; (1908) 6 A.L.J., 57; in (1898) 1 O.C., 231; (1904) 27 All., 338, the dictum as regards the custom relating to houses on village homestead land was dissented from. See also (1910) 8 A.L.J., 61; 9 I.C., 814; (1907) 4 A. L. J., 754; (1906) 4 N. L. R., 155; (1905) 1 N. L. R., 93.

As regards the question of estoppel, see 21 All., 496, P.C.

As regards the right to remove the materials of the building, see 27 Mad., 211.]

[20 All. 252]

The 31st January, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Diwan Singh and others.....Defendants

versus

Jadho Singh.....Plaintiff.*

Act No. III of 1877 (Indian Registration Act), section 50—Registered and unregistered documents—Priority—Notice.

Held, that section 50 of the Indian Registration Act, 1877, will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed, not being a compulsorily registerable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed.

[253] THE suit out of which this appeal arose was a suit to recover money due under a mortgage bond held by the plaintiff dated the 14th of January 1893. The mortgage was for a sum not exceeding Rs. 100, and was not registered. Subsequently to the date of this mortgage the mortgagor sold the mortgaged

* Appeal No. 37 of 1897, under section 10 of the Letters Patent.

property by a registered sale deed dated the 9th January 1895. The defendants to the suit were the mortgagor and the vendees.

The Court of First Instance (Munsif of Phaphund) decreed the plaintiff's claim against the mortgagor alone, holding it not established that at the time of the execution of their sale deed the vendees had notice of the prior unregistered mortgage.

The plaintiff appealed, and the Lower Appellate Court (Subordinate Judge of Mainpuri), finding that the vendees had in fact had notice of the plaintiff's mortgage and therefore could not claim priority under section 50 of Act No. III of 1877, decreed the plaintiff's claim also as against the defendants vendees.

The defendants vendees appealed to the High Court, and their appeal coming before a single Judge of the Court was dismissed (see I. L. R., 19 All., p. 145). From that judgment the defendants vendees appealed to the High Court.

Munshi Madho Prasad, for the Appellant.

Mr. Muhammad Ishaq Khan, for the Respondent.

Edge, C. J. and Burkitt, J. :—In this case it is contended in appeal that the holder of a registered deed of sale of immovable property who, at the time of the making of his contract of sale, had notice of a prior unregistered mortgage, which did not require registration, was entitled to priority by reason of section 50 of the Indian Registration Act, 1877, over the holder of the unregistered mortgage. The rule of equity on this subject which has always been followed in this Court has been applied by our brother AIKMAN in the decree from which this appeal has been brought. We dismiss this appeal with costs.

Appeal dismissed

NOTES.

[Notice defeats the priority, if any conferred by the fact of registration :—5 A. L. J., 112 ; 28 All., 315 ; 25 All., 366 ; (1900) P. L. R., 26 ; 25 Mad. 1.]

[284] *The 31st January, 1898.*

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Jaikaran Bharti.....Plaintiff

versus

Raghunath Singh.....Defendant.*

Civil Procedure Code, sections, 244, 258—Execution of decree—Suit to set aside a sale on the ground of an adjustment of the decree out of Court—Adjustment not certified—Suit not maintainable.

Held, that no separate suit would lie to set aside a sale held in execution of a decree on the ground that the decree had been adjusted out of Court when in fact no such adjustment of the decree had been certified in the manner provided by section 258 of the Code of Civil Procedure. *Shadi v. Ganga Sahai*, I. L. R., 3 All., 538, and *Kalyan Singh v. Kamta Prasad*, I. L. R., 13 All., 539, distinguished. *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* I. L. R., 9 Cal., 788, and *Pat Dasi v. Sharup Chand Mala*, I. L. R., 14 Cal., 876, not

* Second Appeal No. 999 of 1895, from a decree of W. F. Wells, Esq., District Judge of Shahjahanpur, dated the 11th June 1895, confirming a decree of Rai Sanwar Lal, Subordinate Judge of Shahjahanpur, dated the 21st February 1895.

followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal*, I. L. R., 19 Cal., 683; *Asisan v. Matuk Lal Sahu*, I. L. R., 21 Cal., 487, and *Bairagulu v. Bapanna*, I. L. R., 15 Mad., 802, referred to.

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Mr. *Roshan Lal* and *Maulvi Ghulam Muftaba*, for the Appellant.

Mr. *Abdul Majid*, for the Respondent.

Blair, J.—This is a plaintiff's second appeal. His suit has been dismissed by the Court of First Instance and also by the Lower Appellate Court. The suit was brought to set aside an auction-sale which had taken place in execution of a decree in a suit for sale. The point raised in appeal is that the Courts below were wrong in holding that sections 244 and 13 of the Code of Civil Procedure bar the suit.

In the course of the proceedings in execution the parties agreed to refer their differences to arbitration and to abide by the award which should be made. Such an award was made, but it was not certified to the executing Court, as required by section 258 of the Code of Civil Procedure. The execution was proceeded with in spite of objection taken, and the property was sold and bought [255] in by the decree-holder. The judgment-debtor in that suit is the plaintiff and appellant here.

An argument has been addressed to us on behalf of the appellant based upon the amendment of section 258 of the Code of Civil Procedure made by the Civil Procedure Code Amendment Act of 1888. The words in the Act of 1882 were—"No such payment or adjustment shall be recognized by any Court unless it has been certified as aforesaid." In the amending Act the substituted words are:—"Unless such a payment or adjustment has been certified as aforesaid, it shall not be recognised as a payment or adjustment of the decree by any Court executing the decree." The argument was that it was a reasonable inference to draw from the words of limitation imported by the amendment that the Legislature did not intend to exclude the recognition of payments of adjustments by Courts other than those executing the decree in question. My attention has been called to sundry cases, two of which have been the subject of decision in these Provinces. The first is the case of *Shadi v. Ganga Sahai*, I. L. R., 3 All., 538. In that case a payment had been made by a judgment-debtor in satisfaction of a decree, but such payment had not been notified to the executing Court. The Court proceeded to execute the decree on the application of the decree-holder. The judgment-debtor then brought a regular suit to recover the money which he had paid to put an end to the execution proceedings. It was held that the suit could be maintained. But the reliefs asked for in that suit contained no prayer asking that the execution proceedings in the prior suit should be set aside or otherwise interfered with. That case is therefore in a very material particular distinguishable from the one with which we are now dealing. In another case *Kulyan Singh v. Kamta Prasad*, I. L. R., 13 All., 339, it was held by a single Judge that a suit would lie in the following circumstances. Pending the execution of a decree an adjustment by transfer of some trees to the decree-holder had been made, but not certified. In a later suit brought by another plaintiff against the same judgment-debtor, [256] it was sought in execution to attach the trees in question. The decree-holder in the previous suit objected that the trees were his by virtue of the uncertified adjustment. The objection being disallowed, the objector brought a regular suit to establish his right to the trees. It was held that the suit was maintainable. In this case also no setting aside or modification of execution proceedings in the first suit was asked for. Two cases have,

• however, been cited for the appellant which appear to be authorities in favour of his contention. In the case of *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami*, I. L. R., 9 Cal., 788, and in the case of *Pat Dasi v. Sharup Chand Mala*, I. L. R., 14 Cal., 376, suits to set aside execution proceedings in the course of which adjustments had been made, but not certified, were held maintainable. In my opinion the decisions in those cases cannot now be held to be law. They are disposed of by the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*, I. L. R., 19 Cal., 683: s. c. 19 I. A., 166. The suit in that case was a suit to have set aside a sale in execution proceedings of certain zamindari, on the allegation that the decree-holder had made with certain co-sharers in the zamindari an agreement that their shares should be exempted in execution. The agreement was not notified to the executing Court, and those shares were sold. In appeal in a suit to set aside the sale, the Committee of the Privy Council held that section 244 of the Code of Civil Procedure barred the plaintiff's suit, inasmuch as the question which had arisen was a question arising between the parties to the suit in which the decree was passed within the true intent and meaning of section 244 of the Code of Civil Procedure. The decision of their Lordships was followed by a majority of the Judges who decided the case of *Azizan v. Matuk Lai Sahu*, I. L. R., 21 Cal., 437. In my opinion the ruling of the Judicial Committee of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal* governs this case, and is fatal to this appeal. I would dismiss the appeal.

[257] Aikman, J.—I am of the same opinion. Amrit Gir the father of the plaintiff gave the defendant Raghunath Singh a mortgage over certain property. After the death of Amrit Gir, the mortgagee brought a suit against the plaintiff upon his mortgage-deed, obtained a decree, and in execution thereof brought the hypothecated property to sale. The execution was transferred to the Collector, by whom the property was sold. It was purchased by the mortgagee decree-holder. The plaintiff Jaikaran Gir in the course of the execution proceedings filed an objection based on an alleged adjustment of the decree which had taken place out of Court. His objection was disallowed, and, as stated above, the property was sold and purchased by the decree-holder. The plaintiff has now brought a regular suit to set aside the sale on the ground that the decree had been adjusted out of Court. His suit was dismissed by the Subordinate Judge, whose decree was confirmed on appeal by the District Judge. The Courts below held that the present suit was barred by the provisions of section 244 of the Code of Civil Procedure. The plaintiff comes here in second appeal contending that that section does not bar his suit. By the provisions of that section all questions arising between the parties to the suit in which a decree was passed, and relating to the execution, discharge or satisfaction of the decree or to the stay of execution thereof, must be determined by order of the Court executing the decree, and not by separate suit. Now it cannot be denied that the question which arises in this suit is one between the parties to the former suit in which the decree was passed, and it is clear to me that it is a question relating to the execution of the decree. The cognizance of the suit therefore is barred by the provisions of section 244 unless it can be shown that there is any other provision of law which excepts it from that section. The learned counsel who appears in support of the appeal relies upon the last paragraph of section 258 of the Code of Civil Procedure. In my opinion that paragraph cannot be taken as overriding the clear provisions of section 244. As to this I concur with the learned Judges who decided the case of *Bairagula v. Bapanna*, [258] I. L. R.,

15 Mad., 302, and with the majority of the Bench which decided the case of *Azizan v. Matuk Lal Sahu*, I. L. R., 21 Cal., 437. The plaintiff in this suit, if any adjustment of the decree took place out of Court, ought to have taken steps to have that adjustment certified to the Court. I do not think that his negligence in failing to take such steps can give the Court a jurisdiction which is clearly barred by the provisions of section 244. It may be that he may have some other relief against his decree-holder, for instance, by a suit for damages, but I do not think that he can maintain a suit which would have the effect of nullifying a decree regularly obtained in a suit between him and the present defendant. For these reasons I would dismiss the appeal with costs.

BY THE COURT:—The order of the Court is that the appeal is dismissed.
Appeal dismissed.

NOTES.

[See also (1904) 31 Cal., 480. A suit may be brought on breach of the agreement:—(1899) 23 Bom., 394; (1898) 25 Cal., 718; (1898) 21 Mad., 409.]

[20 All. 258]

The 1st February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Brij Bhukhan.....Plaintiff

versus

Durga Dat and others.....Defendants.*

Jurisdiction—Civil and Revenue Courts—Act No. 1 of 1877 (Specific Relief Act), section 42—Letters Patent, section 10—Appeal—Appellant not entitled to be heard on points not argued before the single Judge—Practice.

A plaintiff brought his suit in a Civil Court asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates, or in the alternative for possession, alleging that the lands were the property of a joint Hindu family, of which he was a member, that the family still remained joint and that he was entitled as a member of such joint Hindu family to a one-third undivided share in this ancestral property.

Held, that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third undivided share; further that section 42 of the Specific Relief Act would not apply to the suit, inasmuch as the Civil Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates.

[259] *Held* also, that in appeals under the Letters Patent, section 10, an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Haribans Sahai, for the Appellant.

Munshi Gobind Prasad, for the Respondents.

* Appeal No. 47 of 1897, under section 10 of the Letters Patent.

Edge, C.J. and Burkitt, J.—The zamindar of the village in which Brij Bhukhan Pande, the plaintiff in this suit, claims to be a tenant, sued Brij Bhukhan and other persons for arrears of rent. Brij Bhukhan's co-defendants denied that he was a tenant of the holding, which apparently was a fixed rate holding. That we do not decide. The first Revenue Court decreed the claim for arrears of rent against the other defendants, but dismissed the claim against Brij Bhukhan on the ground that he had not been properly entered in the Revenue papers as a tenant, and that a decree for rent could not be made against him until he had obtained an amendment of the record of rights and had been properly entered in the record as a tenant. It is obvious that the Revenue Court did not actually or impliedly decide that Brij Bhukhan was not in fact a tenant of the land in respect of which the rent was claimed. There was an appeal to the Collector, which was dismissed, but the Collector did not decide whether or not Brij Bhukhan was a tenant. He appears to have disposed of the case on the same lines as the first Court. Brij Bhukhan has brought this suit in a Civil Court, alleging that the lands in respect of which the suit for rent was brought in the Court of Revenue were ancestral lands belonging to a Hindu family of which he was a member, that the family was joint and that he was entitled as a member of that joint family to a one-third undivided share in this ancestral property. He asked for a declaration that he was a tenant at fixed rates of the lands and in joint possession of them with the other defendants to the suit in the Court of Revenue, who are defendants here, and for maintenance of such possession, and, the event of its being found that he was out of possession, [260] he asked for a decree for joint possession as a tenant at fixed rates. The first Court dismissed the suit. The Court of first appeal, partly on findings of fact and partly on admissions of the parties, found that the tenancy in question was part of the ancestral property of the joint Hindu family of which the plaintiff and the defendants are members and that there had been no partition, and gave in general terms a decree decreeing the plaintiff's claim. It probably would puzzle the Court of first appeal to say now precisely what was the decree which it gave, the relief claimed being in the alternative and the decree merely decreeing the plaintiff's claim generally. That is not the way in which decrees should be made.

The defendants appealed to this Court from the decree in first appeal. The appeal came before a single Judge of this Court, and it was argued on behalf of the plaintiff, respondent to the appeal, on the basis that he was entitled to a decree declaring his right as a tenant and his right to be maintained as a tenant or to be put in possession as a tenant at fixed rates. On the case so presented our brother BLAIR properly applied the decision in *Ajudhia Rai v. Parmeshar Rai*, I. L. R., 18 All., 340, and allowed the appeal. No matter how the case had been presented to our brother BLAIR, it would have been necessary for him in any event to have allowed the appeal to some extent, for the decree of the Court of first appeal declaring Brij Bhukhan's title as a tenant at fixed rates of the holding and his right to possession as such tenant and giving him possession as such tenant was a decree which the Civil Court had no jurisdiction to pass. Our brother BLAIR allowed the appeal, and, setting aside the decree of the Court of first appeal, restored the decree of the first Court dismissing the suit. The plaintiff has brought this appeal under the Letters Patent from the decree of our brother BLAIR.

Probably we should be right in dismissing this appeal, and certainly it will be necessary to dismiss it so far as it is based on the case which was argued before our brother BLAIR. It was many [261] years ago decided by the High Court at Calcutta, and rightly in our opinion, that in appeals under the Letters

Patent an appellant was not entitled to be heard on points which he had not raised before the Judge whose decree he was appealing, that is, that it was not intended that in an appeal under the Letters Patent an appellant should be entitled to make a new case. That is a rule which is approved by all the Judges in this Court, and which certainly has been, and, so long as the Court is constituted as at present, will be followed.

However, in this appeal Brij Bhukhan's case has been presented, not probably as an absolutely new case, certainly in a different light from that in which it must have been put by another vakil who appeared for him before our brother BLAIR. Mr. *Haribans Sahai* has contended, and we think rightly, that the Full Bench decision in *Ajudhia Rai v. Parmeshar Rai*, I. L. R., 18 All., 340, does not preclude a Civil Court in such a case as this from giving a member of a joint Hindu family a decree that the family has been and still is joint; that he is a member of it; that the lands or property in dispute are and were ancestral property in the hands of the family and have not been partitioned. He has also contended that it is immaterial whether his client is or is not in possession, as the proviso to section 42 of the Specific Relief Act would not bar Brij Bhukhan's claim to such a declaration, the Civil Court being the only Court which could make the declaration, and the Civil Court having no jurisdiction to grant further consequential relief in the shape of a decree for possession as a tenant. We consider that that argument is well founded. We allow this appeal, and we set aside the decree of this Court, and vary the decree of the Court of first appeal by giving the plaintiff a declaration that the holding, whatever its nature may be, is part of the ancestral property of a joint Hindu family; that it has not been partitioned: that the plaintiff and the defendants are members of that joint Hindu family, and that the plaintiff's interest is a one-third undivided share of that ancestral property; in other [262] respects the suit of the plaintiff is dismissed. As this suit was necessitated by the action of these defendants in taking a very technical objection in the Court of Revenue, which in fact was an objection without substance or merits, we give the plaintiff Brij Bhukhan Pande his costs in all Courts in this civil suit.

Appeal decreed.

NOTES.

[As regards the question under the Letters Patent, this was distinguished in (1900 11 M. L. J., 10.

As regards the jurisdiction of Revenue Courts, see also (1904) 1 A. L. J., 703.]

[20 All. 262]

The 1st February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Hadi Ali.....Defendant

versus

Akbar Ali.....Plaintiff.*

Muhammadian law—Dower—Widow's lien for dower purely personal and not heritable.

The lien which a Muhammadian widow whose dower is unpaid may obtain on lands which have belonged to her deceased husband is a purely personal right and does not survive to her heirs. *Ali Muhammad Khan v. Azizullah Khan*, I. L. R., 16 All., 50, and *Ajuba Begam v. Nasir Ahmad*, Weekly Notes, 1890, p. 115, referred to.

* Appeal No. 43 of 1897 under section 10 of the Letters Patent.

THIS was an appeal under section 10 of the Letters Patent from a judgment in second appeal of BANERJI, J. The facts of the case appear from that judgment, which is as follows:—

“The appellant brought the suit out of which this appeal has arisen to recover possession of his share out of the estate of his deceased uncle, Karim Bakhsh, one of whose heirs he was. The suit was brought against Huran Bibi, the widow of Karim Bakhsh, and Hadi Ali, the donee of a portion of the property from Huran Bibi. Hadi Ali is the son of a daughter of Karim Bakhsh, who predeceased Karim Bakhsh. The Court of First Instance decreed the claim. An appeal was preferred by Huran Bibi and Hadi Ali. Huran Bibi's appeal had reference to that portion of the estate which was not included in the gift to Hadi Ali. During the pendency of the appeal Huran Bibi died. Her legal representatives were her three daughters, who are admittedly alive, and not Hadi Ali, the son of a fourth predeceased daughter. The right as regards the property not comprised in the gift did not survive to Hadi Ali, therefore he alone could not maintain the appeal. As he was not one of the legal representatives of Huran [263] Bibi he could not be brought upon the record in the place of Huran Bibi, and as her legal representatives did not apply to be made parties to the appeal within the time allowed by law, the appeal of Huran Bibi abated, and, so far as the property in respect of which the appeal is concerned, the decree of the Court of First Instance became final.

“As regards the property which is the subject of the alleged gift to Hadi Ali, the Lower Appellate Court has found that Huran Bibi was in possession of it in lieu of her dower. She was not entitled to transfer that property by way of gift or otherwise, and the gift was not legally valid. Having been put in possession in lieu of her dower, she was entitled to continue in possession so long as her dower debt remained unpaid: that was a right personal to her and became extinct on her death. Hadi Ali is not entitled to remain in possession of the estate left by Karim Bakhsh. The result is that the plaintiff is entitled to the decree granted to him by the Court of First Instance.

“I allow this appeal with costs, and, setting aside the decree below with costs, restore that of the Court of First Instance.”

From this judgment the defendant Hadi Ali appealed.

Babu *Durga Charan Banerji*, for the Appellant.

Munshi *Ram Prasad*, for the Respondent.

Edge, C. J., and Burkitt, J.—This is an appeal under the Letters Patent from the decree of our brother BANERJI. He decided that a lien for her dower which a Muhammadan widow had obtained on lands of her husband was a purely personal right and did not survive to her heirs. This decision is supported by *Ali Muhammad Khan v. Azizullah Khan*, I. L. R., 16 All., 50, and *Ajuba Begam v. Nazir Ahmad*, Weekly Notes, 1890, p. 115. It is contended that the latter case is not an authority, as it does not appear that the widow had obtained the lien by consent of her husband's heirs. In our opinion it is a very direct authority. Mr. Justice MAHMOOD held, rightly or wrongly, that the widow had obtained a lien—he may have been right or he may have been wrong on that point—[264] and, holding that she had a lien he held that it did not survive. We agree with our brother BANERJI that such a lien does not survive, but is purely personal, and we dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1907) 29 All., 640; but in (1910) 32 All., 551, the right was deemed to be heritable.]

[20 All. 266]

REVISIONAL CRIMINAL.

The 1st February, 1898.

PRESENT :

MR. JUSTICE KNOX.

Queen-Empress

versus

Ahmadi.*

Criminal Procedure Code, section 208—Evidence—Procedure—Duty of Magistrate inquiring into a case triable by the Court of Session to take the evidence of the witnesses produced by the accused.

A Magistrate inquiring into a case under Chapter XVIII of the Code of Criminal Procedure is not empowered to frame a charge or make out an order^a for commitment until and after he has taken all such evidence as the accused may produce before him for hearing.

THE facts of this case sufficiently appear from the order of the Court.

Alston and Madan Mohan Malaviya, for the Appellant.

Knox, J.—Musammat Ahmadi Begam was suspected of having committed the offence of murder. The case was under inquiry with a view to commitment, if necessary, to the Court of Sessions. The evidence produced in support of the prosecution had apparently been put forward up to the 4th of December. On the date a petition was put in by Musammat Ahmadi Begam asking the Court to take the evidence of her witnesses under section 208[†] of the Criminal Procedure Code before taking her statement. Upon that petition the first order passed is dated the 4th of December, and was as follows :—“ It is too late to pass an order now, as it is about 5 p. m.” With this order apparently the proceedings of the 4th of December came to a close. I understand that the accused had witnesses present in Court on that day who could have been then and there produced and examined. In that case I do not understand what difficulty the learned [266] Magistrate could have had in passing the only proper order under the circumstances, namely,—“ those witnesses shall be heard either to-day or as soon as the Court re-opens to-morrow.” This would

* Criminal Revision No. 684 of 1897.

• [Sec. 208.—The Magistrate shall, when the accused appears or is brought before him, proceed to hear the complainant (if any), and take in manner hereinafter provided all such evidence as may be produced in support of the prosecution or in behalf of the accused, or as may be called for by the Magistrate.

If the complainant or officer conducting the prosecution, or the accused, applies to the Magistrate to issue process to compel the attendance of any witness or the production of any document or other thing, the Magistrate shall issue such process unless, for reasons to be recorded, he deems it unnecessary to do so.

Nothing in this section shall be deemed to require a Presidency Magistrate to record his reasons.]

have been in accord with what appears to me to be the very clear words of the Code, and would have obviated all the difficulties which arose from the way in which the Magistrate subsequently dealt with the case.

On the 5th December, the accused put in another petition to the effect that, in the event of the Court deciding that her case must be committed to the Sessions, she wished to reserve her defence, and that she would in that Court make her replies to any questions that might be put to her for the purpose of enabling her to explain any circumstance appearing in the evidence against her. It was optional and entirely within the power of the accused to put in an application of this kind. The fact that she did do so would not absolve the Magistrate from his duty in carrying out the provisions of the law and from examining her, whether she answered or refused to answer. I mention this because of the order subsequently made by the learned Magistrate, from which it would appear that he thought that as soon as the accused reserved her defence he was not absolved from the duty of asking her for her statement, but he was absolved from the equally imperative duty of taking all such evidence as was produced on her behalf.

On the petition of the 5th of December the Magistrate writes that he must ask the accused herself what statement she has to make, in spite of what he terms an attempt on the part of the barrister for the accused to waive its right to examine the accused vested in it by section 342* of the Code of Criminal Procedure. But he declined to hear the evidence tendered on her behalf, and then and there committed the accused for trial before the Court of Sessions. The Magistrate was not empowered to frame a charge or make out an order for commitment until and after he had taken all such evidence as the accused produced before him for hearing. I accordingly set aside the order of [266] commitment and return the case to the Deputy Magistrate of Gorakhpur with directions to give notice to the prosecution and to the accused of a convenient day, and on that day to hear all and such evidence as may be produced on behalf of the accused and after that to complete the inquiry according to law. Let the record be returned.

NOTES.

[This was followed in 26 All., 177, but not in 36 Cal., 48; 12 C. W. N., 1014. *See also 10 A. L. J., 144.]

* [Sec. 342:—For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall, for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

The answers given by the accused may be taken into consideration in such inquiry or trial, and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

No oath shall be administered to the accused.]

[20 All. 267]
APPELLATE CIVIL.

The 2nd February, 1898.

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Muzaffar Ali Khan.....Defendant

versus

Kedar NathPlaintiff. *

Civil Procedure Code, sections 556, 558—Application to restore an appeal dismissed ex parte—Evidence – Practice.

When an application is made to restore an appeal which has been dismissed *ex parte* for default of appearance the applicant must produce all his evidence in support of the application before the Court to which it is made. If he does not do so and the application is dismissed, he cannot be allowed to supplement such evidence in a Court of appeal on appeal from the order dismissing his application. *Hari Das Mukerji v. Radha Kishan Das*, Weekly Notes, 1890, p 166, followed.

IN this case an appeal was dismissed by the Additional District Judge of Moradabad for default of appearance, the pleader for the appellant being absent when the appeal was called on for hearing. An application for the restoration of the appeal to the list of pending appeals was made, but no affidavit in support of such application was filed therewith. The Additional District Judge dismissed the application on two grounds, first, that it was not accompanied by an affidavit, and, secondly, that it disclosed no sufficient cause for the failure of the appellant or his pleader to appear. Against this order of dismissal the applicant appealed to the High Court, tendering an affidavit in support of his petition for restoration of the appeal.

Maulvi *Abdul Majid*, for the Appellant.

Pandit *Sundar Lal*, for the Respondent.

. [267] Edge, C. J., and Burkitt, J.—No affidavit in support of the application was filed in the Court below. Affidavits are necessary, not only for the information of the Court but for the information of the opposite side, and an affidavit should have been filed in the Court below. We agree with the decision of this Court in *Hari Das Mukerji v. Radha Kishan Das*, Weekly Notes, 1890, p. 166, and dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See (1903) 31 Cal., 150, at 152.]

* First Appeal No. 87 of 1897, from an order of F. E. Taylor, Esq., Additional District Judge of Moradabad, dated the 9th August 1897.

The 7th and 8th December, 1897 and 18th February, 1898.

PRESENT :

LORDS HOBHOUSE, MACNAGHTEN AND DAVEY, AND SIR R. COUCH.

Balwant Singh.....Plaintiff Appellant

versus

Rani Kishori.....Defendant Respondent.

**[On appeal from the High Court for the North-Western Provinces
at Allahabad.]**

*Hindu law—Mitakshara—Power of a member of a joint family to alienate
self-acquired immovables—Construction of words of a sanad granting an
absolute estate of inheritance—Change of ancestral character of
immovables—Mortgage and foreclosure—Bona fide
re-acquisition for value by the mortgagor's
descendant.*

A father, being a member of an undivided family subject to the Mitakshara, can exercise full power of disposition at his own discretion over immovables which he has himself acquired, as distinguished from ancestral property.

The immovables alienated by a father's gift, disputed by his son, partly consisted of zamindari rights in villages which had been, at one time, ancestral in the family, but had been transferred to satisfy the debts of an ancestor, and had been acquired back by his descendant, the donor. As to one of these villages the Courts below had differed whether it was self-acquired property in the donor's hands. It had been mortgaged by the ancestors; and the mortgage had been foreclosed, under Regulation XVII of 1806, before having been re-acquired by the donor.

That the foreclosure and re-acquisition were genuine were facts found upon evidence, including that of prior, concurrent, decrees maintaining the foreclosure, as between other parties.

Held that the re-acquisition was not a redemption of an estate inherited from an ancestor, and merely incumbered; but that the once ancestral character of this village had been destroyed by the foreclosure. Like the other villages alienated by the father's gift it was self-acquired by the donor.

[268] Other immovable property comprised in the gift consisted of a malikana payable out of other villages conferred upon the donor by a Government sanad granting a muafi on seven villages to him for life, and declaring that "the zamindars who now pay the revenue will pay it to him, and after him they shall ever pay ten per cent. as malikana allowance to his heir after the deduction of Government revenue for generation after generation."

Held, that the grant of the malikana was absolute to the one grantee; that there were not two gifts, one for life to the grantee, and the other a distinct gift after his death, to the person who should then be his heir. The malikana formed part of the grantee's heritable property and was self-acquired.

Held, also, in reference to the High Courts' Act, 1861, in which no time is mentioned for the appointment of an acting judge on the occurrence of a vacancy, that such an appointment could not be questioned on the ground of its not having been made until after a period alleged to be unreasonable.

CONSOLIDATED appeals from two decrees (14th August 1893) of the High Court,

The first decreed the respondent's appeal from a decree (28th January 1890) of the District Judge of Mainpuri. The second dismissed the appellant's cross-appeal from the same decree; the effect of the two decrees of the appellate court being that the suit was dismissed.

The suit out of which these appeals arose, was brought by the appellant who was the only son of the late Raja Jaswant Rao, C. S. I., who died on the 24th August 1879. The claim was for estate that had belonged to the late Raja, now in the possession of his widow, Rani Kishori, the defendant, who set up a title to it under a deed of gift dated the 4th September 1875. By that deed the Raja conveyed to Rani Kishori what was virtually the whole of his property to the exclusion of the plaintiff, his son by another wife who was then deceased; and to this son the Raja left only an allowance of Rs. 100 a month, and this dependent upon his conducting himself to the widow's satisfaction. The suit alleged the invalidity of that gift.

All the facts material to this report appear in their Lordships' judgment.

The two Courts below concurred in findings of fact disentitling the plaintiff to the greater part of the estate claimed, which [269] consisted of zamindari, muafi, and malikana, interests in villages, and of movable property.

The principal question among those now raised was whether, under the Mitakshara, if the property comprised in the deed of gift of 1895 had been acquired by the late Raja himself, he could deal with it at his own discretion; the plaintiff contending that the gift must be set aside, whether the property was ancestral or self-acquired. Another question related to whether the property, given by the deed fell within the description of self-acquired, or was ancestral. There was a third question; whether a malikana granted by sanad to the Raja and to his heir was, in regard to the words of inheritance, the Raja's own property to give away, or there was a gift over to the heir over which the Raja had no control. Also whether one of the judges who had heard the appeal had been duly appointed was now disputed.

The above principal question of Hindu law was applicable, after the concurrent findings of fact below in regard to the bulk of the estate claimed, only to five villages. And the subordinate question, whether they all were rightly under the description "self-acquired," applied, as far as this appeal was concerned, only to one village; inasmuch as the two Courts below had concurred upon facts, proving that four of the villages were in that class of property, and in finding that the four were so.

• It was ground common to both parties that the zamindari interest in the five villages had, at one time, formed part of the ancestral property of the family, having been inherited by the late Raja Jaswant's father, Rao Khaman Singh; and it was found by both Courts that, to satisfy the debts of Khaman Singh, the ancestral property had been sold or transferred. Both Courts had also found that four of the five villages had been re-acquired by the Raja Jaswant without recourse to any ancestral funds. The District Judge, however, had been of opinion that the fifth, named Bakewar, had not been so dealt with as to have got rid of its ancestral character in the hands of the late Raja when he made the gift of the 4th of September 1875. But the High Court [270] on the contrary, had found that the re-acquisition by the late Raja out of his own resources applied to Bakewar as well as to the other four villages, and that this village was his self-acquired property as well as the others.

The question as to whether the malikana passed by the Raja's gift to his wife, as being the donor's property, arose on the construction of a jaghir sanad

dated the 6th of April 1861, from the Government to the Raja. That sanad entitled him to a muafi, or remission of the revenue upon seven villages, including the five above referred to, and declared that, "after him the zamindars shall ever pay ten per cent. as malikana allowance to his heir, after the deduction of Government revenue, for generation after generation."

First—In regard to the question whether a member of an undivided family has or has not the power to alienate at his discretion self-acquired property the judgment of the District Judge was as follows:—"The authorities on the point are reviewed in paragraph 318 of Mayne's well-known work on Hindu Law and Usage, 4th edition, from which it will be seen that the tendency of the later decisions is to hold that a father may dispose of his self-acquired property in any way he pleases. Following the latest rulings, I hold that, if the property referred to in the deed of gift was Raja Jaswant Rao's self-acquired property, he could deal with it as he saw fit; and his disposition of it cannot be successfully attacked by the plaintiff. It will follow that so far as it can be shown that the property comprised in the deed of gift is ancestral, to that extent the deed must be held to be invalid, and the plaintiff entitled to succeed; whilst on the other hand, the deed will hold good in respect of all property shown to be self-acquired.

"*Secondly*.—The plaintiff comes into Court alleging that the transfers of the five villages, in which his father possessed zamindari rights, were fictitious, and that his father all along remained in possession of them. It was necessary for him to prove [271] this allegation, and I hold that as to the four villages Lakhman, Beriknera, Aheripur and Indrakhi, he has failed to do so. His claim, therefore, as regards these villages must be dismissed. As to the fifth village, Bakewar, the case stands on a different footing from that of the other villages. From documentary evidence filed in the case it appears that it was mortgaged by Rao Khuman Singh to one Kunjbehari Lal by a deed of conditional sale executed on 19th August 1839. It had been previously mortgaged to one Mahant Liebman Das in 1836. On the death of Khuman Singh, which took place in 1845, litigation took place between the rival mortgagees. The dispute between them was referred to arbitration and decided on the 11th May 1846, the result being that Kunjbehari Lal paid off the amount due to the prior mortgagee. He got a decree on the 20th of March 1854, to have his name entered as proprietor, and Jaswant Rao's name expunged. But in a suit between him and Jaswant Rao, decided on the 19th of August 1869, it was held that this decree was never executed and had become barred by lapse of time, and that Kunjbehari Lal had been in possession only as mortgagee.

"Evidence has been given on behalf of defendant to prove that on the 22nd of June 1858, in lieu of a payment of Rs. 4,526-12-0 received from Thakurain Adhar Kunwar, through Jaswant Rao, her general manager, and Shoo Charan Lal, her agent, Kunjbehari Lal gave up the decrees he had, and declared his foreclosure proceedings cancelled (see No. 104 of defendant's documents). The defendant's counsel contends that this was a sale of the proprietary rights of the village; but this is a contention I cannot sustain. In the suit above referred to, decided on the 19th of August 1869, it was held that Kunjbehari Lal was in possession of the village only as mortgagee and the amount paid, which is less than the annual revenue of the village, bears out the plaintiff's contention that what took place on the 22nd of June 1858 was nothing but the discharge of an incumbrance on the village. On an application to a Revenue Court of March 18th, [272] 1868, Jaswant Rao represented it as having been in his proprietary possession up to that year, and as always

having been entered in his name. Although in the deed of gift he asserted that this village had been bestowed on him by Adhar Kunwar, this is without foundation, as I consider. This village is not included in the deed of 1871 by which she conveyed to Jaswant Rao the villages of Lakhman, Berikhera, Aheripur, and Indrakhi, and no reason is suggested for this exclusion. The evidence adduced to prove the gift is extremely feeble . . . To hold that a transaction of this nature has the effect of destroying the ancestral character of property would be a most dangerous doctrine, as it would put it in the power of any Hindu father to defeat his children's rights by a temporary alienation of the property he himself had inherited. The conclusion I come to, then, as regards this village, is that Jaswant Rao inherited the proprietary rights in it from his father; that he had, therefore, no power to convey these rights to his wife, and that in respect of this village the plaintiff is entitled to a decree."

Proceeding to another class of property included in the gift, *viz*, the assigned revenue of seven villages, the District Judge said:—"The effect of the grant as regards the seven villages, of which the Raja did not own the proprietary right, was that the zamindars of those villages had to pay their land revenue to him as long as he lived, instead of to the Government, and after his death had to pay a percentage of it to his successor. I am of opinion that an estate of this nature is self-acquired property, and in this opinion I am borne out by the views expressed in paragraph 262 of Mayne's Hindu Law and Usage, where it is laid down that estates conferred by Government in the exercise of their sovereign power become the self-acquired property of the donee, whether such gifts are absolutely new grants or only the restoration to one member of the family of property previously held by another but confiscated" . . . "As to the ten per cent. *malikana* allowance from the other villages it was for the plaintiff to show that his father had no power of disposing of it, and that [273] he, the son, was entitled to succeed to it under the terms of the sanad. This contention, in my opinion, is likewise unsound." The decision, accordingly, was that the plaintiff's claim to this part of the assigned revenue failed.

On appeal and cross appeal to the High Court the three principal points were dealt with as follows in the judgment of a Divisional Bench (KNOX and BURKITT, JJ.). First, as to the general question of the right to dispose of self-acquired immoveables the Court said:—

"There is a last plea in the memorandum of appeal to the effect that Raja Jaswant Rao was not competent to disinherit his only son, the appellant. To this plea the learned counsel for the appellant made no allusion beyond stating that he did not withdraw it. The respondent's counsel did not answer the plea. An attempt was made on behalf of the appellant at the very end of the reply to address us upon it. We, however, ruled that, under the circumstances, it was not competent to the learned counsel to address any argument to us then for the first time. The plea will be dealt with towards the end of our judgment in this appeal."

At the end, however, it was added:—"In the view of the above facts no necessity arises for considering the plea."

Secondly, the Judges considered the question as to the village Bakewar, holding that the lower Court had arrived at a wrong conclusion in regard to it, by reason of overlooking the fact that this village had lost its ancestral character as soon as the year of grace allowed by Regulation XVII of 1806 expired in 1854. They continued thus:—"From that date Kunjbehari Lal became absolute proprietor. Even granting that the effect of the decree of the

19th of August 1869, in the suit to which we shall next refer between Kunjbehari Lal and Jaswant Rao, in which it was held that Kunjbehari Lal had been in possession only as mortgagee, gave Jaswant Rao the status of proprietor with a right to redeem, he would be proprietor of self-acquired, not of ancestral property.

[274] " When Kunjbehari Lal transferred his rights in Bakewar to Thakurain Adhar Kunwar he realized that he was proprietor. Otherwise, there would have been no force or meaning in his pretence to set aside and annul the foreclosure transaction—an act which he had absolutely no power to do. As full proprietor, he transferred to Thakurain Adhar Kunwar thereby making her full proprietor. It seems to us that this document did not receive the force and construction which it should have received at the hands of the lower Court. It supplements and corroborates the evidence given by Gursahai.

" In 1869 the village became again the subject of litigation. This time between Kunjbehari Lal and Raja Jaswant Rao, and in that suit the extraordinary decision was arrived at that, as Kunjbehari Lal had never executed his decree of the 20th March 1854, and it had become barred by lapse of time, Kunjbehari Lal had been in possession only as mortgagee. The Court of First Instance apparently accepts the conclusion, and holds that Bakewar never passed out of the hands of Khuman Singh or his family, and that Kunjbehari Lal never had any higher title in regard to it than that of mortgagee. This conclusion is attacked by the appellant. He contends before us that Kunjbehari Lal, by his decree of the 20th of March 1854, became full proprietor over the village, and that on that day at any rate Bakewar ceased to be ancestral property.

" It appears to us that there is great force in this contention. Under Regulation XVII of 1806 the conditional sale-deed had been judicially declared absolute, and nothing more was needed to clothe Kunjbehari Lal with the status of full proprietor. He had been in possession as mortgagee, but from the date of the decree of the 20th of March 1854, his possession as proprietor became at once adverse to that of Jaswant Rao, and the property ceased to be that of Jaswant Rao's in any sense ancestral or otherwise. It matters little that by the endorsement on the decree above alluded to, viz., the endorsement of the 22nd of June 1858, Kunjbehari Lal professed to set aside the foreclosure proceedings and [275] to render them null and void; no words and no document of his could effect such an act or could restore to Bakewar its former condition, viz., that of ancestral property in the hands of Jaswant Rao.

" The language of section 8 of Regulation XVII of 1806 is very clear and precise, and provides that if the mortgagor, in this case Raja Jaswant Rao, shall not redeem the property, the property mortgaged in the manner provided for by section 7 of the same regulation, the mortgage will be finally foreclosed and the conditional sale will become conclusive. Thakurain Adhar Kunwar held the village for some months, and then made it over to Jaswant Rao. In 1868, Jaswant Rao sold the village to Sheo Narayan, and immediately upon the sale arose the litigation of 1869, between Kunjbehari Lal and Raja Jaswant Rao which ended in the decision above referred to.

" The respondent takes his stand upon the judgment and decree of 1869, that was delivered in the suit above-mentioned, brought by Kunjbehari Lal for establishment of right to, and maintenance of possession over, Bakewar, and to set aside a sale-deed under which Raja Jaswant Rao had, on the 15th of February 1868, conveyed it to Sheo Narayan. It is a most involved and in many places obscure judgment, but there was no doubt that under it Kunjbehari Lal's claim was dismissed, and it was held that the foreclosure proceedings were fictitious, the only object being to save the property.

"In considering the value of this judgment it must not be forgotten that, so far as the appellant was concerned, it was not a judgment *inter partes*, and that at its highest it cannot be looked upon as conclusive, but only as a piece of evidence. Both the appellant and respondent in this appeal are representatives of Raja Jaswant Rao who was defendant in that case. No one in this appeal derives title through Kunjbehari Lal, who was then plaintiff. Moreover, it was in no way competent to the Court which decided the case in 1869 to set aside the foreclosure judgment and decree of 1854.

[276] "The Sadr Dewani Adalat in 1856 had determined that the mortgage-deeds of Lachman Das and Kunjbehari Lal were both genuine instruments; that the deed of conditional-sale held by Kunjbehari Lal was considered as being still in force and in nowise modified by the arbitration-award, positions both of which are assailed by this judgment without any reference to the determination of the case, by the Sadr Dewani Adalat. The judgment in question virtually amounts to a setting aside of those findings.

Much stress was laid upon the improbability of a valuable village like Bakewar being conveyed for a sum of Rs. 4,526-12-0. This consideration is not, however, entitled to much weight; the transaction took place just after the mutiny and at a time when Kunjbehari Lal was, if any value is to be attached to the judgment of 1869, under great obligations to Raja Jaswant Rao for procuring him release from custody. Matters at this time had, so far as Kunjbehari Lal was concerned, reached a very serious crisis, and if the bargain relating to Bakewar saved Kunjbehari Lal from death by hanging, it was, so far as he was concerned, a valuable bargain. Kunjbehari Lal, so says the judgment aforesaid, and there is other evidence to corroborate it, had been arrested and was about to be tried by martial law, and according to the Special Commissioner deserved to be hanged. The value of property too at a time like this would be very different from its value in days of security.

"Putting all this evidence together, and bearing in mind that it was for respondent to establish that the transfer of Bakewar was fictitious, we do not think that he has established his case. We find that on the 20th of March 1854 Bakewar had ceased to be ancestral property. It matters little how Raja Jaswant Rao afterwards became possessed of it. It could only be self-acquired property in his hands, and capable of alienation by him at his pleasure * * * *

The village Bakewar when we first came upon it, is mortgaged to strangers. The equity of redemption, it is true, remained [277] with Raja Jaswant Rao, but passed away from him finally, and without power of recall, as soon as the year of grace given under Regulation XVII of 1806 expired. This was before the year 1854. Hence it was clearly upon Balwant Singh to establish that the property retained its ancestral character, and that the transfer to Kunjbehari Lal, by force of the foreclosure proceedings, and the transfers after 1854, were one and all fictitious."

Thirdly, the judgment disposed of the question as to the malikana in this Raja's gift in the following words:—

"Now as regards the interpretation to be put on the grant made by Government and bearing date the 6th day of April 1861. The first fact to be noticed in connection with it is that it makes no allusion whatever to the appellant or to any service rendered by him. The grant confers certain of the villages on Raja Jaswant, Rai Bahadur, 'for generation after generation.' As to the rest the words are that they are granted for his lifetime and that the revenue of the seven villages granted for lifetime shall remain under remission during his life, and that after his death the zamindars are to pay 10 per cent. *malikana*

to Jaswant Rao's heirs after the deduction of Government revenue for generation after generation. The whole language of the deed shows that it was a deed granted in return for personal good services rendered to the Government. There is nothing in the deed to lead us to hold that the property conveyed by it was not property over which Raja Jaswant Rao had full right of disposal.

"The interpretation which we have put upon the deed and which was put upon it by the lower Court, is in accord with the view taken by their Lordships of the Privy Council in *Gulab Das, Jagjiwan Das v. The Collector of Surat*, (1878) L. R., 6 I. A., 54, s. c., I. L. R., 3 B. m., 186. Their Lordships held that 'a jaghir must be taken *prima facie* to be an estate only for life, although it may possibly be granted in such terms as to make it hereditary.'"

[278] "Jaswant Rao had in our opinion as much right and control over all the property granted under it as if it was self-acquired property."

The decrees of the High Court dismissed the suit entirely, and these two appeals were preferred by the plaintiff.

Mr. C. E. A. Ross, for the appellant, argued that although the District Judge was right in attributing to the later decisions of the Courts in India a uniform ruling to the effect that, under the Mitakshara, a member of an undivided family has absolute power of disposition over property acquired by himself, yet the question whether the exercise of that power was in accordance with the Hindu law had never been actually decided by the Judicial Committee. It was therefore still open to argument. The point was whether, in an undivided family under the Mitakshara, the father could so deal with immovables acquired by himself as to disinherit his only son. Reference was made to *Babu Pertab Sahee v. Maharaja Rajender Pertab Sahee*, 12 Moo. I. A., 39, the *Hansapur* case, as showing that the question of the power of the head of the family in this respect had been designedly left open by this Committee. There were conflicting texts in the Mitakshara as to the power of a member of an undivided family on this point. He referred to the Mitakshara, Ch. I, section 1, v. 27, and to Ch. I, section 5, v. 10, arguing that, contrary to the decisions of the Indian Courts, the conflict of these authorities should be decided in favour of the view that the power could not be held established. Reference was also made to Strange's Hindu Law, vol. 1, p. 261, and to vol. 2, pp. 436, 439, 441, 450; and to the Vivada Chintamani, which he described as a compendium of law prevalent in Mithila, not materially differing from the Mitakshara, and also having conflicting paragraphs see pp. 76, 309, 228, 229. Reference was also made to the Vayavahara Mayukha. There was one case decided by the Judicial Committee, according to the Mithila law as stated in a dictum in the Vivada Chintamani, to the effect that the owner of self-acquired property has [279] full power of disposition over it, *Raja Bishen Perkash Narain Singh v. Bawa Misser*, (1873) 12 B. L. R., 430. He referred also to the *Rithoor* case, *Nana Nurain Rao v. Huree Punth Bhao*, (1862) 9 Moo. I. A., 96. For decisions in the North-West Provinces on this point he referred to *Rajah Buldeo Singh v. Koonwer Mahabeer Singh* in 1866 before SPANKIE and TURNER, JJ. (1866) 1 N. W. P., H. C. Rep., 153; *Maha Sukh v. Budree*, (1869) H. C. R. N. W. P. 1869, p. 57, and *Sital v. Madho*, (1877) I. L. R. 1 All., 394. As a Madras decision in his favour he referred to *Tara Chand v. Reeb Ram*, (1866) 3 Mad., H. C. Rep. 55.

Upon the second point, whether the District Judge was right in deciding that Bakewar retained its original character of ancestral estate, he examined the evidence at length arguing that the acts of the mortgagee Kunjehari Lal, with reference to the foreclosure, showed collusion with the late Raja. The arrangement was in effect fraudulent on the creditors of Khuman Singh who

were now all barred by time, and was contrary to the rights of the appellant as heir of the mortgaged property.

The foreclosure could even at this distance of time be reopened. He referred to the Regulation XVII of 1806, sections 1, 7 and 8, and to *Forbes v. Ameeroonissa Begam*, (1865) 10 Moo., I. A. 340, 348. In an early case—*Morley v. Elwayes*, (1668) 1 Ch., 107,—it was shown that to re-open a foreclosure the facts could be examined, and the Court, on fraud established, could restore the parties to their original position.

Upon the third point, the construction of the sanad of 1861, the contention was in reference to the malikana, that the grant was only for life to Jaswant, and after him to his heir, as an absolute gift to the latter, that heir being the son, the appellant, to whom there was a distinct gift apart from the assignment for life to his father. Thus the malikana in perpetuity was not within the control of Jaswant to confer upon his wife.

Lastly, it was submitted that the appointment of BURKITT, J., to act as a Judge of the High Court had not been made in due [280] time, under the High Courts Act, 1861, with the result that there had been no Court properly constituted to hear these appeals. The argument was to the same effect as that in the *Queen Empress v. Gungaram*, (1894) I. L. R. 16 All, 136. The decision in that case had been in favour of the validity of the appointment, but the judgment of the Full Bench was of a date subsequent to that of the judgment now under appeal, 24 and 25 Vic., C. 104, referred to.

Mr. J. D. Mayne and Mr. H. Cowell, for the respondent. Some of the texts, in condemning the leaving a family without means of support, seemed to make objection to the alienation of even self-acquired property. But for the last twenty-five years the decisions in India had been unanimous as to the power of the owner under the Mitakshara to dispose absolutely of self-acquired property. The judgment of the Bengal High Court in *Mudhu Gopal v. Ram Buxsh Pandey*, (1863) 6 W. R., 71, had disposed of all controversy in regard to the conflict of dicta found in the Mitakshara.

Reference was made to the *Hansapore* case (1867) 12 Moo., I. A., 39, and to the *Bitthoor* case, (1862) 9 Moo., I. A., 96, where the question was raised as to this power. In the latter case the judgment, in deciding upon a question of fact, proceeded upon the view that the law had been settled in favour of the acquirer of property having power to dispose of it. *Raja Bishen Perakash Narain Singh v. Bawa Misser*, (1873) 12 B. L. R., 430, was cited.

On the question as to Bakewar the decision of the High Court was right. The operation of Regulation XVII of 1806 was referred to, and its effect, after the expiration of the year of grace. Neither the plaint, nor any of the proceedings, raised the question whether, assuming the mortgage to have been valid, the foreclosure was collusive. The plaint raised only the question whether Khuman Singh's mortgages were valid. The litigation after the foreclosure did not tend to show collusion. The judgment of the District Judge of Mainpuri, reported in the North-Western [281] Provinces District Reports for September 1854; (Mainpuri), and in the Reports of the Sudder Court, Agra, S. D. A., 1856, at p. 119, did not indicate any such fact. The later litigation, to which Kunjbehari Lal was a party, did not attack the foreclosure, but raised the issue whether the indorsement of transfer was genuine. The ancestral quality of the property has been lost when it was re-acquired. In regard to the third point, the construction of the sanad of April 1861, it was clear that nine-tenths of the remitted revenue was to revert to Government, and the one-tenth, malikana, was to continue, upon the death of

the Raja. But his heir was not to take any interest distinct from the estate of inheritance given to the Raja himself absolutely.

Upon the validity of the appointment of BURKITT, J., the point had not been taken in the Court below, and there were no facts on this record to give rise to any question about it.

Mr. D. E. A. Ross replied.

Afterwards on the 18th February 1898 their Lordships' judgment was delivered by Lord Hobhouse:—

In the suit which gives rise to this appeal the plaintiff now appellant claimed as heir-at-law of Raja Jaswant Rao to be entitled to properties valued at 40 lakhs of rupees, of which Jaswant's widow Kishori, the defendant below and the respondent here, had become possessed. As regards the larger portion of this property, principally movable, the plaintiff has failed in both the Courts below, and raises no further question. He still claims (1) the proprietary right in five villages conveyed as a gift by Jaswant to Kishori by deed dated 4th September 1875; (2) the proprietary right in two other villages purchased by the defendant after Jaswant's death; and (3) a perpetual charge by way of *malikana* amounting to 10 per cent. of the revenue of seven other villages which were the subject of a grant by the Government of India to Jaswant, dated 6th April 1861. The District Judge decided against the plaintiff as to all these properties except one of the five villages named Bakewar. As to that village the District Judge held that it was ancestral property which Jaswant had [282] no power to alienate by way of gift, and he decreed possession of it to the plaintiff. Both parties appealed to the High Court. Separate orders were made on the two appeals. The plaintiff's appeal was dismissed; the defendant's was allowed; so that the plaintiff's suit stood dismissed as to all his claims. The plaintiff has appealed from both these orders and his appeals, in form two but in substance one, have now been argued.

Except as regards the village of Bakewar which has been the subject of difference between the two Courts below, the facts of the case may be briefly stated:—All the villages in suit were at one time the estate of Khuman Singh, the father of Jaswant. Through extravagance or misfortune Khuman fell into poverty and he parted with the villages; whether in fact or only in appearance is matter of dispute in this suit. Jaswant became a successful man of business, and he also rendered active and valuable services to the Government at the time of the Sepoy mutiny. Thus he became able to repossess himself of the estates which Khuman had enjoyed, and the Government acknowledged his services by the grant in question. Khuman died in December 1844. His eldest son Lal Barian married Adhar Kunwar a lady of considerable private fortune, and died without issue. Jaswant was the only other son, and he married Kishori as his third wife. He died in August 1879.

The plaintiff's claim under the grant stands on an entirely different footing from his other claims, and it may be disposed of at once. The Sanad of April 1861 recites the services of Jaswant and that they had been recognised by the bestowal of the title of "Raja" and were worthy of further recognition by the grant of a "*jaghir*." It then continues:—"Be it known that the possession and *Jama* (revenue) of the five villages, granted for generation after generation, shall for ever be given up and remitted, and that the revenue of the seven villages granted for lifetime shall remain under remission till his lifetime, to wit, their *zamindars* who now pay the revenue to the British Government shall pay it to him, and after him they shall ever pay 10 per cent. as [283] "*malikana* allowance to his heir after the deduction of Government revenue, for generation after generation." The five villages are the five villages before mentioned as contained in the deed of gift.

Mr. Ross does not contend that the words "generation after generation" confer any interest less than absolute ownership, nor does he now sustain the contention urged in the lower Courts that the jama of the five villages did not pass to Jaswant in absolute ownership. His contention is that as regards the seven villages there are two distinct gifts; one to Jaswant for his life, and the other after his death; and that at his death the malikana is given in absolute ownership to the person who may then happen to be his heir. That would attribute to the Government the strange intention of acknowledging the personal merits of Jaswant by conferring a benefit on some unknown heir for whom he might or might not have a regard. The construction also appears to their Lordships to be as strained as it is improbable. They think that the obvious meaning of the expression "his heir for generation after generation" is that the malikana is to form part of his heritable property; and that whereas he takes the whole income for his life only, he is to take the 10 per cent. malikana in absolute ownership. Both the Courts below have taken substantially the same view, and the appeal fails on this point.

The next question is whether Jaswant could lawfully give the property in question to his wife. The District Judge states that the point is one on which there has been a great conflict of opinion; and without discussing it further he says that he follows the latest rulings in holding that if the property comprised in the gift was Jaswant's self-acquired property he could deal with it as he saw fit. The High Court have given no opinion on the point except so far as an opinion is involved in their affirmation of the District Judge's decree, nor did they hear argument upon it. It was one point of appeal by the plaintiff but his counsel did not open it till at the very end of his reply, when the Court ruled that it was not competent for him to argue it. In delivering judgment they [284] stated their opinion that the plaintiff by not addressing to them any remarks in support of this argument must be taken virtually to have abandoned it.

Mr. Ross has raised the question again in this appeal and has addressed to their Lordships a serious argument which requires consideration. His proposition is that a member of an undivided family subject to Mitakshara law has not the power of disposition over self-acquired immovable property at his will. The Indian Courts have differed on this question, and there is no decision of this Board which after examination of the authorities affirms the power in unqualified terms.

• It is not surprising that conflicts of opinion should have arisen, seeing that the texts of the Mitakshara itself, as translated by Colebrooke, whose translation has long been accepted as correct, are apparently and literally in conflict with one another. The passage cited by Mr. Ross is found in Chapter I, section 1, clause 27, and is as follows:—Speaking of the father of a family, it says that "he is subject to the control of his sons and the rest in regard to the immovable estate whether acquired by himself or inherited from his father or other predecessor. Since it is ordained, 'though immovables or bipeds have been acquired by a man himself, a gift or sale of them should not be made without convening all the sons. They who are born, and they who are yet unbegotten, and they who are still in the womb, require the means of support. No gift or sale should therefore be made.'" And immediately below the commentator insists on a man's duty not to leave his family without means of support. Mr. Ross further points out that the rule so stated as to immovable property is accented as law by Sir Thomas Strange: see Vol. I, p. 261, Vol. II, pp. 436 and following.

On the other hand we find in the same source of law quite opposite precepts. In clause 21 of the same chapter and section the commentator quotes two texts, one from Yajnavalkya himself, to the same effect with clause 27 and then adds "they both [285] relate to immovables which have descended from the paternal grandfather." In Section V of the same chapter, clause 9, the commentator, speaking of a donation made by a father, says :—"The son has no right of interference if the effects were acquired by the father;" and in clause 10 the same precept is repeated with more particularity. So in Section IV, where the commentator appears to be dealing with the principle which lies at the root of the system of joint family property. He there explains what may not be divided; and in Clause 1 he says :—"Whatever else is acquired by the co-parcener himself.....does not appertain to the heirs.....nor shall he who recovers hereditary property which had been taken away give it up to the parceners." Clause 2 enlarges on the same point.

Pausing there to consider the authorities apart from decisions, their Lordships observe that the rule laid down in Section I, clause 27 of the Mitakshara rests upon an ulterior reason, "since it is ordained," and so forth; and the reason ranges so far beyond the rule as seriously to weaken its support of a positive rule. The necessity of support to children applies in principle to the alienation of movable property as well as immovable. And the assertion of rights in those who are unbegotten conflicts with the principle uncontradicted as their Lordships understand by any decision, that a man may alienate even his descended estate if he has no child, or at least if he has no co-parcener, in existence. See the cases cited for this proposition in Mr. Mayne's book on Hindu Law, Section 318.

All these old text-books and commentaries are apt to mingle religious and moral considerations, not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir W. Macnaghten says :—"It by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the *vinculum juris* and the *vinculum pudoris* is not always discernible." (Hindu Law, Principles and Precedents, p. vi of the preliminary remarks). He illustrates this position by the [286] example of the very subject of the present discussion. It is, as their Lordships think, the most reasonable inference that the passage in Section I belongs to the former class of precepts and those of Sections IV and V to the latter.

As regards the authority of Sir T. Strange, which undoubtedly is great, their Lordships observe that, though he does not bring the conflicting texts of the Mitakshara into comparison with one another, he introduces similar contradictions into the body of his own work. In his "Addenda" he corrected his own opinions by the authority of Sir Francis Macnaghten's Considerations on Hindu Law, which work he had seen after he had written his own. He says that he has used Macnaghten's work for supplementing, for correcting, or for confirming his own (Addenda, p. 4). Among the passages which he adopts is the following :—"It is desirable that the extent to which a Hindu in his lifetime may give or make an unequal distribution of his property should be ascertained. I think it clear that he has a right to dispose of his self-acquired property whether movable or immovable, according to his own pleasure, and that he has the same right as to ancestral movable property." Addenda, p. 8. It seems then that Strange intended to accept for Madras the opinion of Macnaghten who, though a Bengal judge, wrote of the Benares as well as the Bengal school. Macnaghten's opinion, clearly applying to the Mitakshara law, is that the father of a family, with regard to all kinds of property

acquired by himself, is at liberty to make any alienation he may think fit, subject only to spiritual responsibility.

To turn to the decided cases, there is no decision of this Board which is adverse to the power of alienation claimed by the defendant. Mr. Ross referred to the language of the Board in the Hansapore case, (1867) 12 Moo. I. A., 38, decided in 1867. Sir JAMES COLVILLE, after showing that by that time testamentary powers, long disputed, had been established in Hindu law, spoke thus:—"Accordingly it has been settled that even in those parts of [287] India which are governed by the stricter law of the Mitakshara a Hindu without male descendants may dispose by will of his separate and self-acquired property whether moveable or immoveable; and that one having male descendants may so dispose of self-acquired property if moveable; subject perhaps to the restriction that he cannot wholly disinherit any one of such descendants." It is argued that this passage shows that in the opinion of the Board the power of disposition by will does not extend to land and does not exist if there are male descendants. In that case, however, the Board gave no judicial opinion upon the point, because they held that the property in dispute was an indivisible Raj, subject to the custom of primogeniture, and that, as the heir was a consenting party to the disposition in dispute, the question of the testator's power did not arise. It is true that they did not affirm the proposition now contended for by the defendant.

In the Bithoor case, (1862) 9 Moo. I. A., 96, there came into question the validity of a will devising self-acquired property. There was a long and intricate discussion as to the genuineness of the will, which was ultimately established. It appears also that objection was taken to the legal power of the testator, but it does not appear on what grounds that point was argued. The only passage in the judgment bearing on this question is as follows:—"The rest of the evidence consists of the testimony of Pandits, who say that the Soobadar was always obedient to the Shasters, and that the Shasters forbid a father who has several sons to appropriate by will to one the property which by law ought to be equally divided amongst all. It is clear that in this district a strong feeling prevails among the Brahmins upon the subject of testamentary disposition, which though at length established by law as to self-acquired property is opposed to the ancient usages and feelings of the country." That was a decision in favour of the power to make such a will; but the grounds of it do not appear; the attention of the Board would seem to have been directed to the [288] general question of testamentary power, rather than to distinctions between ancestral and self-acquired estate; and in the Hansapore case the present proposition was treated by this Board as still open to argument and to qualifications.

Their Lordships do not think it necessary to go through the series of Indian decisions bearing on this point, but they will refer to some of the most important and of the latest date. It appears to them that the subject is one of those in which from the earliest times there have been two conflicting principles of law, one favouring the perpetual integrity and the fixed succession of family property, and the other the free use of such property for the circumstances of the day. The controversies and conflicting decisions on the father's powers of mortgage and sale, on the payment of his debts out of the inheritance, and on the testamentary power, will occur to everybody who is familiar with Indian litigations of the past half century or so. On each of those subjects there has been a growing tendency, coincident with the growth of commerce, to give more effect to the latter of the two principles, viz., the use of property

by the living generation, or its living heads. This their Lordships conceive is the kind of change referred to by Lord KINGSDOWN in the Bithoor case.

The earliest case in which their Lordships have found any exact comparison of the texts of the Mitakshara was decided by a Division Bench of the High Court of Calcutta in the year 1863. *Mudhu Gopal v. Runi Buksh*, 6 W. R., 71. In that case the plaintiff's father had sold to the defendant property which was held to be self-acquired. The learned Judges carefully compared the texts of the Mitakshara. They treat those of Sections IV and V as the governing ones. They conclude:—"We must hold that according to the law as laid down in the Mitakshara, a father is not incompetent to sell immoveable property acquired by himself."

In the year 1872 the question was discussed before a Full Bench in Calcutta, 10 B. L. R., 192. A son disputed his father's disposition of property inherited by the father from a cousin and not from [289] the grandfather. Sir RICHARD COUCH compares the texts and quotes cases which as he says exhibit the better opinion among commentators. His conclusion is this:—"It is only in respect of property not liable to obstruction that the wealth of the father or grandfather becomes the property of his sons or grandsons by virtue of birth." In this case the property being inherited by the father from a cousin was held to be obstructed as to inheritance.

As regards the North-Western Provinces the question was carefully considered in the year 1877 by two experienced civilian Judges [*Sital v. Madho*, I. L. R., 1 All., 394]. Those learned Judges did not consider themselves bound by a previous decision of the High Court in 1869, which negatived the father's power to alienate, but without citing the authorities. In their elaborate judgment they make more than one suggestion for reconciling the conflicting texts. They say that the Courts have recognised the principle that the prohibition of certain acts may be implied, yet where it is not declared that there is absolutely no power to do them those acts if done are not necessarily void. And in the end they adopt Sir WM. MACNAGHTEN'S view "that with respect to personal property whether ancestral or acquired, and with respect to real property acquired or recovered by the occupant, he (the father) is at liberty to make any alienation which he may think fit, subject only to spiritual responsibility." (See Principles, &c., p. 3). This is the same view as is expressed by Sir FRANCIS MACNAGHTEN, and adopted by Sir T. STRANGE in the passage above quoted.

Their Lordships fully assent to the reasoning contained in the judgments they have cited: and they find that in India there is a decided preponderance of judicial authority in favour of the power claimed for Jaswant in this case.

It remains to mention a decision of this Board in the year 1873, which, though it falls under the Mithila law, appears to their Lordships to bear closely on the present case. It is reported [290] in 12 Beng. L. R., p. 430, *Raja Bishen v. Bawa Misser*. The Mithila law differs in some respects from that of the Mitakshara, but on the subject in question follows it very closely. The leading text-book is the Vivada Chintamani, and their Lordships quote from the translation made in 1863. In page 76 and again in page 229 are passages giving a free hand to the owners of self-acquired property. In p. 229 it is written:—"Such property as is acquired or recovered by the father without the aid of the ancestral estate shall be divided equally, or unequally, or not divided at all, at his pleasure. The father has full dominion over . . . that property which is gained by him through skill, valour or the like, he may give it away at his pleasure," and so forth. In p. 309 occurs this passage:—"It is declared in the work called Prakasa that immoveable and biped property,

even if it be self-acquired, cannot be sold or given away without the consent of the sons. They who are born...even they who are not yet conceived, require paternal property for their maintenance therefore it is improper to deprive them of it." The decision of this Board was in accordance with the first set of texts. It is true that p. 309 is not referred to in the judgment, but it can hardly be supposed that in a case fought up to the highest tribunal it was overlooked.

For the foregoing reasons their Lordships have no hesitation in laying it down that the law of the Mitakshara is shown after long conflicts of opinion due to the conflicting nature of the original texts, to be that which has been adopted from Sir William Macnaghten by the Courts of Calcutta and Allahabad.

Such being the law it remains to apply it to this case. The plaintiff contends that the property in question was ancestral. As regards the four villages the dispute turns on matters of fact and the Courts below are agreed in finding against the plaintiff. That dispute cannot be re-opened here. As regards Bakewar they have differed, and the plaintiff asks their Lordships to say that the High Court is wrong in finding that this village was the self-acquired property of Jaswant. The question turns on transactions [291] which took place in the year 1852. In 1836 Khuman the father of Jaswant executed a simple mortgage of Bakewar to Lachman Das. In 1839 he executed a second mortgage by way of conditional sale to the father of Kunjbehari. Disputes arose between the two mortgagees, who under an award were put into possession each of a moiety. In 1847 Kunjbehari bought out Lachman and was placed in sole possession. In 1852 one Harbans Rai, a creditor of Jaswant who had then succeeded to the property, got a decree against him. In the same year Kunjbehari applied for foreclosure under Regulation XVII of 1806. The year of grace expired, and the foreclosure became absolute. Harbans endeavoured to execute his decree against Bakewar; but was opposed by Kunjbehari who brought a suit against both Jaswant and Harbans to assert his title. The First Court decided against him, apparently on the ground that his title was no better than that of Lachman whose simple mortgage did not carry the right to foreclosure or to possession. The Zillah Judge, thought differently, and held that the mortgage had been finally foreclosed. Harbans appealed to the Sudder Dewani Adawlat, who upheld the Zillah Judge's decree and granted Kunjbehari's claim to have the sale of the estate of Bakewar made absolute by expungement of the name of Jaswant and the entry of his own name. That final decree bears date the 14th February 1856. Kunjbehari was then in possession and he remained in possession, but he did not procure any mutation of name.

The subsequent events are involved in some obscurity. It seems that Kunjbehari got into trouble during the mutiny; that he was charged with serious offences and was in great danger of being hung; that Jaswant took up his cause, saved his life, and even gave him compensation to the amount of some thousands of rupees for injuries done to his estate. (Rec., p. 274). On Kunjbehari's part we find that in an irregular way, by endorsement on the decree of February 1856, he purported to annul that decree in favour of Adhar Kunwar. The consideration [292] stated is the sum of Rs. 4,526 apparently less than a year's revenue. That endorsement is dated 22nd June 1858. The defendant alleges that soon afterwards Adhar Kunwar, also in an irregular way, made a verbal gift of the property to Jaswant (Rec., p. 480). The certain thing is that about this time Jaswant regained possession and remained in possession until his death. How far his title depended on Adhar Kunwar's gift, how far on Kunjbehari's relinquishment of possession and practical

reconveyance, and how far Kunjbehari's acceptance of the small sum given for purchase money was influenced by Jaswant's services to him or why he took so small a sum, are questions which are not and which need not be, cleared up

In the year 1868 Kunjbehari sued to establish his right to Bakewar. The defendants were Jaswant and Sheo Narain, to whom it was stated that Jaswant had sold the property. Kunjbehari alleged that the endorsement on the decree was a forgery and gave a different account of his transactions with Adhar Kunwar; admitting however that he took the money from her and that he, as he calls it, annulled the decree. The Subordinate Judge held that the arrangement of the 22nd June 1858 was a *bona fide* one, and that Jaswant got actual proprietary possession. (Rec. p. 280.)

On one of the issues he found that the foreclosure of the decree of February 1856 and the other previous transaction between Kunjbehari and Jaswant were wholly fictitious and collusive. It is impossible to accept such a finding as of any value. Nobody disputes that Kunjbehari had a genuine mortgage from Khuman, or that the estate and the liability devolved on Jaswant. And the Subordinate Judge himself points out that the validity of the foreclosure was challenged by Harhans who had a strong interest to upset it; but he adds "unfortunately these objections were not entertained by any Court." (Rec. p. 273).

There is also another finding on a separate issue, of a most extraordinary character. The Subordinate Judge finds that because Kunjbehari did not effect a mutation of names therefore [293] his foreclosure decree became void and that he remained in possession as a mortgagee.

It is mainly on account of these two findings, on which Mr. Ross dwelt at great length, that this voluminous, intricate and confused judgment of the Subordinate Judge of 1869 has been put in. Of course they have no legal force as between the heir and the grantee of Jaswant. Nor had they any result as between the parties to that suit; seeing that it was dismissed with costs. (Rec. p. 283).

The decision of the District Judge in this case is apparently founded on the last-mentioned finding of the Subordinate Judge of 1869, which he quotes as though it were conclusive. Their Lordships think it clear that the point of time and the event to look at is the foreclosure of 1853. If that were a mere sham, the conclusion that the mortgage continued and that on its payment Jaswant only redeemed the estate he had inherited from Khuman might have some colour. But in the suit of 1853 the two appellate Courts held that the foreclosure was genuine and valid. That was held against the appeal of the execution creditor whose claim was defeated by it. It is not a decision between the present parties, but it is strong evidence, and their Lordships cannot find any substantial evidence for disputing it. If the foreclosure took place the former title of Bakewar was broken and its ancestral character destroyed. The exact mode of its reacquisition by Adhar Kunwar and Jaswant is not material. For money or for services, it passed from Kunjbehari to Jaswant and so was acquired by him. For the above reasons their Lordships agree with the High Court on this point.

The only other point taken for the appellant is one of a very unusual character. It is alleged that the decree of the High Court is void because one of the Judges, Mr. BURKITT, was not properly appointed. The point was not taken in the Court below; nor is the nature of it explained in the printed case of the appellant. Their Lordships understand that the appointment is questioned on the ground that it was not made immediately [294] upon, or

within a reasonable time after, the occurrence of the vacancy which it supplied. Their Lordships cannot discover any ground for the objection. Under the High Courts Act the Lieutenant-Governor of the North-Western Provinces has power to appoint an acting Judge upon the happening of a vacancy among the puisne Judges of the Court. No limit of time is mentioned within which the appointment shall be made. That is left to the discretion of the Lieutenant-Governor, and it is not competent to a Court of Law to invent a restriction not contemplated by the Legislature.

The result is that the appeals fail on all points, and their Lordships will humbly advise Her Majesty to dismiss them. The appellant must pay the costs.

Appeal dismissed.

Solicitors for the Appellant: Messrs. *Pyke and Parrott.*

Solicitors for the Respondent: Messrs. *Ranken, Ford, Ford and Chester.*

NOTES.

[In (1909) 32 Mad., 377, the nature of succession was regarded as one of survivorship. See also (1907) P. R., 150; (1906) 16 M. L. J., 491 (son born after the Will).]

As regards the interpretation of Hindu Law Books, see also (1898) 22 Mad., 398 at 415; (1907) 30 All., 197.]

[20 All. 295]

APPELLATE CIVIL.

The 3rd February, 1898.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Chiranji Lal.....Plaintiff

versus

Kundan Lal and others.....Defendants*

Civil Procedure Code, sections 556, 558—Appeal—Dismissal of Appeal—Default of appearance.

Where, on an appeal being called on for hearing the vakil who held the brief for the appellant stated that he was unable to argue the case, the fact being that the brief had come into his hands too late for him to prepare himself in the case, and the appeal was in consequence dismissed, it was held that this was not a dismissal for default of appearance. *Shankur Dat Dube v. Radha Krishna*, I. L. R., 20 All., 195, distinguished. *Ram Chandra Pandurang Naik v. Madhav Purshotam Naik*, I. L. R., 16 Bom. 23, referred to. *Rakhai Chandra Rai Chowdhri v. The Secretary of State for India in Council*, I. L. R., 12 Cal. 603, dissented from.

THIS was an appeal under section 10 of the Letters Patent from an order dismissing an application for the restoration to the [295] file of pending appeals of an appeal which had been dismissed. The appeal was a second appeal, which under the Rules of the Court came for hearing before a single Judge. The circumstances under which it was dismissed are indicated by the following order:—"This appeal is not supported. The pleader for the appellant has made over his brief to another gentleman when the appeal was

* Appeal No. 8 of 1897 under section 10 of the Letters Patent Act.

called on for the second time. The latter says he is unable to argue the case. I dismiss the appeal with costs." The appellant applied to the Judge who passed the above order for restoration of the appeal as an appeal dismissed for default. This application was rejected by the following order:—"This case cannot be reinstated. It was not dismissed for default. Rejected." The appellant thereupon appealed under section 10 of the Letters Patent.

Mr. B. E. O'Connor and Pandit Moti Lal, for the Appellant.

Mr. Roshan Lal, for the Respondent.

Knox and Banerji, JJ.—Upon a second appeal being called on for hearing the vakil who appeared for the appellant told the Court that he was unable to argue the case; the appeal was accordingly dismissed. An application was then presented to the learned Judge who heard and decided the case praying that the appeal might be restored to its original number and heard in the ordinary course. The order passed was:—"This case cannot be reinstated: it was not dismissed for default." It is contended before us to-day that under the circumstances the case is one which was practically dismissed for default and should have been so treated. In support of this contention the case of *Shankar Dat Dube v. Radha Krishna*, I. L. R., 20 All., 195, was cited.

The circumstances, however, of that case differ materially from the circumstances in the appeal before us. In that case the pleader who had been retained by the defendant came before the Court and stated that no one had ever come near him on the part of his client, and he had no instructions of any kind. His case was rightly treated as one in which the pleader engaged had retired [296] from the case. In the appeal before us there was no retirement. The learned vakil who was engaged came forward with instructions in his hand and said he was unable to argue the case. From an affidavit which was filed along with the application for reinstatement the cause of inability is stated to be that the brief had come to the hands of the vakil so late that he could not prepare himself to argue the case. That, as pointed out in the case of *Ram Chandra Pandurang Naik v. Madhav Purshottam Naik*, I. L. R., 16 Bom., 23, was a good reason to pray for an adjournment, but it was not a retirement from the case, and not a default of appearance. We were also referred to *Rakhal Chandra Rai Chowdhuri v. The Secretary of State for India in Council*, I. L. R., 12 Cal., 603. That case no doubt supports the contention of the appellant, but we find ourselves unable to follow it. We prefer to follow the ruling of the Bombay Court, with which we are in accord. We dismiss this appeal with costs.

Appeal dismissed

NOTES.

[See also (1907) 34 Cal., 403; (1904) 8 C.W.N., 621.]

[20 All. 296]
REVISIONAL CIVIL.*The 3rd February, 1898.*

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Debi Singh.....Plaintiff

versus

Muhammad Ismail KhanDefendant.*

Jurisdiction—Civil and Revenue Courts—Suit against an evicted tenant for damages for use and occupation—Landholder and tenant.

If a landholder wishes to get rent from a tenant of his agricultural land he must, during the continuance of the tenancy, either come to an agreement with the tenant as to the rent to be paid or get the rent fixed by means of an application under Act No. XII of 1881. If no rent has been fixed, the landholder cannot, after the determination of the tenancy, sue his *quondam* tenant in a Civil Court for damages for the use and occupation of the land. *Ram Prasad v. Dina Kuar*, I. L. R., 4 All., 515, *Radha Prasad Singh v. Jugal Das*, I. L. R., 9 All., 185, and *Debi Singh v. Jhanno Kuar*, I. L. R., 16 All., 209, referred to. *Brijbawan Singh v. Mehdi Ali*, Weekly Notes, 1887, p. 140, and *Ranjit Singh v. Diwan Singh*, Weekly Notes, 1889, p. 175, overruled.

[297] THIS was an application for revision of a decree made by the Subordinate Judge of Meerut in an appeal from the Munsif of that place. It appears that the plaintiff, applicant, purchased at an auction-sale certain landed property belonging to the defendant's father. He got the defendant ejected from that land by proceedings under section 36 of Act No. XII of 1881. He then brought a suit in the Court of the Munsif to recover from the defendant compensation for the use and occupation by the defendant of the land so purchased by him, alleging that, as the rent of the land had not been hitherto determined, the claim was not entertainable by a Court of Revenue. The defendant pleaded *inter alia* that the claim was not cognizable by a Civil Court. The Court of First Instance (Munsif of Meerut), held that the suit was cognizable by a Civil Court and gave the plaintiff a decree. The defendant appealed. The Lower Appellate Court (Subordinate Judge of Meerut) held that the suit would not lie in a Civil Court, and, reversing the decree of the Munsif, dismissed the plaintiff's suit. Against this decree the present application for revision was presented on behalf of the plaintiff.

Babu Jivan Chandar Mukerji, for the Applicant.

The Opposite party was not represented.

Edge, C. J., and Burkitt, J. :—This was a suit for compensation for the use and occupation of agricultural land. Judging from the record, the plaintiff had purchased the zamindari rights of the defendant's father. Whether the land in respect of the occupation of which compensation is claimed was *sir* land of the ex-zamindar we do not know. One thing is clear. The plaintiff had, by proceeding under section 36 of Act No. XII of 1881, obtained the ejectment of the defendant from the lands to which this claim relates. He could not have obtained ejectment under such a proceeding unless the defendant had been a tenant of this agricultural land. The plaintiff, if he wanted to get a decree for rent and did not agree with the defendant as to the

* Civil Revision No. 26 of 1897.

rent to be paid whilst the defendant was his tenant, ought to have got the [298] rent determined whilst the tenancy subsisted by an application under Act No. XII of 1881. Mr. *Jivan Chandar* argues that, the rent not having been determined during the tenancy and not having been agreed on, the Court of Revenue would not now determine it. The Court of Revenue would of course act wisely in not determining the rent of a tenancy which no longer subsisted; it has other work to do. Mr. *Jivan Chandar* also contended that, on the authority of the decisions of Mr. Justice TYRRELL in *Brijbawan Singh v. Mehdi Ali*, Weekly Notes, 1887, p. 140, and *Ranjit Singh v. Diwan Singh* Weekly Notes, 1889, p. 175, it was competent to a Civil Court in such a case, although it could not decree the claim *sub nomine* rent, to award to the plaintiff compensation for the use of his land by the defendant. Mr. Justice TYRRELL apparently had forgotten that he had delivered the judgment of a Bench of two Judges in 1882 which was directly in conflict with the view which he was expressing in 1887 and 1889. Sir ROBERT STUART, C. J. and Mr. Justice TYRRELL in *Ram Prasad v. Dina Kuar*, I. L. R., 4 All., 515, held, and we think rightly, that in such a case the zamindar cannot sue for use and occupation. If he wants to enforce payment of rent by his tenant he must agree on the rent with his tenant, if the case be one in which such an agreement would be lawful under, and not contrary to, the provisions of Act No. XII of 1881 and could be enforced under that Act, or he must have the rent determined under the Act, and then he could sue for the arrears of the rent so agreed on by the tenant or determined under the Act, and he could sue in the Court of Revenue, which is the only Court having jurisdiction. This view of the law is supported by the judgment of this Court in *Radha Prasad Singh v. Jugal Das*, I. L. R., 9 All., 185. Some decisions bearing on this subject are referred to in *Debi Singh v. Jhanno Kuar*, I. L. R., 16 All., 209. Zamindars must comply with the law of Act No. XII of 1881, or they will go without remedy, not only in the Court of Revenue, but also in the Civil Court, in respect of [299] compensation for the occupation of their land. This case came before us as an application in revision from the judgment of a Civil Court dismissing the suit. We dismiss this application.

Application dismissed.

[20 All. 299]

The 4th February, 1896.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Kamrakh Nath.....Applicant

versus

Sundar Nath.....Opposite Party.*

Civil Procedure Code, sections 406, 407—Application for leave to sue in forma pauperis—Applicant to make out that he has a good subsisting cause of action.

Clause (c) of section 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction, but the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. *Chatterpal*.

* Civil Revision No. 27 of 1897.

Singh v. Raja Ram, I. L. R., 7 All., 661; *Dulaji v. Vallabdas Praggi*, I. L. R., 13 Bom., 126; and *Vijendra Tirtha Swami v. Sudhindra Tirtha Swami*, I.L.R., 19 Mad., 197, referred to. *Koka Ranganayaka Ammal v. Koka Venkatachellapati Nayudu*, I. L. R., 4 Mad., 328, dissented from. *Venkubai v. Lakshman Venkoba Khot*, I. L. R., 12 Bom., 617, distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. S. S. Singh and Pandit Madan Mohan Malaviya, for the Applicant.

Munshi Ram Prasad and Pandit Sundar Lal, for the Opposite Party.

Edge, C.J. and Burkitt, J.—This is an application asking the Court to revise, under section 622 of the Code of Civil Procedure, an order of the Subordinate Judge of Gorakhpur rejecting an application for leave to sue as a pauper. The applicant alleged that he was the eldest chela of the deceased mahant; that whilst he was on a pilgrimage the mahant died and the proposed defendant to the suit had wrongfully usurped the gaddi and the position of mahant of the temple, and the applicant alleged that he was entitled to the gaddi by law and custom. [300] We may observe here that that was a very loose allegation. In nearly all these cases of succession to the gaddis of temples the succession is governed by the custom of the class to which the temple is appropriated. Sometimes the mahant nominates his successor, and that successor on the death of the mahant becomes entitled by virtue of the nomination. In other cases the successor is appointed by the representative of the founder of the temple. In others again the successor is appointed by the mahants of the neighbouring temples, but the instances we have given are not exhaustive of the customs which have been found to apply in such cases. Consequently the mere allegation that a claimant is entitled by law and custom to the gaddi of a temple is not in our opinion a sufficient allegation of title. Something more than general allegations are requisite in the plaint where a claim is made to the possession of property which is in the possession of another person, always of course provided that the case is not one falling under section 9 of the Specific Relief Act. The case of *Philipps v. Philipps*, L. R., 4 Q. B. D., 127, and that of *Dawkins v. Lord Penrhyn*, L. R., 4 App. Cas., 58, are instructive as to the law on this subject in England.

The Subordinate Judge examined, under section 406 of the Code of Civil Procedure, the applicant regarding the merits of his claim. The fact that he was a pauper was not disputed. It appeared from the examination that, according to one custom at least affecting the particular temple, a jar with water in it was placed on the gaddi in the event of the mahant dying during the absence of the person entitled to succeed him on the gaddi. This is not alleged to have been done in the present case, and it also appeared that the defendant had taken possession of the gaddi without any serious opposition on the part of the panches of the temple. On these facts the Subordinate Judge came to the conclusion that the applicant had not shown a *prima facie* reasonable cause of action, and rejected the application for leave to sue as a pauper.

[301] It has been contended that this case comes within the ruling of the Bombay High Court in *Venkubai v. Lakshman Venkoba Khot*, I. L. R., 12 Bom., 617. It appears to us that that case does not apply here. Here the Judge addressed himself to the question of whether or not the applicant had shown grounds from which it might be inferred that he had a probable cause of action. It is obvious that the mere statements in the plaint which accompanies an application for leave to sue as a pauper cannot be accepted as the sole materials on which a decision as to whether the applicant's allegations do or do not show a right to sue can depend. If the allegations in the plaint were the sole matters to be looked to and the applicant were admittedly a pauper, the granting of this application to sue as a pauper would depend, not

on whether he had any merits to go upon, but on the skill of the gentleman who drafted his petition and his plaint, and the examination as to the merits under section 406 would be superfluous.

It has been held by this Court in *Chattarpal Singh v. Raja Ram*, I. L. R., 7 All., 661, that clause (c) of section 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction, but that the applicant must make out that he has a good, subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. That Full Bench ruling was cited with approval by JARDINE, J., in *Dulari v. Vallabdas Pragji*, I. L. R., 13 Bom., 126, and even if the Madras Court in *Koka Ranganayaka Ammal v. Koka Venkatachellapati Nayudu*, I. L. R., 4 Mad., 323, took a different view, we are bound to follow the Full Bench ruling of our own Court. We may say that we entirely approve of that Full Bench ruling. Further, the Madras Court in *Vijendra Tirtha Swami v. Sudhindra Tirtha Swami*, I. L. R., 19 Mad., 197, did not follow the case in I. L. R., 4 Mad., 323. Assuming the Full Bench ruling to be correct, as we do, it was within the jurisdiction of the Subordinate Judge to decide whether or not the applicant's allegations showed a right to sue. It has been held by their [302] Lordships of the Privy Council in *Rajah Amir Hassan Khan v. Sheo Bakhsh Singh*, L. R., 11 I. A., 237, that where a Court has jurisdiction to decide a question, and does decide it, the High Court cannot under section 622 of the Code of Civil Procedure interfere merely because the Court has wrongly decided the question. There is no question in this case of illegality or material irregularity. The result is that the Subordinate Judge had jurisdiction to decide this question and did decide it. He was not guilty of any illegality or irregularity, and it is unnecessary to consider whether he decided the question rightly or wrongly. We cannot interfere. We dismiss this application with costs.

Application dismissed.

NOTES.

[The C.P.C., 1908, O. 23, r. 5, clause (d) is now worded thus, "where his allegations do not show a cause of action."

This decision had been followed in (1903) 27 Mad., 37; 120; (1910) 11 I.C., 55 (Cal.). See also (1903) 13 M. L. J., 425; (1909) 6 M.L.T., 359.]

[20 All. 302]

APPELLATE CIVIL.

The 7th February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Chunni Lal.....Judgment-debtor

versus

Harnam Das.....Decree-holder.*

Execution of decree—Act No. IV of 1882 (Transfer of Property Act), section 89—Order absolute for sale—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule II, Article 179.

An application for an order absolute for sale under section 89 of the Transfer of Property Act, 1882, is an application to which article 179 of the second schedule to the Indian Limitation Act, 1877, applies. *Oudh Behari Lal v. Nageshar Lal*, I. L. R., 13 All., 278, referred to. *Ranbir Singh v. Drigpal Singh*, I. L. R., 16 All., 23, overruled.

* First Appeal No. 12 of 1897, from an order of Babu Baijnath, Subordinate Judge of Shahjahanpur, dated the 17th June 1897.

THIS appeal arose out of an application for an order absolute for sale under section 89 of the Transfer of Property Act, 1882. The respondent obtained a decree for sale under section 88 of the Transfer of Property Act on the 30th of March 1893 against the appellant. By the decree six months were allowed for payment of the decretal sum. That period expired on the 30th of September 1893. On the 10th of March 1897, the respondent decree-holder applied for an order for sale under section 89 of the [303] Transfer of Property Act. That was the first application made for execution of the decree or to take a step in aid of the execution of the decree. The Court of First Instance (Munsif of Bisauli) held that the application was barred by limitation. On appeal by the decree-holder the Lower Appellate Court (Subordinate Judge of Shahjahanpur) held, following the decision in *Ranbir Singh v. Drigpal*, I. L. R., 16 All., 23, that the application was not barred, and, reversing the decree of the Munsif, made an order of remand under section 562 of the Code of Civil Procedure. From that order of remand the judgment-debtor appealed to the High Court.

Munshi Ram Prasad, for the Appellant.

Mr. D. N. Banerji, for the Respondent.

Edge, C. J. and Banerji, J. :—On the 30th of March 1893 the respondent here obtained a decree under section 88 of the Transfer of Property Act, against the appellant here. By the decree six months were allowed for payment of the decretal sum. That period expired on the 30th of September 1893. On the 10th of March 1897, the respondent decree-holder applied for an order for sale under section 89 of the Transfer of Property Act. That was the first application made for the execution of the decree or to take a step in aid of the execution of the decree. The first Court held that the application was barred by the Indian Limitation Act, 1877, and dismissed it. On appeal the Lower Appellate Court held, following the decision in *Ranbir Singh v. Drigpal*, I. L. R., 16 All., 23, that there was no period of limitation provided for such an application, and set aside the order of the first Court and made an order under section 562 of the Code of Civil Procedure remanding the case. From that order of remand this appeal has been brought. A Full Bench of this Court has held in *Oudh Behari Lal v. Nageshar Lal*, I. L. R., 13 All., 278, that an application for an order under section 89 of the Transfer of Property Act is a proceeding in execution of decree and subject to the rules of procedure governing such matters. Applying the decision of the [304] Full Bench, we hold that an application for an order under section 89 of the Transfer of Property Act is an application to which article 179 of the second schedule to the Indian Limitation Act, 1877, applies, and consequently, having regard to section 4 of the Act, the application was rightly dismissed by the first Court. If we were to hold that there was no limitation in such a case the decree-holder might postpone without loss of any rights his application under section 89 for fifty years after the date when he obtained his decree under section 88 of the Transfer of Property Act, as there would be nothing in the Limitation Act to bar his application, and section 230 of the Code of Civil Procedure would not apply. We allow this appeal with costs in this Court and in the Court below, and set aside the order under appeal, dismiss the appeal to the Court below, and restore and affirm the decree of the first Court.

Appeal decreed.

NOTES.

[The C.P.C., 1908, O. 34, r. 5, takes the place of the Transfer of Property Act, 1882, sec. 89, according to which an application for the passing of a final decree is not an application in execution of a decree.]

The view in the following cases had been similar :—(1905) 27 All., 625 ; (1902) 24 All., 542 ; (1898) 20 All., 357 ; (1902) 25 Mad., 244 ; (1914) M.W.N., 251 ; (1908) 26 Mad., 780 ; (1908) 31 Mad., 68 ; (1899) 23 Bom., 644 ; though the Calcutta view was different—(1906) 33 Cal., 867 ; (1902) 29 Cal., 651.]

[10 All. 304]

The 9th February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Daya Kishan.....Opposite Party

versus

Nanhi Begam and others.....Petitioners.*

Execution of decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Schedule ii, Article 179—Application to the proper Court—Civil Procedure Code, section 206.

An application under section 206 of the Code of Civil Procedure does not give a fresh starting point to limitation and cannot be regarded as an application to the proper Court to take a step in aid of execution. *Kishen Sahai v. The Collector of Allahabad*, I.L.R., 4 All., 137, *Tarsi Ram v. Man Singh*, I. L. R., 8 All., 492, and *Kallu Rai v. Tahiman*, I. L. R., 18 All., 124, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, for the Appellant.

Munshi Ghulam Mujtaba, for the Respondents.

Edge, C. J., and Banerji, J. :—This appeal arises out of proceedings taken for the execution of a decree. A decree for sale [306] was made under section 88 of the Transfer of Property Act, 1882, on the 31st of March 1891. An order absolute for sale was made on the 17th of December 1892, under section 89 of that Act. On the 23rd of January 1893, an application for execution was made. On the 1st of July 1893, the judgment-debtor paid into Court the amount decreed, which included costs. On the 5th of July 1893, the decree-holder, having found that by the judgment he was entitled to a sum of about Rs. 1,000 more than the decree had given him, applied under section* 206 of the Code of Civil Procedure to have the decree brought into accordance with the judgment. For some reason best known, if known at all, to the Judge to whom that application was made, he shelved the application on the 18th of November 1893. On the 28th of November 1895, the decree-holder made a second application under section 206 to the same effect as the previous one, and on the 25th of July 1896, the decree was brought into accordance with the judgment. The decree-holder delayed making his next application until the 17th of March 1897. It was for execution of the decree as amended. That application was dismissed on the ground that it was barred by limitation. From the order dismissing that application this appeal has been brought. Unless the decree-holder is entitled to call in aid his applications of the 5th of July 1893, and the 28th of November 1895, as applications to the proper Court to take a step in aid of the execution of the decree, execution of the decree* is barred by limitation under article 179 of the second schedule to the Indian Limitation Act, 1877, as the last application to execute the decree was that of the 23rd of January 1893.

In *Kishen Sahai v. The Collector of Allahabad*, I. L. R., 4 All., 137, it was held that an application under section 206 of the Code of Civil Procedure to

* First Appeal No. 231 of 1897, from an order of Maulvi Muhammad Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 22nd May, 1897.

bring a decree into accordance with the judgment was substantially an application for review of judgment and gave, under section 167* of schedule ii of Act No. IX of 1871, a fresh starting point for limitation. We cannot regard [306] proceedings under section 206 of the Code as of the same nature in any respect as proceedings under section 623 of the Code. In the former case, namely, under section 206, the correctness of the judgment is not questioned; it is assumed; but the jurisdiction arises from the fact that the decree as drawn up and signed is not in accordance with the judgment. In the latter case, namely, under section 623, not only the correctness of the decree, but the correctness of the judgment is questioned, and, if the application under section 623 is allowed, a re-hearing of the suit or appeal to which it refers becomes necessary. In the former case there is no re-hearing. That part of the decision in *Kishen Sahai v. The Collector of Allahabad* to which we have referred was explained by STRAIGHT, J., in *Kallu Rai v. Fahiman*, I. L. R., 13 All., 124, on the ground that, though ostensibly the application in *Kishen Sahai v. The Collector of Allahabad* had been made under section 206 of the Code, the proceedings which were taken were proceedings which could only have been taken under section 623 of the Code. We need not consider whether that explanation is correct or not. The decision in *Kallu Rai v. Fahiman* shows that an application under section 206 of the Code of Civil Procedure does not give a fresh starting point to limitation, and cannot be regarded as an application to a proper Court to take a step in aid of execution. That this is so is obvious from a consideration of article 179, clause (4) of the second schedule to Act No. XV of 1877. The application under that clause must be one in accordance with law made to "the proper Court" for execution or to take some step in aid of execution of the decree. By explanation II to article 179 "proper Court" means the Court whose duty it is to execute the decree. The Court executing a decree may or may not be the Court which would have jurisdiction to take action on an application under section 206 of the Code, and, even if it was the Court which passed the decree, its functions as a Court executing the decree are not the same as its functions were as the Court making the [307] decree. In executing the decree the Court executing it must take the decree as it finds it. It cannot amend the

* [Art. 167 :—

| Description of Application. | Period of limitation. | Time when period begins to run. |
|--|-----------------------|--|
| For the execution of a decree or order of any Civil Court not provided for by No. 169. | Three years ... | The date of the decree or order, or (where there has been an appeal) the date of the final decree or order of the Appellate Court, or (where there has been a review of judgment) the date of the decision passed on the review, or (where the application next hereinafter mentioned has been made) the date of applying to the Court to enforce, or keep in force, the decree or order, or (where the notice next hereinafter made has been issued) the date of issuing a notice under the Code of Civil Procedure, section two hundred and sixteen, or (where the application is to enforce payment of an instalment which the decree directs to be paid at a specified date) the date so specified.] |

decree or alter it in any way. It is bound of course to construe the decree. The decree in execution may be the decree of the High Court, and the proper Court to execute that decree may be the Court of the Munsif by whom the suit was first decided. The Munsif could not act under section 206 in respect of a decree made by an appellate Court, and he would be bound, as the Court executing the decree, to execute the decree whether he approved of it or not, even if the decree had been one made by himself. For these reasons we are of opinion that the applications of the 5th of July 1893, and the 28th of November 1895, were not applications made to the proper Court within the meaning of article 179 to take a step in aid of execution of the decree, and consequently that execution of the decree was barred by limitation. It was decided, and we think rightly, in *Tarsi Ram v. Man Singh*, I. L. R., 8 All., 492, that an application under section 206 of the Code does not give a fresh starting point for limitation. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[There was a conflict of case law on this subject. These cases adopted the view in this case : (1905) 27 All., 575 ; (1907) 4 A.L.J., 169, but the contrary view was taken in (1901) 24 Mad., 25 ; (1898) 25 Cal., 258 ; (1909) 10 C.L.J., 467.

The Indian Limitation Act, 1908, Art. 182, clause 4, removes this conflict by including " (where the decree has been amended) the date of amendment."]

[20 All. 307]

APPELLATE CRIMINAL.

The 11th February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Muhammad Shah Khan and another.*

Act No. XLV of 1860 (Indian Penal Code), section 218—Public servant framing incorrect record—Injury to the public—Police officer framing a false report.

A report of the commission of a dacoity was made at a thana. The Police officer in charge of the thana at first took down the report which was made to him, but subsequently destroyed that report and framed another and a false report—of the commission of a totally different offence—to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant.

Held, that on the above facts the Police officer was guilty of the offences punishable under section 204 and section 218 of the Indian Penal Code.

[308] THE facts of this case are fully stated in the judgment of the Court. Messrs. *W. M. Colvin* and *C. C. Dillon*, for the Accused Persons.

The Officiating Government Advocate (*Mr. A. E. Ryves*), for the Crown.

Edge, C. J., and **Burkitt, J.**—Muhammad Shah Khan, who was a clerk or muharrir at the thana of Didauli, and Kutb-ud-din, who was the thanadar, were tried for the offences punishable under sections 204 and 218 of the Indian Penal Code. Kutb-ud-din was acquitted ; the Government has appealed against that acquittal, and that appeal is before us. Muhammad Shah Khan was convicted of the offence punishable under section 204 of the Indian Penal

* Criminal Appeal No. 1556 of 1897.

Code and was sentenced therefor to two years' rigorous imprisonment. He has appealed, and his appeal is now before us.

The facts of this case, although the evidence was taken at considerable length, are very simple. A dacoity had been committed on the night of the 24th-25th of May, and in that dacoity one Abdul Wahid, who was the zamindar's karinda, was injured rather severely. He first went to make his report to the thana at Amroha, apparently because he had been told that a difficulty had arisen about one Roshan belonging to the village getting a report made as to a previous dacoity alleged to have taken place in the same village on the night of the 23rd. He was directed at Amroha to make his report at the thana of Didauli, within the circle of which thana the village in question was. He arrived at the thana late at night, and made a statement to the thanadar; and early the next morning he made a report. He says in his evidence that he mentioned that two dacoities had been committed, and that he signed a book three times, and that later on they again put before him a book for his signature and he again signed it two or three times. He says that he did not take away any cheque receipt. A cheque book which was printed at the Government Press in 1891 was produced in Court, and [309] in that cheque book there was a counterfoil taken from a cheque book which was printed at the Government Press in 1892, and which otherwise shows on the face of it that it was of a different issue from that of the cheque book of 1891. On the interpolated counterfoil there was what purported to be a report by Abdul Wahid of a theft committed by three persons in the village. According to that report, after the three men had put the grain and other things into their bags, Abdul Wahid and his servant awoke, and in trying to seize the men were hurt. That report bears the genuine signature of Abdul Wahid. He says that that was not the report which he made, and we have no doubt that it was not. There must have been some strong motive to induce the thanadar and the clerk to concoct the report on a sheet of a cheque book of the issue of 1892, to get Abdul Wahid's signature to that report and to substitute that report for the report which was first recorded and signed by Abdul Wahid. No explanation is given by Muhammad Shah Khan or Kutb-ud-din of how it happened that in the cheque book of the issue of 1891 a sheet of the issue of 1892 has found a place. No reasonable man could believe that when the cheque book of 1891 was being bound a sheet from a cheque book printed the following year was inserted by mistake, and that by a fortuitous concurrence of circumstances the report which is questioned in this case happened to be written on the sheet which by mistake had got into the wrong book in binding. Further, all the other sheets in the book of the issue of 1891 have the mark of three holes where the binding string has passed through them. The sheet from the book of 1892 has got three holes corresponding with the holes in the book of 1891 and in addition three other holes which do not correspond with any of the holes in the book of 1891. These are facts which speak for themselves.

The report made in the cheque book was a report which the muharrir or clerk, according to the Police Regulations, was bound to report correctly word for word as it fell from the man making the report, and it was a report which, according to the same [310] Police Regulations, the officer in charge of the thana was bound to sign, with the object of making the two men responsible for the correctness of the report. Consequently, it was a report which, in our opinion, must be taken to have been recorded by the two men. Further, as the report was signed by the person making it, namely Abdul Wahid, the document bearing his signature would have been admissible in a Court of Justice

to contradict any statement which he might make at variance with the report and might for that purpose be sent for on a subpoena and could have been proved, if necessary, by the thanadar and the clerk in whose presence it was made and signed. No doubt the object in preparing the false report and substituting it for the true report was to keep from the knowledge of the District Superintendent of Police and the Magistrate of the District the fact that two dacoities were reported to have taken place in a village in the district. The offence, in our opinion, was a very serious one. It is in the interest, of the public necessary that these reports should be recorded faithfully and truly by police officers. It is to the injury of the public that offences should be concealed by the police, and that reports should be falsely recorded. We bear in mind in dealing with the appeal of Muhammad Shah Khan that he is a young man, and that what he did was done no doubt at the suggestion and by the orders of the thanadar. However, we cannot pass over his offence lightly. We dismiss his appeal; but we alter the sentence to one of 12 months' rigorous imprisonment, which will count from the date of his conviction in the Court of Session. As to Kutb-ud-din, he was the responsible officer at the thana. It was his duty not only to show a good example of acting lawfully, but to take care, as far as he could, that those under him at the thana acted according to law. There is, in our opinion, a wide difference between his case and that of his subordinate Muhammad Shah Khan. We convict Kutb-ud-din of the offence punishable under section 204 of the Indian Penal Code; he certainly secreted, or destroyed the first signed report; and we sentence him under that section to be rigorously imprisoned for [311] two years. We convict him also of the offence punishable under section 218 of the Indian Penal Code; he framed a record which he knew to be incorrect knowing it to be likely that he would thereby cause injury to the public. The record in respect of which we convict him under section 218 was the false record to which he obtained the signature, on the second occasion, of Abdul Wahid. Under section 218 we sentence Kutb-ud-din to be rigorously imprisoned for two years. The latter sentence will commence on the expiration of the former. A warrant will forthwith issue for the arrest of Kutb-ud-din.

[20 All 311]
APPELLATE CIVIL.

The 12th February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Shah Muhammad Khan and others... ..Defendants

versus

Hanwant Singh.....Plaintiff.*

Civil Procedure Code, section 108—Application to set aside a decree passed ex parte—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 164—Suit for partition—Nature of decree in such suit—Civil Procedure Code, section 396—Execution of process for enforcing the judgment.

The action of an amin appointed under section 396 of the Code of Civil Procedure in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of article 164† of the second schedule to the Indian Limitation Act, 1877. *Dwarka Nath Misser v. Barinda Nath Misser*, I. L. R., 22 Cal., 425, referred to.

IN this case the respondent obtained on the 30th September 1896 a decree for partition of certain immovable non-revenue-paying property against Shah Muhammad Khan and others. This decree was a decree of an interlocutory nature not capable of execution until the actual shares of the parties to it had been properly demarcated by means of the procedure prescribed by section 396 of the Code of Civil Procedure. An application, [312] described by the Court which passed the decree (Subordinate Judge of Meerut) as an application for execution was made by the respondent on the 13th of February 1897, in pursuance of which an amin was sent to prepare lots for partition. The amin on the 3rd and 4th of March 1897 made a survey of the property and prepared lots, and on the 18th of March returned a report to the Court, on the basis of which report notice was issued to the defendants fixing the 17th of April 1897 for the allotment amongst the parties of the lots prepared by the amin. On that date some of the defendants applied under section 108 of the Code of Civil Procedure to have the decree of the 30th of September 1896 set aside as having been passed *ex parte* without due notice having been served upon them. This application was dismissed by the Subordinate Judge as barred by limitation, he being of opinion that the sending of the amin to demarcate the lots was the "executing of a process for enforcing the judgment" within the meaning of art. 164 of the second schedule to the Indian Limitation Act, 1877. Against this order of dismissal the applicants appealed to the High Court.

Munshi Ram Prasad, for the Appellants.

* First Appeal No. 58 of 1897, from an order of Pandit Rai Indar Narain, Subordinate Judge of Meerut, dated the 1st May 1897.

† [Art. 164 :—

| Description of Application. | Period of limitation. | Time from which period begins to run. |
|--|-----------------------|--|
| By a defendant for an order to set aside a judgment, <i>ex parte</i> . | Thirty days ... | The date of executing any process for enforcing the judgment.] |

Pandit *Moti Lal*, for the Respondent.

Edge, C. J., and Burkitt, J.—This appeal has arisen in a suit for the partition of immoveable property not paying revenue to Government. The Court in which the suit was made a decree for partition, which we must construe as an interlocutory decree, but a decree nevertheless within the meaning of section 2 of the Code of Civil Procedure, defining the interests of the parties to the suit; that is, it was in effect an interlocutory decree declaring the interests of the parties. Now in suits for partition of immoveable property not paying revenue to Government, the Court, no doubt, if it has the information before it necessary to enable it to make a decree not only declaring the rights of the parties but actually fixing the particular areas, or rooms, or parts of the houses, as the case may be, of which possession is to be given to the parties respectively on partition, may make such a decree [313] without employing the procedure of section 396 of the Code of Civil Procedure, and the decree so made would be enforceable in execution, and possession of the respective areas, rooms, &c., could be given to the parties in execution of the decree. But where, as most generally happens, a Court has not the information necessary to the making of such a decree, it must make a preliminary or interlocutory decree of a declaratory nature, and then adopt the procedure of section 396 of the Code of Civil Procedure by appointing a commissioner or commissioners, whose duty will be, not to give possession, for at that period there would be no decree capable of execution by possession, but who should allot such shares to the parties, award the sums to be paid in case sums are to be paid, and then prepare and sign a report appointing the shares and distinguishing such shares by metes and bounds, if ordered so to do. The commissioner or commissioners must then submit that report to the Court, and the Court, after giving the parties an opportunity of objecting to the report, may quash the report and proceedings of the commissioner or commissioners and issue a new commission, or pass a decree in accordance with the report. The decree in accordance with such report would be a decree allotting the specific shares, areas, rooms, &c., distinguishing them where possible by metes and bounds or other adequate description, and decreeing to the respective parties possession of those portions of the property allotted to them. In the latter case which we have been putting that would be the final decree. It is true that the interlocutory decree—following the principle laid down by their Lordships of the Privy Council—would be appealable, but for all that it is not the final decree or the decree which is capable of execution, except possibly for such costs as it might award to be paid. It is merely of the character of an interlocutory and declaratory decree. In such a case as the present, which falls under the second category, the appointment of a commissioner, whether he be the *amin* of the Court or some one else, is not the issuing of a process in execution of a decree, nor are any proceedings of such commissioner [314] the carrying out of any process in execution. The time has not yet arrived for execution of the decree. It was in our opinion correctly decided by the High Court at Calcutta in *Dwarka Nath Misser v. Barinda Nath Misser*, I. L. R., 22 Cal., 425, that proceedings under section 396 of the Code of Civil Procedure for the purpose of effecting partition are proceedings in the suit itself and not proceedings in execution of a decree.

In the present case a decree, which we must regard as simply declaratory and interlocutory, was made in the absence of the defendants, who are appellants here. All these appellants with one exception were minors. They applied for an order to set aside the decree under section 108 of the Code of Civil Procedure. The Court considering that the appointment of an *amin*

under section 396, under which section only at the stage of the case he could have been appointed to act, was the issuing of a process for enforcing the judgment, and that the action of the amin in proceeding to the place and making the allotment was the executing of a process for enforcing the judgment, applied article 164 of the second schedule of the Indian Limitation Act, 1877, and dismissed the application. There has been in this case no execution of a process for enforcing the judgment. The application was within time. We set aside the order of the Court below with costs and remand the case under section 562 of the Code of Civil Procedure to that Court to be disposed of on the merits.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1899) 21 All., 409 ; (1899) 19 A.W.N., 124. See also (1905) 28 All., 75.]

[316] FULL BENCH.

The 16th February, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, MR. JUSTICE BLAIR,
MR. JUSTICE BANERJI, MR. JUSTICE BURKITT, AND MR. JUSTICE AIKMAN.

Batul Begam.....Plaintiff

versus

Mansur Ali Khan and others.....Defendants.

Pre-emption—Suit for pre-emption based on a mortgage by conditional sale—Limitation—Act No. XIV of 1877 (Indian Limitation Act), Schedule ii, Articles 10 and 120—“Physical possession.”

* *Held*, (1) that, the other conditions being present necessary to make article 10 of the second schedule to Act No. XV of 1877 applicable, article 10 would apply to a sale which, in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation No. XVII of 1806 or by the operation of Act No. IV of 1882, had become in effect an absolute sale with the right of redemption gone.

(2) That in such a case as above limitation begins to run, where Regulation No. XVII of 1806 applies, from the expiry of the year of grace.

(3) That a share in an undivided zamindari mahal is not susceptible of “physical possession” in the sense of article 10 of the second schedule to Act No. XV of 1877.

(4) That constructive possession, e.g., by receipt of rent from tenants, is not “physical possession” within the meaning of said article.

Ali Abbas v. Kalka Prasad, I. L. R., 14 All., 405 ; *Nath Prasad v. Ram Pallan Ram*, I. L. R., 4 All., 218 ; *Goordhun v. Heera Singh*, S. D. A., N.-W. P., 1866, p. 181 ; *Ganeshee Lall v. Toola Ram*, N.-W. P. H. C. Rep., 1868, p. 276 ; *Jageshar Singh v. Jawahir Singh*, I. L. R., 1 All., 311, and *Unkar Das v. Narain*, I. L. R., 4 All., 24, referred to.

THE facts of this case are as follows :—

One Zahur Ali mortgaged by conditional sale certain shares in each of four villages. Two of these villages were of pure zamindari tenure, the others

* First Appeal No. 14 of 1895, from a decree of Kuar Mohan Lal, Subordinate Judge of Gorakhpur, dated the 28th November 1894.

were imperfect pattidari. Proceedings were taken in 1881 by the mortgagee under Regulation No. XVII of 1806. The year of grace provided by section 8 of that Regulation expired in 1882. Before the expiry of the year of grace, the heirs of the mortgagor deposited in Court what they thought was sufficient to discharge the mortgage-debt. They subsequently brought a suit for redemption, which was dismissed [316] by the Privy Council on the ground that the deposit which had been made was not sufficient. Thereupon the heirs of the mortgagee brought a suit for possession, and obtained a decree from the first Court on the 28th of July 1891, which was confirmed in appeal by the High Court on the 6th of July 1893. Formal possession was given on the 27th of November 1893. Whether or not actual possession was given under the decree of the 6th of July 1893 was a matter disputed by the parties. The mortgage by conditional sale did not entitle the mortgagees to possession during the currency of the mortgage. The plaintiff brought her suit for pre-emption on the 4th of July 1894. The Court of First Instance (Subordinate Judge of Gorakhpur) dismissed the suit as barred by limitation, having regard to the provisions of article 120 of the second schedule to the Indian Limitation Act, 1877, and the case of *Ali Abbas v. Kalka Prasad*, I. L. R., 14 All., 405. The plaintiff appealed to the High Court.

On the appeal coming on for hearing before a Division Bench of two Judges, an issue was remitted to the lower Court under section 566 of the Code of Civil Procedure as to whether the property in suit admitted of physical possession. The lower Court returned a finding that the property did not admit of physical possession. After the receipt of this finding, to which the appellant took objections under section 567 of the Code of Civil Procedure, the appeal was laid before a Full Bench.

Pandit *Sundar Lal* (with whom Mr. *Ghulam Muftaba*) for the appellant contended that the suit was not barred by limitation. Article 10 of schedule II of Act No. XV of 1877 applies to all cases of sales of property. It applies equally to a sale which, though in its inception it was only a mortgage by way of conditional sale, has now matured into an absolute sale by foreclosure. On the facts found by the Court below on the issue remitted by the High Court under section 566 of the Code of Civil Procedure the whole of the property sold is susceptible of physical possession being taken. Each co-sharer collected his share of rent [317] directly from the tenants, and being thus in possession of his share in the *zamindari*, he was also in possession of the joint lands unoccupied by tenants which appertained to the *zamindari*. The word "physical" implies some corporal or perceptible act done which of itself conveys, or ought to convey, to the mind of a person notice that his right has been prejudiced. (*Shiam Sundar v. Amanat Begam*, I. L. R., 9 All., 234 : at p. 239). The collection of his share of the rents from the tenants was such act, and it indicated that the vendee had taken physical possession. The suit being instituted within a year from the date the physical possession was so taken is within time.

Mr. *T. Conlan* and *Munshi Jwala Prasad*, for the Respondents, do not appear to have been called on.

The judgment of the Court (EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by *Edge, C. J.* :—

This was a suit for pre-emption. The Court of First Instance dismissed the suit on the ground that it was barred by article 120 of the second schedule of the Indian Limitation Act, 1877. The facts of the case are shortly these :—In 1868 *Zahur Ali Khan* mortgaged by conditional sale certain shares in each of four villages. Two of those villages were of pure *zamindari* tenure

the others were imperfect pattidari. Proceedings were taken in 1881 by the mortgagee under Regulation No. XVII of 1806. The year of grace provided by section 8 of that regulation expired in 1882. Before the expiry of the year of grace the heirs of the mortgagor deposited in Court what they thought was sufficient to discharge the mortgage debt. They subsequently brought a suit for redemption, which was dismissed by the Privy Council on the 13th of July 1886, on the ground that the deposit which had been made was not sufficient. Thereupon the heirs of the mortgagee brought a suit for possession, and obtained a decree from the first Court on the 28th of July 1891, which was confirmed in appeal by this Court, on the 6th of July 1893. It is alleged on the one side and denied on the other that the heirs of [318] the mortgagee obtained possession in execution of the decree of the 6th of July 1893, on the 27th of November 1893. Formal possession at any rate was given on that date. The mortgage by way of conditional sale did not entitle the mortgagees to possession during the currency of the mortgage. This suit for pre-emption was brought on the 4th of July 1894. It is contended on behalf of the plaintiff, appellant here, that article 10 of the second schedule to Act No. XV of 1877 applies—that contention being based on the argument that the property sold, in respect of which pre-emption was claimed, does and did admit of physical possession being obtained of it. The Court below, misunderstanding the question actually decided by the Full Bench in *Ali Abbas v. Kulka Prasad*, I. L. R., 14 All., 405, applied article 120 to the suit, and, as the year of grace had expired more than six years before suit, dismissed the suit on the ground of limitation. We should point out here how the Full Bench ruling has been misunderstood by the Court in question. The Full Bench in that case had not to decide what article of the Limitation Act applied. In effect what the Full Bench had to decide was—when does a pre-emptor's right to sue accrue when he claims pre-emption in respect of a mortgage by conditional sale which has become absolute? That question, although the Bench referring the case had to decide the question of limitation, was one, so far as the Full Bench was concerned, apart from the question of limitation.

The real question before us turns on what is the meaning of "physical possession." The first question is—can article 10 apply to a sale which was in its inception a mortgage by conditional sale, but which in the result has become an absolute sale? In *Nath Prasad v. Ram Paltan Ram*, I. L. R., 4 All., 218, the Full Bench decided that the limitation applicable to a suit to enforce a right of pre-emption in respect of a conditional sale of a share in an undivided mahal was that prescribed by article 120 of the second schedule to Act No. XV of 1877. So far as we can ascertain from the record, the Full Bench in deciding that question decided more [319] than was necessary for the disposal of the case before them. The learned Judges said:—"We think that the sale referred to in article 10 must be an absolute one having immediate effect and operation, in those cases where the interest passed is capable of physical possession, by physical possession, and where it is not by the creation of a title under an instrument duly registered."

We cannot see how a sale is any the less an absolute one because it is not to take immediate effect and operation. There is certainly nothing in article 10 to suggest that the sale mentioned in that article is limited to a sale which is to have immediate effect and operation. In our opinion, the other conditions being present necessary to make article 10 applicable, article 10 would apply to a sale which in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation No. XVII of 1806 or by the

operation of Act No. IV of 1882, had become in effect an absolute sale with the right of redemption gone. In such a case, the other conditions existing, article 10 would apply as soon as the mortgagee had acquired the complete interest of the mortgagor. No doubt in the case before the Full Bench to which we have been referring, article 120 was the only article which could have been applied at the particular stage of the transaction at which it came before the Court. We dissent from the proposition of law expressed *obiter* in that case.

In the present case if the whole of the property sold was capable of physical possession being taken by the mortgagee vendee, we should hold that article 10 of the second schedule of Act No. XV of 1877 applied. The question really turns, as we have said, on what is the meaning of "physical possession" as that term is used in article 10 of the second schedule to Act No. XV of 1877. It must mean something different from "actual possession," and it must mean something different from ordinary possession. In clause (1) of section 1 of Act No. XIV of 1859, which was the clause prescribing the limitation in suits for pre-emption, the term [320] used was "possession," and limitation ran from the time of possession being obtained by the vendee. In *Goordhun v. Heera Singh*, S. D. A., N.-W. P., 1866, p. 181, a Full Bench of the Sadr Diwanj held that the "possession" of Act No. XIV of 1859 must be an actual and not a constructive possession. In 1868 the question came again before a Full Bench, then of this Court, and in *Ganeshee Lall v. Toola Ram*, N.-W. P. H. C. Rep., 1868, p. 376, the Full Bench decided that the possession of Act No. XIV of 1859 included constructive as well as actual possession. It is probable that that decision led to the alteration of the wording of the article relating to limitation in pre-emption suits in the next succeeding Limitation Act. In article 10 of the second schedule to Act No. IX of 1871 it was prescribed that limitation should run from the date when actual possession was taken under the sale. Then came a Full Bench of this Court in 1876, *Jageshar Singh v. Jawahir Singh*, I. L. R., 1 All., 311, in which a majority of the Full Bench held that the "actual possession" of Act No. IX of 1871 was the same thing as the possession of Act No. XIV of 1859, and included constructive possession. The then Chief Justice of this Court, Sir ROBERT STUART, in our opinion, was right in differing from the rest of the Full Bench. He held that the purchaser does not take actual possession of the property sold to him until he takes physical and tangible possession. The next matter to which we have to refer is that when Act No. XV of 1877 was passed, the Legislature still determined, in our opinion, to exclude constructive possession from the possession from which limitation should run under article 10, used the term "physical possession," and they added a different terminus of limitation in respect of property which did not admit of physical possession. As we have said, two of the villages here were of pure zamindari tenure, that is, they were villages in which the zamindars got no shares allotted to them by metes and bounds, but held fractional shares, in respect of which fractional shares they received a proportionate amount of the profits of the village. [321] It is said that the mortgagor used to receive direct from the tenants of the zamindari body his proportion of the rents payable by them. That in our opinion does not alter the case. In *Unkar Das v. Narain*, I. L. R., 4 All., 24, it was held that a share in an undivided zamindari mahal was not susceptible of physical possession in the sense of article 10 of the second schedule to Act No. XV of 1877. We adhere to that decision. The Legislature meant some limitation of the term "possession" by the use of the term "physical." In our opinion, for instance the owner of a house who has let the house to a tenant cannot be said to be in physical possession of that house so long as the tenancy subsists and his tenant remains in exclusive possession of the demised

premises. In such a case the owner has parted with the physical possession to his tenant for the period of his tenancy, and the tenant alone is the person who has physical possession. It appears to us that it would be straining the English language and going contrary to the obvious intention of the Legislature to hold otherwise. In this particular case article 10 cannot apply, because the whole of the property sold is not capable of physical possession within the meaning of that article, and no instrument of sale has been registered. The result is that, article 10 not applying, article 120 must apply in this case. As article 120 applies, we have got to see when the right to sue accrued to the pre-emptor. That point is concluded by the Full Bench ruling of this Court in *Ali Abbas v. Kalka Prasad*, I. L. R., 14 All., 405, which in our opinion was rightly decided, but which must always be regarded as deciding merely the point referred to the Full Bench and not the question of limitation. This suit was barred by limitation when brought, and we dismiss this appeal with costs. The costs of translating and printing must be borne by the appellant.

Appeal dismissed.

NOTES.

[This was affirmed in (1901) 24 All., 17 P.C.]

[322] *The 17th February, 1898.*

PRESENT:

SIR JOHN EDGE, KT., CHIEF JUSTICE, MR. JUSTICE BLAIR,
MR. JUSTICE BANERJI, MR. JUSTICE BURKITT,
AND MR. JUSTICE AIKMAN.

Sundar Singh and others.....Plaintiffs

versus

Bholu and others.....Defendants.

Act No. IV of 1882 (Transfer of Property Act), section 55—Civil Procedure Code, section 43—Cause of action—Mortgage—Holder of two mortgages on the same property suing separately on each.

There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.

THE plaintiffs in this case held a mortgage of certain property from one Bholu, dated the 21st of October 1878. In January 1883 they acquired the mortgagee interest in a mortgage given by Bholu over the same property in August 1882. In December 1890 the plaintiffs obtained a decree for sale on the mortgage of October 1878. In the suit in which that decree was obtained the plaintiffs made no mention of their claim under the mortgage of August 1882. In May 1893 the plaintiffs, not yet having executed their decree obtained on the former mortgage in December 1890, brought the present suit asking for a decree for sale in virtue of their second mortgage of August 1882.

* Second Appeal No. 1030 of 1894, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 18th June 1894, confirming a decree of Babu Ganga Saran, Subordinate Judge of Aligarh, dated the 10th July 1893.

The Court of First Instance (Subordinate Judge of Aligarh) dismissed the suit as being barred by the provisions of section 43 of the Code of Civil Procedure. The plaintiffs appealed. The Lower Appellate Court (District Judge of Aligarh) dismissed the appeal, holding that the suit was barred by the operation of section 43 of the Code of Civil Procedure read with section 85 of the Transfer of Property Act, 1882. From this decree the plaintiffs appealed to the High Court.

Mr. W. K. Porter, for the Appellants.—Neither of the sections upon which the judgment and decree of the Lower Appellate Court were based applied to the facts of the case. Section 43 of the Code of Civil Procedure did not apply, because the plaintiffs' [323] two mortgages gave rise to two separate causes of action. Section 85 of the Transfer of Property Act could not apply, because all the necessary parties were in fact on the record. So long as the plaintiffs had not executed their first decree by sale of the mortgage property there was nothing in law to prevent their getting a decree on their second mortgage and executing both decrees together.

Pandit Sundar Lal, for the Respondents.—Section 67 of Act No. IV of 1882 contemplates a sale of the "property" as distinguished from merely the bare rights and interests of a mortgagor, and section 85 insists upon the joinder in a suit for sale of all persons having a claim based on a mortgage of the property sought to be sold with the object of either redeeming or foreclosing them, so that the property may be sold free from the mortgage in favour of the person so joined.—*Math Din Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432. If the mortgage in suit had been assigned to a third person the plaintiffs would have been bound to implead him in their suit on the bond of the 21st of October 1878 and the sale in execution of the decree on the mortgage of the 21st of October 1878, would have been free of the incumbrance of the mortgage in suit. The plaintiffs being the mortgagees under both the mortgages, in obtaining their decree on the mortgage of the 21st of October 1878, must be taken to have abandoned their claim on their second mortgage.

The judgment of the Court (EDGE, C. J., BLAIR, BANERJI, BURKITT and AIKMAN, JJ.) was delivered by Edge, C. J.—This appeal has been referred to the Full Bench. The plaintiffs were mortgagees under a mortgage of the 21st of October 1878. On that mortgage they obtained, on the 2nd of December 1896, a decree for sale under section 88 of the Transfer of Property Act. Before they brought the suit in which they obtained that decree the plaintiffs had become assignees of a mortgage of the 1st of August 1882, which was made to a third party by the same mortgagor and which mortgaged the same property as that [324] which was mortgaged by the mortgage of the 21st of October 1878. The mortgage of 1882 was a mortgage by which it was agreed that the amount of the mortgage debt should be payable on demand. The present suit, which was brought on the 10th of May 1893, was brought for the enforcement of the mortgage of 1882, and in this suit the plaintiffs seek a decree for sale under section 88 of Act No. IV of 1882. The first Court dismissed the suit, applying section 43 of Act No. XIV of 1882 and section 85 of Act No. IV of 1882. The application of section 43 had reference to the previous suit. What application section 85 of Act No. IV of 1882 could have had to this case it is impossible to say: all the necessary parties were before the Court. The plaintiffs appealed and the Court of first appeal dismissed their appeal on the same grounds. From that decree dismissing their appeal this appeal has been brought.

Each suit was a suit for the enforcement of the security which was given for the debt. Consequently each suit was a suit in respect of which the cause

of action was different from the cause of action in the other. Section 43 of the Code of Civil Procedure could have no application to such a case as this. This is conceded by the learned advocate for the respondents. So far as we are aware there is nothing in the Code of Civil Procedure or in the Transfer of Property Act which prevents a holder of two independent mortgages over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each, of them in a separate suit. Here the plaintiffs were entitled to obtain their decree for sale on the mortgage of 1878. It appears to us that their having obtained that decree can be no bar to their right to obtain a decree for sale on the mortgage of 1882. What benefit the two decrees will be to the plaintiffs it is difficult to see, except that the plaintiffs may execute one of these decrees by sale of the property, and, if there is a surplus arising from the sale, they may probably attach that surplus in execution of the other decree. One thing is quite clear, that the plaintiffs cannot sell the property twice [325] over, and they cannot sell under the second decree subject to the first. That would be selling the equity of redemption, a right which is not acknowledged or recognized by Act No. IV of 1882, and would be a mischief which has been struck at by section 99 of that Act. This Court in *Mata Din Kasodhan v. Kazim Husain*, I. L. R., 13 All., 432, which has been followed in many other cases, has recognized that the intention of the Legislature was to put an end to the abuses which existed before Act No. IV of 1882 came into force, and that there can be no sale of the equity of redemption apart from the property itself at the instance of the mortgagee.

We allow this appeal with costs, and we set aside the decrees of the Lower Appellate Court and of the Court of First Instance with costs and remand this case under section 562 of the Code of Civil Procedure to the Court of First Instance to be disposed of on the merits.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1909) 3 I.C., 175; (1906) 3 A.L.J., 238; but see (1901) 25 Mad., 109; (1907) 30 Mad., 358; (1910) 37 Cal., 589; in (1903) 26 All., 14 the case of one of the mortgages being a usufructuary one was distinguished.

As regards splitting of causes of action, see also (1911) 13 I.C., 458 (Mad.); (1914) 41 I.A., 142; 18 C.W.N., 617.]

[20 All. 325]

APPELLATE CIVIL.

The 1st March, 1898.

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Bhagirathi Misr.....Plaintiff

versus

Sheobhik and others.....Defendants.

Hindu law—Joint Hindu family—Rights of son in joint ancestral property—Mortgage.

A member of a joint Hindu family has no power in his father's life-time to make a mortgage of any part of the ancestral family property. *Bal gobind Das v. Narain Lal*, I. L. R., 15 All., 339, and *Madho Prashad v. Mehrban Singh*, I. L. R., 18 Cal., 157, referred to.

*Second Appeal No. 1185 of 1895, from a decree of Babu Mohan Lal, Subordinate Judge of Jaunpur, dated the 19th September 1895, modifying a decree of Maulvi Shah Amjad-ullah, Munsif of Jaunpur, dated the 13th June 1895.

THE facts of this case are as follows :—

The land in question in the suit was the ancestral property of one Mattu and his son Daulat. Mattu sold the greater portion of the property to the plaintiffs by deed dated the 15th of January [326] 1889. The remainder of the property was hypothecated by Mattu to the plaintiffs by a registered bond, under which the property mortgaged was brought to sale and bought in by the plaintiffs on the 20th of June 1894. On the 1st of September 1891, during the life-time of Mattu, his son Daulat gave a bond to Sheobhik and Balkaran mortgaging a certain share in the property in question. Subsequently, after the death of Mattu, the plaintiffs sued for a declaration of their right to the entire property and that the mortgage given by Daulat to Sheobhik and Balkaran was of no effect so far as he was concerned. The Court of First Instance (Munsif of Jaunpur) decreed the plaintiff's claim, holding that Daulat in the life-time of his father had no authority to mortgage any portion of the property so as to defeat the alienations made by his father Mattu. The defendants Sheobhik and Balkaran appealed. The Lower Appellate Court (Subordinate Judge of Jaunpur) decreed the appeal, holding that Daulat had a right to mortgage his share of the ancestral property. From this decree the plaintiffs appealed to the High Court.

Pandit Sundar Lal, for the Appellant.

Munshi Gobind Prasad, for the Respondent.

Blair and Burkitt, JJ.—This is the suit of a plaintiff mortgagee for a declaration of right under his mortgage and also under a deed of sale of a certain land which were made by one Mattu. The defence was that the son of the mortgagor had during his life-time, upon the 1st of September 1891, given a mortgage to the defendants of a portion of the property. The Court of First Instance decreed the claim of the plaintiff. The Court of first appeal held that the defendant's mortgage was a good and subsisting mortgage. That finding is the part of the judgment impeached in this appeal. The case of the appellant is simple. He says that Daulat as a member of a joint Hindu family, which he is found to have been, had no power, during the life-time of his father, to make a mortgage of any part of the ancestral family property. The plaintiff's contention is supported by two cases decided by the Privy Council. One is reported in [327] I. L. R., 15 All., 339; the other in I. L. R., 18 Cal., 157. It seems to us that those cases go to the full length of the appellant's contention. It is suggested for the defendants respondents that the deed executed by Daulat was voidable only and not void, and that his mortgagees ought to have been impleaded in the previous suit brought by the appellant upon his mortgage. No authority was cited in support of that proposition, which is at all upon all fours with the facts of this case. The authority upon which Mr. *Gobind Prasad* relied is in I. L. R., 19 Cal., 123. That was a special case, and the facts do not, in our opinion, appear to be upon all fours with the facts of this case. The appeal will be allowed with costs. The effect will be to restore the decree of the Court of First Instance setting aside that of the Lower Appellate Court.

Appeal decreed.

NOTES.

[See also (1908) 6 A.L.J., 11 : (1908) A.W.N., 163,]

[20 ALL. 327]

The 1st March, 1898.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Phul Chand.....Defendant

versus

Ohhote Lal and others.....Plaintiffs.*

Act No. IV of 1882 (Transfer of Property Act), section 135—Actionable claim—

Person claiming the benefit of section 135 not obliged to pay the amount

paid by the assignee before judgment.

Held, that a person who is entitled to claim the benefit of section 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. *Rani v. Ajudhia Prasad*, I. L. R., 16 All., 815; *Muchiram Barik v. Ishan Chunder Chuckerbutti*, I. L. R., 21 Cal., 568; *Jani Begam v. Jahangir Khan*, I. L. R., 9 All., 476; *Hakim-un-nissa v. Deonarain*, I. L. R., 13 All., 109, and *Nilakanta v. Krishnasami*, I. L. R., 13 Mad., 225.

THE facts of this case are fully stated in the judgment of the Court.

Pandit Sundar Lal and Munshi Ram Prasad, for the Appellant.

Munshi Gobind Prasad, for the Respondents.

[328] Banerji, J. (Knox, J., concurring).—This was a suit for sale under a mortgage dated the 3rd of September 1873, executed by one Mohan Singh for Rs. 4,300 in favour of Mansukh Das and his son Dungar Mal. After the death of the aforesaid mortgagees the widow of Dungar Mal, three of the sons of Mansukh Das and the widow of another son assigned, on the 8th of November 1891, their rights under the mortgage to the first four plaintiffs for a consideration of Rs. 10,000. Out of that amount Rs. 600 was paid in the presence of the registering officer and Rs. 1,858-9-3 was kept back for the purpose of discharging a decree held against the widow of Dungar Mal and Baldeo Das, one of the sons of Mansukh Das, by Rao Balwant Singh. That decree was, however, not satisfied, and it was purchased from Balwant Singh by Kishan Lal, the fifth plaintiff. He put the decree into execution, and having caused the two-fifths share of Baldeo Das and Dungar Mal's widow in the aforesaid mortgage to be sold by auction, purchased it himself. The five plaintiffs having thus acquired the rights of the mortgagees have instituted this suit, claiming Rs. 10,500 as due under the mortgage. The mortgaged property was sold in execution of a decree obtained upon a subsequent mortgage, and was purchased by Than Singh and Nathu Ram, who are now represented by the appellant Phul Chand. The defendants to the suit were the legal representatives of the mortgagor and subsequent transferees of the mortgaged property. The defence raised on behalf of the defendants, whom Phul Chand appellant represents, was that the mortgage had been discharged and the mortgage bond returned to the mortgagors; that the plaintiffs had not paid consideration for their purchase; that the purchase had been made to carry on litigation and that the plaintiffs were not entitled to recover any portion of the amount claimed. The defendants produced the mortgage bond bearing endorsements of payment, which, if genuine, showed that the mortgage had been

* First Appeal No. 40 of 1896, from a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 20th September 1895.

discharged in full in 1889. The Court below has held the plea of payment not to be established. It found that the bond had somehow come into the [329] possession of the mortgagors, that the indorsements on it were not genuine and that the mortgagors and their heirs had not the means to make the alleged payments. It also held that the assignment of the mortgage bond to the first four plaintiffs was the transfer of an actionable claim to which section 135 of the Transfer of Property Act applied; that the purchase of the bond was in reality made by Kishan Lal in the names of the other plaintiffs; that only Rs. 600 were paid as consideration for that purchase, and that in virtue of that purchase the plaintiffs could not recover more than that amount and incidental expenses. As regards the share of the mortgage debt purchased by Kishan Lal at auction, the Court below was of opinion that by reason of clause (d) of section 2 of Act No. IV of 1882 the first portion of section 135 of that Act did not apply. That Court accordingly made a decree for two-fifths of the mortgage money, with interest, and for Rs. 600 with incidental expenses and interest.

Both parties have appealed from this decree. In this appeal, which has been preferred by the defendant Phul Chand, two contentions have been raised on behalf of the appellant; first, that it has been proved that the mortgage has been discharged by payments, and, second, that since it has been found that Kishan Lal plaintiff was the real purchaser of the mortgage under the assignment of the 8th of November 1891, he took the place of the judgment-debtors to the decree of Balwant Singh, and the purchase of that decree by him had the effect of discharging that decree. Consequently by virtue of the auction purchase of the rights of Dungar Mal and Baldeo Das he acquired no interest in the mortgage in question and is only entitled to recover the price paid by him for the assignment of the 8th of November 1891, with incidental expenses and interest. On behalf of the plaintiff it is urged that there is nothing to show that Kishan Lal is the real purchaser under the sale of the 8th of November 1891; that payment of the full amount of consideration for that sale has been proved and that section 135 of Act No. IV of 1882 does not apply to a case like this.

[330] As regards the discharge of the mortgage by repayment of the mortgage money we agree with the conclusion at which the learned Subordinate Judge has arrived. The mortgage deed is no doubt in the possession of the heirs of the mortgagor, Mohan Singh, by whom it has been produced. It also bears indorsements of payments. These circumstances certainly raise a presumption in favour of the defendants; but the evidence and the probabilities to which the Subordinate Judge has referred in detail completely negative that presumption. According to the indorsements on the mortgage deed, payments were made on account of it between the 9th of June 1883 and the 2nd of June 1889, and the number of payments was five. It is rather surprising that for ten years from the date of the mortgage not a farthing was paid to the mortgagees, but in the course of the next six years such a large sum as Rs. 7,025 was paid by the mortgagors, and the bond was taken back. The evidence on the record clearly shows that the mortgagor had not the means to make such large payments, that they were in very involved circumstances, that they were not even in a position to pay the Government Revenue, that their movable property had to be sold for the realisation of the revenue and that their zamindari share had to be let out in farm for the recovery of arrears of revenue. It is in the highest degree improbable that persons in such impecunious circumstances made the alleged payments. It appears from the evidence of Lala Lokman Das, a respectable pleader of the District Court of Aligarh, that shortly

before February 1888, Dungar Mal, one of the mortgagees, showed the bond to him with a view to raise money for the purpose of bringing a suit on the basis of the bond, and, as far as Lala Lokman Das could recollect, it bore no indorsements of payment. If the indorsements which now appear on the bond are genuine, all of them, except the last, must have been on it at the time when it was shown to Lala Lokman Das, and his attention would undoubtedly have been attracted by them. Further, the only amount which would have remained due on the mortgage at that time would have been a sum below [331] Rs. 800, upon payment of which about eighteen months afterwards the mortgage is alleged to have been discharged. It seems to us to be extremely improbable that for the purpose of meeting the expenses of instituting a suit to recover that small sum Dungar Mal would have been endeavouring to raise money by negotiating with Lala Lokman Das. There is another piece of evidence which to our minds clearly shows that no payments were made to the mortgagees on account of the bond in question. On the 16th of December 1889, Dungar Mal applied for the execution of a decree held by him against Chitra Singh and others, heirs of the mortgagor Mohan Singh, and he prayed for the sale of the 10 biswas share comprised in the mortgage now in suit subject to that mortgage. With his application he filed an affidavit in which he stated that he held a mortgage over that property for Rs. 4,200, that is, the mortgage upon which the present claim has been brought. Had the mortgage been discharged in the preceding month of June, Dungar Mal's statement that there was a subsisting mortgage on the property for Rs. 4,200 would not have been allowed by the debtors to go unchallenged. It appears that they did raise objections in regard to Dungar Mal's application for execution, but they never traversed his statement that their property was subject to the mortgage for Rs. 4,200.

These facts, and the other facts stated in the judgment of the lower Court, clearly show that the mortgage was never discharged and that payments were never made on account of it. We agree with the learned Subordinate Judge in considering the oral evidence adduced on the point to be wholly unworthy of credit. The Subordinate Judge has also, in our opinion, conclusively shown that the purchase of the mortgage bond in suit in the names of the first four plaintiffs on the 8th of November 1891, was in reality a purchase by Kishan Lal, and that the amount paid as consideration for that purchase before or at the time of the sale was Rs. 600, the sum which was paid in the presence of the registering officer. We have carefully considered the evidence [332] on the point to which our attention has been directed, and we think it unnecessary to refer to it in detail further than to say that we fully concur with the Court below in its estimate of that evidence and with the conclusions at which that Court has arrived. The impecunious circumstances of the first four plaintiffs, the non-production of account-books, the fabrication of accounts, the non-production of the documents by which were secured the debts alleged to have been discharged with the consideration money, and the fact that the decretal amount due to Balwant Singh was not paid by those plaintiffs clearly show that the full amount of consideration for the sale deed of the 8th of November 1891 was not paid and that the first four plaintiffs did not make that purchase on their own account. Had they been the real purchasers, why did they leave the decree of Balwant Singh unsatisfied? Why did they allow Kishan Lal to purchase that decree and why did they allow the shares of the judgment-debtors to that decree to be sold for the small sum of Rs. 200 and purchased by Kishan Lal himself? The fact is, as the learned Subordinate Judge has pointed out, that under the

deed of the 8th of November 1891, Kishan Lal himself purchased the rights of the mortgagees, that, being apprehensive that the subsequent purchasers of the mortgaged property would claim the benefit of the provisions of section 135 of the Transfer of Property Act, he took an assignment of the decree held by Rao Balwant Singh, and, putting that decree into execution, purchased at auction the shares of Dungar Mal and Baldeo Das in the mortgage in order to avoid the operation of that section. We hold, in concurrence with the Court below, that Kishan Lal plaintiff was the real purchaser of the interests of the mortgagees by virtue of the sale deed of the 8th of November 1891; that the other plaintiffs were only *benami* for him and that they were not beneficially interested in the purchase. That being so, the contention of the learned counsel for the appellant that the claim of the first four plaintiffs ought to have been dismissed must prevail.

[333] It is next urged on behalf of the appellant that as Kishan Lal was the real purchaser under the sale deed of the 8th of November 1891, and thus acquired the rights of Dungar Mal and Baldeo Das in the mortgage of 1873, which Rao Balwant Singh had caused to be attached in execution of the decree held by him against Baldeo Das and the widow of Dungar Mal, he took the place of the judgment-debtors to that decree, and, as he subsequently purchased the decree from Rao Balwant Singh, the decree became extinct and incapable of execution, and consequently he acquired nothing under the auction purchase which subsequently took place at his instance in execution of that decree. The correctness of the proposition raised by this contention seems to us to be open to doubt. We are, however, of opinion, upon another ground, that no title passed to Kishan Lal under the auction sale referred to above. We have held that he was the actual purchaser of the property conveyed by the sale deed of the 8th of November 1891, so that he acquired the interests of Baldeo Das and Dungar Mal in the mortgage in question by virtue of that purchase. As the assignee of the decree held by Rao Balwant Singh against those persons he could not put up to sale and purchase the interest which those persons originally had in the mortgage and which he himself had purchased before the date of the assignment of the decree. Those interests had on the date of the auction sale ceased to be the property of the judgment-debtors to the decree and had become his own property. He could not, as the holder of Rao Balwant Singh's decree, cause his own property to be sold in execution of that decree, and, as that property had, as we have said, ceased to be the property of the judgment-debtors to the decree, the auction-sale of the interests of the judgment-debtors in that property, which were no longer in existence at the time of the sale, could not and did not confer any title to the property on the auction purchaser. The auction-sale was only a device resorted to by Kishan Lal for the purpose of evading the operation of section 135 of Act No. IV of 1882 and in our opinion he did not acquire any title [334] by virtue of the auction purchase. His only title in respect of the mortgage in suit consequently rests on the sale deed of the 8th of November 1891. The consideration for that sale was not only the sum of Rs. 600 which was paid in cash at the time of the registration of the sale deed, but the amount paid to Rao Balwant Singh as the price of the decree purchased from him must also be deemed to be a part of the consideration. The agreement under the sale deed was that Rao Balwant Singh's decree should be discharged out of the consideration. Instead of paying him the amount due upon the decree Kishan Lal took from him an assignment of the decree and adopted this mode of satisfying his claim. The amount paid to him must therefore, we think, be regarded as a part of the consideration for the sale deed of the 8th of

November 1891. That amount, it has been proved was Rs. 1,800. The total sum which was paid as the price of this mortgage debt in suit was thus Rs. 2,400, and if section 135 of Act No. IV of 1882 is applicable, that is the only amount which Kishan Lal is entitled to recover, besides interest on that amount and the incidental expenses of the sale. The learned vakil for the respondent, however, contends that section 135 of Act No. IV of 1882 has no application in this case.

This contention leads us to the consideration of the only point which remains to be determined, namely whether the appellant is entitled to the benefit of the provisions of section 135 of Act No. IV of 1882. It is admitted that on the 8th of November 1891, when the mortgage-debt now in suit was assigned by the mortgagees, the debt had become recoverable by suit, and had matured into an actionable claim. It is also conceded that the provisions of Chapter VIII of Act No. IV of 1882 apply to a debt secured by a mortgage. That is the effect of the ruling of the Full Bench of this Court in *Rani v. Ajudhia Prasad*, I. L. R., 16 All., 315. It is urged, however, that a debtor cannot claim the benefit of section 135 of Act No. IV of 1882 unless he pays before judgment the amount paid by the assignee of the actionable claim, and [335] in support of that contention the Full Bench ruling of the Calcutta High Court in *Muchram Barik v. Ishan Chunder Chuckerbutti*, I. L. R., 21 Cal., 568, has been cited. That ruling is no doubt an authority in favour of the respondents. But a contrary view has been held in this Court in *Jani Begam v. Jahangir Khan*, I. L. R., 9 All., 476, and *Hakim-un-nissa v. Deonarain*, I. L. R., 13 All., 103, and by a Full Bench of the Madras High Court in *Nilakanta v. Krishnasami*, I. L. R., 13 Mad., 225. We agree with the learned Judges who decided the cases last mentioned. The object with which section 135 was enacted was evidently to discourage trafficking in litigation by precluding the purchaser of an actionable claim from recovering any thing beyond the actual price paid by him and the incidental expenses of the sale together with interest. That object would surely be defeated were we to hold that it was the intention of the Legislature that a debtor could not avail himself of the provisions of section 135 if he put the assignee to proof of the price paid by him and waited till the amount of the price had been determined and declared by the Court. The section, it is true, provides that the debtor is discharged by payment to the assignee of the price and incidental expenses and interest on the price, but it does not limit the period within which the payment must be made in order to secure a discharge. There is nothing in the section, as far as we can judge, which would preclude the debtor from securing his discharge by payment after decree. Clause (d) of that section in our opinion contemplates the case of the sale of an actionable claim in respect of which at the time of the sale a judgment has been delivered affirming the claim or the claim has been made clear by evidence. The four clauses of section 135 were evidently intended to provide for cases of sale of actionable claims which would not be affected by the provisions of the first paragraph of the section, as in those cases the probability of gambling in litigation would be very remote. The "claim" referred to in clause (d), we consider, is the claim which is sold and which at the date of the sale has been affirmed by a judgment or is about [336] to be so affirmed. Such a claim, if sold, would in the ordinary course of things fetch its proper value, and therefore, like the actionable claims referred to in the preceding clauses, it was excluded from the operation of the section. We fully agree with the observations contained in the judgment of SHEPARD, J., in the Full Bench case of *Nilakanta v. Krishnasami* cited above, and we are of opinion that it would be placing an unreasonable construction on section 135 to hold, as we have said

above, that a debtor would lose the benefit of the section if he called upon the assignee of the debt to prove the price paid by him. Such a construction would, we think, frustrate the very object with which the section was enacted. We may refer to the present case as an instance in point. The assignee alleged the price to be Rs. 10,000. The defendant denied that any price had been paid. We have held the true price to be Rs. 2,400. We do not think the Legislature intended that such a case would not come within the purview of section 135, and that the defendant must pay the full amount due upon the mortgage, namely, upwards of Rs. 11,000, although the plaintiff actually paid for his purchase a much smaller sum. We hold that section 135 precludes the assignee of an actionable claim from recovering from the debtor any sum in excess of the price paid by him, the interest thereon and the incidental expenses of the sale. That being so, the plaintiff Kishan Lal was only entitled to a decree for Rs. 2,400, the price paid by him, to interest on that amount at the rate payable under the mortgage from the 8th of November 1891, and to Rs. 39, the incidental expenses of the sale.

We accordingly vary the decree below by making a decree in favour of Kishan Lal plaintiff for Rs. 2,400, together with interest thereon at the rate of 9 per cent. per annum from the 8th of November 1891, to the 20th of August 1898, which we hereby fix as the date on or before which the decretal amount should be paid, and also for Rs. 39 the incidental expenses of the sale to him. We award to him proportionate costs here and in the Court below, and we direct that, in the event of the [337] amount decreed by us not being paid on or before the date above mentioned, the mortgaged property, or a sufficient part thereof, be sold. We dismiss the remainder of Kishan Lal's claim, and totally dismiss the claim of the other plaintiffs with costs. The appellant will recover from Kishan Lal his costs here and in the Court below proportionately to the amount of his success.

Decree modified.

NOTES.

[Sec. 135 of the Transfer of Property Act, 1882, was repealed in 1900.]

[20 All. 337]

REVISIONAL CIVIL.

The 5th March, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Lakho Bibi.....Defendant

versus

Salamat Ali.....Plaintiff.*

*Civil Procedure Code, section 206—Application to bring decree into
accordance with the judgment—Decree erroneous but in
accordance with judgment—Decree
not susceptible of alteration.*

Where a decree is in fact in accordance with the judgment on which it is based, such decree, however erroneous it may be, cannot be altered on an application under section 206 of the Code of Civil Procedure to bring the decree into accordance with the judgment.

* Civil Revision No. 36 of 1897.

THE facts of this case are fully stated in the judgment of the Court.

Pandit Datti Lal and Babu Baidiya Nath Das, for the Appellant.

Maulvi Ghulam Muftaba, for the Opposite Party.

Edge, C. J. and Burkitt, J.—This is an application in revision under section 622 of the Code of Civil Procedure. It arises out of an order made by the Subordinate Judge of Allahabad on an application presented under section 206 of the Code. The facts are these. The respondent here, Syed Salamat Ali, was the holder of a second mortgage of mauza Sondhia. The appellant here, Musammat Lakho Bibi, was the holder of a third mortgage over mauzas Sondhia, Khaura and Gaura. Her mortgage money had been applied to the discharge of the first mortgage in which the three mauzas had been mortgaged. Salamat Ali brought a suit under section 88 of the Transfer of Property [338] Act for sale of mauza Sondhia in discharge of his mortgage. That was the only relief which he asked. Musammat Lakho Bibi had pleaded her third mortgage and the discharge of the first mortgage as a shield to protect mauza Sondhia being brought to sale until the money paid by her to discharge the first mortgage had been repaid to her. The Subordinate Judge found that Lakho Bibi was entitled to avail herself of the discharge of the first mortgage as a shield, and in his judgment he held that Salamat Ali was bound to pay Lakho Bibi Rs. 2,050, being the amount paid to discharge the first mortgage, and he also held that Salamat Ali having made that payment, if Lakho Bibi did not redeem him, Salamat Ali was entitled to his decree for sale. The decree as drawn up was, in our opinion, in accordance with the judgment. It decreed that Salamat Ali should pay Rs. 2,050 to Lakho Bibi, that in default of redemption by Lakho Bibi at a specified time mauza Sondhia should be sold. Here we may observe that in our opinion the judgment and decree were incorrect. On the finding that Lakho Bibi was entitled to avail herself of the discharge of the first mortgage as a shield in this suit, the Subordinate Judge ought to have ascertained what proportionate part of the Rs. 2,050 should be attributed to the discharge of the first mortgage on mauza Sondhia as far as it was concerned, and he should have given the plaintiff, of course subject to redemption by Lakho Bibi, a decree for sale of mauza Sondhia on payment of that proportionate amount to Lakho Bibi. No party appealed; but after the decree had been drawn up and signed Salamat Ali applied under section 206 of the Code to have the decree amended by making it a decree for sale of not only mauza Sondhia, but also of mauzas Khaura and Gaura. The Subordinate Judge granted that application and altered the decree in accordance with it. It is with reference to that order that this application for revision has been made. Now the decree as first made was, in our opinion, strictly in accordance with the judgment. The judgment was incorrect in the particulars to which we have referred, but still the decree was a decree in [339] accordance with the judgment, whether that judgment was right or wrong in law. The decree as altered on the application under section 206 is not a decree in accordance with the judgment. The judgment did not decide that mauzas Khaura and Gaura should be sold; Salamat Ali had not asked in his plaint that they should be sold. In law he was not entitled to a decree for sale of those mauzas. He was not a mortgagee of those mauzas, and did not become a mortgagee of those mauzas by payment of the amount paid by Musammat Lakho Bibi in discharge of the first mortgage. If the result has been that he has paid more than he ought to have been compelled to pay in order to obtain the sale of mauza Sondhia, that result could have been avoided; it was due to his own laches in not appealing. He has brought that result upon himself. The law cannot be altered to relieve a man from the effect

of his own laches. The application under section 206 of the Code of Civil Procedure should have been dismissed and not granted. Under section 622 of the Code we make the following order. We allow this application with costs. We set aside the order passed on the application under section 206 of the Code with costs. We dismiss that application, and we restore the decree as originally drawn up and signed.

Application allowed.

NOTES.

[This was followed in (1907) 31 Bom., 447.

A wider power is conferred by sec. 152, C.P.C., 1908. See also (1909) 5 N.L.R., 159.]

[20 All. 339]

REVISIONAL CRIMINAL.

The 12th March, 1898.

PRESENT :

MR. JUSTICE BURKITT.

Queen-Empress

versus

Ajudhia and another.*

Criminal Procedure Code, section 437—Order for further inquiry—Order to the prejudice of an accused person—Notice to show cause.

Before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. *Queen-Empress v. Chotu*, I. L. R., 9 All., 52, referred to.

IN this case the applicants Ajudhia and Punni had been charged before the Cantonment Magistrate of Allahabad with [340] the offence of causing grievous hurt whilst committing house-breaking, under section 459 of the Indian Penal Code. The accused were discharged by the Cantonment Magistrate, and against this order the complainant filed an application in revision before the District Magistrate. The District Magistrate considered that there was sufficient evidence against both the accused and ordered them to be re-tried. This order was upheld by the Sessions Judge. The accused persons then applied in revision to the High Court on the ground that the Magistrate before ordering a re-trial ought to have called upon the applicants to show cause why a re-trial should not be ordered.

Mr. W. Wallach for the Applicants.

The Government Pleader (Munshi Ram Prasad) and Babu Parbati Charan for the Crown.

Burkitt, J.—I think it would have been well if the District Magistrate had acted on several precedents of this Court which lay down that, before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. It is quite true, as remarked by the learned Sessions Judge, that there is no distinct provision to that effect in the Code of Criminal Procedure, but several able and experienced Judges of this Court have laid down the rule that it is most advisable that such notice should be given. I may refer to the cases of

* Criminal Revisional No. 88 of 1898.

Queen-Empress v. Chotu, I. L. R., 9 All., 52, and *Queen-Empress v. Mushtaq Husen* (unreported), Criminal Revision No. 183 of 1897, decided on the 28th of April 1897. The order made in this case was undoubtedly prejudicial to the accused person, inasmuch as, whatever may be the result of the further inquiry, the accused person is subjected to the worry and nuisance of that further inquiry. I must set aside the order of the District Magistrate directing a re-trial, and I direct that, if he thinks it necessary to take any further action in this case, he should do so after notice to the accused person. I would further point out to the District Magistrate that he was [341] wrong in directing a re-trial of the case. All that the Code empowers him to do is to direct that further inquiry be made. I order accordingly.

NOTES.

[See also 39 Cal., 238; (1901) P.B., 2; 8 Bom. L.R., 694.]

[20 All. 341]
APPELLATE CIVIL.

The 14th March, 1898.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Tribhuwan Sundar Kuar.....Plaintiff

versus

Sri Narain Singh.....Defendant.

*Hindu law—Hindu widow—Succession—Legal representative—Civil
Procedure Code, section 365.*

A reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound by a decree obtained against the widow provided that there was a fair trial of the suit in which the decree was passed. Consequently the widow's right to sue survives to, and devolves on, the heir of her husband entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of section 365 of the Code of Civil Procedure. *Katama Natchiar v. The Raja of Shivagunga*, 9 Moo. I. A., 543; *Hari Nath Chatterjee v. Mothurmohun Goswami*, I. L. R., 21 Cal., 8; and *Premmoyi Choudhrani v. Proenath Dhur*, I. L. R., 23 Cal., 686, referred to.

THE facts of this case are fully stated in the order of the Court.

Mr. W. M. Colvin, Munshi Ram Prasad and Munshi Jwala Prasad for the Applicant.

Mr. T. Conlan, Pandit Sundar Lal and Babu Jogindro Nath Chaudhri for the Respondent.

Banerji, and Aikman, JJ:—Rani Tribhuwan Sundar Kuar, the appellant in this appeal, having died since the institution of the appeal, two applications have been presented, one by Rani Balraj Kuar, asking to have her name entered on the record in place of the deceased appellant, and the other by Babu Sri Narain Singh, respondent, praying that the appeal and the suit be declared to have abated. Similar applications have been made in the connected appeal No. 144 of 1896.

The suit out of which the two appeals arose, was instituted by Rani Tribhuwan Sundar Kuar for a declaration that the property in suit was the

separate estate of her deceased husband [342] Raja Shambhu Narain Singh and that she was entitled to it as a Hindu widow; that the defendant Babu Sri Narain Singh had no right to interfere with it, and that an agreement, dated the 7th of November 1892 was void and not binding on her. She further prayed that, should the Court hold that she was not in possession and that the property was in the possession of the defendant, she should be put into possession.

The claim was resisted on the ground that the defendant and the deceased Raja were members of a joint Hindu family and that the defendant was entitled to the estate in preference to the widow. The Court below partially decreed the claim, and thereupon the two appeals mentioned above were preferred, one by the plaintiff and the other by the defendant.

Rani Balraj Kuar is the mother of Raja Shambhu Narain Singh, and it is conceded that, if the estate was the divided property of the Raja to which the ordinary rule of succession of Hindu law would apply, she would be the next reversioner after the widow.

It is contended on behalf of Babu Sri Narain Singh that the cause of action upon which Rani Tribhuwan Sundar Kuar brought her suit was a cause of action personal to her; that it did not survive to Rani Balraj Kuar and that she is in no sense the legal representative of the deceased Rani Tribhuwan Sundar Kuar.

The whole question, in our opinion, turns upon whether after the death of Rani Tribhuwan Sundar Kuar the right to sue survives. And the decision of that question again depends upon the determination of the further question whether the decree passed in the suit of the widow is one which would bind the reversioner after the widow, for if the decree be binding on the reversioner the right of action would survive to him. Both these questions seem to us to be concluded by the ruling of their Lordships of the Privy Council in the case of *Katama Natchiar v. The Raja of Shivagunga*, 9 Moo. I. A., 543. Their Lordships held that [343] "upon the death of a Hindu widow, the right of action formerly vested in her devolves, not upon her heirs, but upon the next heirs of her husband." Upon the question whether a decree passed in a suit brought by a widow for the estate of her husband would bind those claiming the estate in succession to her, their Lordships were of opinion that "unless it could be shown that there had not been a fair trial of the right in that suit—or, in other words, unless that decree could have been successfully impeached on some special ground, it would have been an effectual bar to any new suit *** by any person claiming in succession to" the widow. "For, assuming her to be entitled to the zamindari at all the whole estate would for the time be vested in her absolutely for some purposes, though, in some respects, for a qualified interest; and until her death it could not be ascertained who would be entitled to succeed. The same principle which has prevailed in the Courts of this country as to tenants in tail representing the inheritance would seem to apply to the case of a Hindu widow; and it is obvious that there would be the greatest possible inconvenience in holding that the succeeding heirs were not bound by a decree fairly and properly obtained against the widow" (p. 604). This view was adhered to by their Lordships in the subsequent case of *Hari Nath Chatterjee v. Mothurmohun Goswami*, I. L. R. 21 Cal, 8. Upon these authorities it must be taken to be settled law that a reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound by a decree obtained against the widow, provided that there was a fair trial of the suit in which the decree was passed. Consequently the widow's right to sue survives to and devolves on the heir of her husband

entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of section 365 of the Code of Civil Procedure. The cause of action of the widow as against the defendant to the suit is not a cause of action personal to herself. Therefore the heir of the husband, and not her personal heir, is [344] the person entitled to prosecute the suit. This view is supported by the ruling of the Calcutta High Court in *Premmoyi Choudhrani v. Preonath Dhur*, I. L. R., 23 Cal., 636. Rani Balraj Kuar being the next heir of Raja Shambhu Narain Singh is in our opinion the legal representative of Rani Tribhuwan Sundar Kuar for the purposes of the suit.

Mr. Conlan has contended that Rani Balraj Kuar should not be allowed to continue Rani Tribhuwan Sundar's suit or appeal for two reasons, namely, first, that she could not have brought the suit, as she was not in possession, and, second, that she is estopped from claiming the estate under the terms of the deed of agreement, dated the 7th of November 1892, referred to above. As regards the first point, we observe that the estate is in charge of the receiver appointed by the Court and not in the actual possession of either of the parties. Under such circumstances the person who has the title to the property must be deemed to be in possession, and if Rani Balraj Kuar is entitled to the estate she must be held to be in possession. As for the other point, we do not deem it necessary to decide at this stage of the proceedings whether the defendant would or would not be entitled to set up the agreement as a bar to Rani Balraj Kuar's right to claim the estate. We think that, notwithstanding the existence of the agreement, she is the legal representative of Rani Tribhuwan Sundar for the purposes of this suit. We accordingly direct that the name of Rani Balraj Kuar be entered in the record of the two appeals before us in the place of Rani Tribhuwan Sundar, deceased. Rani Balraj Kuar will have the costs of her applications.

Application allowed.

NOTES.

[These decisions are similar:—(1899) 23 Mad., 125; (1903) 2 C.L.J., 602; (1904) 8 O.W.N., 843; (1906) 34 Cal., 642; (1910) 33 All., 15.

As regards the representative character of litigation dealing with the estate, conducted by the widow, see also 21 C.L.J., 157; (1914) 23 I.C., 931 (Cal.); (1914) 25 I.C., 921.]

[345] *The 23rd March, 1898.*

PRESENT:

MR. JUSTICE BANERJI.

Haji Syed Muhammad.....Defendant

versus

Gulab Rai... ..Plaintiff.*

Injunction—Discretion of Court as to granting mandatory injunctions—Delay on the part of the plaintiff in bringing his suit.

A plaintiff brought his suit for proprietary possession of a plot of land, and, secondly, for a mandatory injunction to demolish certain buildings which the defendant had erected on such plot. The suit, however, was not brought until upwards of two years from the time when the buildings complained of were completed. It was found that the plaintiff was not entitled to proprietary possession of the land claimed by him, but that he had a right of

* Second Appeal No. 17 of 1897, from a decree of Rai Sanwal Singh, District Judge of Agra, dated the 29th September 1896, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 10th June 1896.

user over it, and that the defendant was not entitled to build upon the land. The Court, however, on account of the plaintiff's delay in bringing his suit declined to grant the mandatory injunction asked for. *Benode Coomaree Dossee v. Soudaminy Dossee*, I. L. R., 16 Cal., 252, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Maulvi Ghulam Mujtaba, for the Appellant.

Babu Jogindrc Nath Chaudhri (for whom Babu Satish Chandra Banerji), for the Respondent.

Banerji, J.—This appeal and the connected appeal No. 16 of 1897 arise out of two cross-suits brought by one party against the other. They relate to two plots of land adjacent to each other on which each party has made certain constructions. The claim of Gulab Rai, who brought the suit out of which this appeal has arisen, was that the land on which the defendant Haji Syed Muhammad had built certain buildings was his (Gulab Rai's) property, and that Haji Syed Muhammad had no right to build on it. Haji Syed Muhammad, on the other hand, alleged himself to be the proprietor, not only of the piece of land on which he had built the buildings complained of by Gulab Rai, but also of the adjacent plot of land on which Gulab Rai had built certain shops. Gulab Rai claimed to be the proprietor of that piece of land also. Each party, in addition to the claim [346] for possession, has prayed for the removal of the buildings. Both parties relied on a decree of the 31st of August 1846. The Court of First Instance construed that decree to have declared that the land claimed in the two suits was the property of Haji Syed Muhammad. It accordingly dismissed the suit of Gulab Rai and decreed that of Haji Syed Muhammad. The Lower Appellate Court reversed the decree of the Court of First Instance. It placed on the decree and judgment of 1846 a construction different from that put on it by the Court of First Instance. It is evident that there was some confusion in the mind of the learned Judge of the Lower Appellate Court as to what was determined by the decree of 1846. In one part of the judgment the learned Judge says that "the decree of 1846 shows that the ancestor of Haji Syed Muhammad was declared to be the owner of all the lands on the north of a line drawn from the said platform towards the west to the shop of the ancestor of Gulab Rai and towards the east to his own shop adjoining the eastern of the four shops built." He evidently meant that the land now in dispute which lies to the north of the line referred to above had been declared by the judgment of 1846 to be the property of Haji Syed Muhammad. A few lines lower down he says that the judgment of 1846 shows that the whole of the land lying to the north of the line referred to above was the land of Gulab Rai. It is difficult to account for this inconsistency, except on the assumption that the learned Judge never carefully perused the judgment of 1846. As both the parties rely on that judgment, and as it is common ground that their right to the land in suit was determined by it, the first question to be decided in this appeal is what is the true construction to be placed on that judgment and what are the rights of the respective parties declared by it. It appears that the suit in which the judgment was passed was instituted by Ali Raza, the ancestor of Haji Syed Muhammad, against the predecessor in title of Gulab Rai for a declaration of his right to a piece of land on which he had erected certain buildings. That suit was compromised by the parties and the [347] judgment referred to above was passed in accordance with the compromise. It is abundantly clear that the dispute between the parties to the litigation of 1846 related to the plots of land in respect of which the present suits were brought. The property claimed in that suit was a plot of land lying to the north of an enclosure belonging to Haji Syed Muhammad's

ancestor up to a public road, and that is the land claimed in the two suits before me. It was distinctly stated in the judgment of the 31st August 1846 that the land then in dispute had been declared by the compromise to be the property of the plaintiff Ali Raza. The judgment further declared that Ali Raza was to construct buildings towards the north up to a line drawn from the western end of his existing shop on the one side to the eastern extremity of the buildings of Gulab Rai's ancestor on the other; that the land lying to the north of that line as far as the road was to be used by Gulab Rai's ancestor as *phar* land, that is, as land on which he was to stack his grain, and that neither party was to build on that land. There can be no doubt that this is what the decree of 1846 declared. Under that decree the ownership of the land now in suit was, as I have said, determined to exist in Haji Syed Muhammad, but Gulab Rai's predecessor in title was granted the right of using the land for the purpose of stacking grain, and neither party was to build on it. That being so, the suit which Haji Syed Muhammad brought against Gulab Rai to which Second Appeal No. 16 of 1897 relates was bound to succeed. Gulab Rai is not the owner of the land claimed in that suit, and he has no right to build on it. As regards the other suit, namely, that brought by Gulab Rai against Haji Syed Muhammad, Gulab Rai was not entitled to be declared the owner of the land claimed by him. A further question, however, arises in that case, namely, whether Gulab Rai is entitled to the mandatory injunction he seeks in that case for the demolition of the buildings erected by Haji Syed Muhammad. It is contended on his behalf that under the decree of 1846 he was granted the right to use the land as *phar* land and Haji [348] Syed Muhammad's ancestor was declared not to have the right to build on it, and consequently Gulab Rai was entitled to ask for the removal of the buildings erected by Haji Syed Muhammad. It is urged on behalf of Haji Syed Muhammad that Gulab Rai is not entitled to the mandatory injunction claimed by him for two reasons. First, that he claimed the demolition of the buildings on the basis of a proprietary title, and he has not been able to prove that he has such a title; secondly, that as the buildings were upon the showing of Gulab Rai himself completed upwards of two years before the institution of his suit, the Court in the exercise of the discretion which it possesses in the matter of granting mandatory injunctions should not grant the injunction he prays for. I am of opinion that the contention raised on behalf of Haji Syed Muhammad must prevail. It is true that if a plaintiff asserts a proprietary right but can only prove a right of easement or any other inferior right which entitles him to the relief he seeks, such relief should not ordinarily be refused to him, but when the granting of such relief on the basis of a right not originally asserted depends upon the determination of issues of fact which were never raised in the Court of First Instance, an appellate Court should not allow the plaintiff to change front in such a way as to prejudice the defendant. If in this case the plaintiff had asserted a right of easement in the Court of First Instance, that assertion might have been traversed on various grounds, the determination of which might involve the decision of several issues of fact. Further, it is alleged in the plaint that the buildings of which the plaintiff seeks the demolition were constructed in January 1893. He did not bring his suit till November 1895. It is thus clear that the plaintiff has not brought his suit or sought legal proceedings at the earliest opportunity, but has waited till the building has been completed. If under such circumstances he seeks to have the building removed, a mandatory injunction will not be granted except under special circumstances. This was laid down in the authorities quoted in the judgment of the Calcutta High Court in *Benode [349] Coomaree Dossee v. Soudaminy Dossee*, I. L. R., 16 Cal., 252. No special circumstances have been alleged or shown to exist in this case,

and therefore the plaintiff was not entitled to the mandatory injunction which he prayed for. A case like this is different from a suit in which a mandatory injunction is sought for the removal of buildings erected by one of several co-sharers on joint land. The plaintiff's suit ought to have been dismissed in its entirety. The result is that I allow the appeal with costs, and, setting aside the decree of the Lower Appellate Court with costs, restore that of the Court of First Instance.

Appeal decreed.

NOTES.

[As regards the consequences of delay, see also (1907) 9 Bom. L.R., 1117; (1906) 2 N.L.R., 4.]

[30 All. 349]

The 23rd March, 1898.

PRESENT :

MR. JUSTICE BURKITT.

Thakur Prasad.....Plaintiff

versus

Gaya Sahu and others..... Defendants.*

Act No. IV of 1882 (Transfer of Property Act), section 52—Transfer pendente lite—Lease of property in respect of which a decree for sale had been made under section 88.

Held, that a lease of property made by a judgment-debtor against whom a decree for sale had been made under section 88 of the Transfer of Property Act for sale of that property came within the purview of section 52 of the Transfer of Property Act.

THE facts of this case are as follows :—

The plaintiff Thakur Prasad was the mortgagee of a 4 pie share in a certain village from one Chandi Prasad, under a mortgage executed in April 1885. In January 1892 Thakur Prasad obtained a decree for sale on that mortgage. On the 9th of March 1893 Chandi Prasad, the mortgagor, gave a lease of a portion of the mortgaged property to one Gaya Sahu. On the 20th of September 1893 Thakur Prasad executed his decree for sale, and, having caused the mortgaged property to be sold, purchased it himself. He was, however, unable to get possession of [350] that portion of the property which had been subsequently leased by Chandi Prasad. He accordingly brought a suit for cancellation of the lease and to obtain possession of the property, the subject of the lease.

The Court of First Instance (Munsif of Gorakhpur) dismissed the suit. The plaintiff appealed, and the Lower Appellate Court (District Judge of Gorakhpur) dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pundit Sundar Lal, for the Appellant

Munshi Ram Prasad, for the Respondents.

Burkitt, J.—From a perusal of the order of the Subordinate Judge it would appear either that the learned Subordinate Judge did not comprehend

* Second Appeal No. 1008 of 1896, from a decree of Babu Nil Madhab Roy, Officiating District Judge of Gorakhpur, dated the 12th September 1896, confirming a decree of Munsif Ahmad Ali Khan, Munsif of Gorakhpur, dated the 31st March 1896.

all the hearings of the case then in appeal before him, or that the appeal was not properly argued before him. I note, however, that the memorandum of appeal which was before the learned Subordinate Judge contained and set forth all the pleas which have now been raised before me to-day. The admitted facts are that in April 1885, one Chandi Prasad mortgaged a four pie share in a certain village to the plaintiff; that on the 19th of January 1892, the plaintiff got a decree for sale of the mortgaged property in a suit on that mortgagee; and that on the 20th September 1893, the plaintiff mortgagee purchased the same property and was put in possession by the Court. He was, however, unable to obtain possession of the whole. It appears that on the 9th March 1893, that is to say, more than a year after the plaintiff had obtained a decree for sale of the mortgaged property, Chandi Prasad leased a certain portion of that property to the defendant-respondent. By the present suit the plaintiff appellant seeks to have that lease set aside and to obtain possession of the property the subject of the lease. He also asks for mesne profits. These were the reliefs asked for at the hearing of this appeal. As to the lease, it is contended that it is bad with reference to the provisions of section 52 of the Transfer of Property Act. In my opinion that contention is sound. The lease was executed undoubtedly during the active prosecution of a contentious suit, a suit which [351] had been commenced by the plaintiff in September 1891, and in which the plaintiff in January 1892 had obtained a decree for sale of the mortgaged property, which included the land leased to the respondents. The transfer under this lease which is for a period of no less than eleven years undoubtedly must affect the rights of the auction purchaser. The auction purchaser certainly in my opinion comes within the wording of section 52 of the Transfer of Property Act as being a party to an order which might be made in the suit. In a somewhat similar case, though no doubt, in a case arising under the Code of Civil Procedure and not under Act IV of 1882,—*Debi Prasad v. Baldeo*, I. L. R., 18 All., 123,—it was held that even an ordinary agricultural lease made during the pendency of an attachment came within the mischief aimed at by section 276 of the Code of Civil Procedure. *A fortiori* it appears to me that a lease of property made by a judgment-debtor against whom a decree had been made under section 88 of the Transfer of Property Act for sale of that property comes within the provisions of section 52 of the latter Act. The lease executed by the judgment-debtor, Chandi Prasad, whatever be its object, cannot but have the effect of, to some extent, defeating the auction purchaser of that property. I am therefore of opinion that the appellant here is entitled to my judgment. I set aside with all costs in those Courts the decrees of both the lower Courts, and, allowing this appeal, I give a decree in the plaintiff's favour for possession of the *sir* lands mentioned in the schedule of his plaint, with the exception of Nos. 716 and 718, of which he is in possession. I further give to the plaintiff a decree for mesne profits to be ascertained in execution up to the date the plaintiff is put in possession under this decree. The plaintiff appellant will recover the costs of this appeal.

Appeal decreed.

NOTES.

[These are similar decisions:—(1899) 26 Cal., 966; (1901) 23 All., 331; (1901) 15 O.P.L.R., 6; (1905) 32 Cal., 891, though agricultural leases in the course of reasonable management will not be avoided except on proof of detriment to the decree.]

[352] The 28th March, 1898.

PRESENT :

SIR JOHN EDGE, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Ram Kuar and another.....Opposite Parties

versus

Sardar Singh.....Applicant. *

Act No VII of 1889 (Succession Certificate Act) sections 6 and 7—Certificate to collect debts—Minor.

Held, that a certificate of succession may be granted under Act No. VII of 1889 to a minor through his next friend. *Kali Coomar Chatterjee v. Tara Prosunno Mookerjee*, 5 C. L. R., 517, referred to.

IN this case Sardar Singh, a minor, applied through his next friend Dip Chand for a certificate under section 6 of Act No. VII of 1889 to collect debts due to one Gur Prasad his alleged adoptive father. On this application notices were duly issued to the other relations of the deceased, but on the day fixed for the hearing no one appeared and the District Judge granted a certificate, as prayed, to the applicant. At the hearing, the applicant's next friend appeared and gave evidence to the effect that the applicant was duly adopted by the wife of Gur Prasad in pursuance of an authority given by him to her to adopt. After the certificate had been granted the two widows of Gur Prasad, Ram Kuar and Mahtab Kuar appealed against the order of the District Judge, on the ground that there was no legal evidence of the adoption of the applicant.

Mr. D. N. Banerji and *Babu Jogindro Nath Chaudhri*, for the Appellant.

Munshi Ram Prasad and *Pandit Moti Lal*, for the Respondent.

Edge, C. J., and Burkitt, J.—Kunwar Sardar Singh, minor, made an application to the District Judge of Aligarh by his next friend under Act No. VII of 1889, for a certificate to collect debts alleged to have been due to his alleged adoptive father, then deceased. Notice to persons who might have been interested in opposing the application were duly served. These persons had three several opportunities of opposing the grant of such certificate. No one opposed the grant, and the District Judge made [353] an order granting a certificate as prayed. After the grant of the certificate had been made Musammam Ram Kuar and Musammam Mahtab Kuar, filed an appeal against the order of the District Judge, on the grounds that there was no legal evidence of permission to adopt the minor having been given by the deceased creditor* to his wife, and that a certificate should not have been granted. This question which has been argued before us is—can in law a certificate under Act VII of 1889 be granted to a minor? That is the only question which has been presented to us for consideration in argument. It has been contended on behalf of the appellants that a certificate under Act No. VII of 1889 cannot be granted to a minor although he appears and applies for it through his next friend. *Mr. Dwarka Nath Banerji*, in his argument, was compelled to admit that it was not intended that a debt due in such a case to a minor should by effluxion of time become barred by limitation, and he contended that any near relation of such a minor might apply for, and obtain, a grant of a certificate to himself to collect the debts which might be due to the minor. For that purpose *Mr. Dwarka Nath Banerji* had further to contend that the grant of a certificate

* First Appeal from Order No. 100 of 1897, from an order of L. G. Evans, Esq., District Judge of Aligarh, dated the 5th August 1897.

gave the holder of such certificate a cause of action. In our opinion the grant of a certificate neither gives a cause of action nor is it a part of the cause of action. Section 4 of Act No. VII of 1889 suggests quite the contrary. That section does not debar a person entitled from suing until such person has obtained a certificate, but merely prohibits the Court from making the decree in favour of such person until that person has produced a certificate under the Act, or one or other of the documents referred to in the section. If the granting of a certificate was part of the cause of action, it would follow that no suit would lie unless before the commencement of the suit a certificate had been obtained. Now, in our opinion, the Legislature intended under Act No. XXVII of 1860 and under Act No. VII of 1889 that a person to whom a certificate might be granted should be a person who had some title or interest in the debt to collect [354] which a certificate is applied for, and that a mere interest in the minor or in the person entitled to sue for the debt is not sufficient to entitle a stranger, or even a relation, to a certificate. That is the conclusion which we draw from section 3 of Act No. XXVII of 1860, from clause (d), sub-section 1 of section 6 of Act No. VII of 1889, from clause (b) of sub-sections 1 of section 7 of the same Act, and from sub-sections 2, 3 and 4 of section 7 of the same Act. Now the Legislature has not prohibited, by Act No. VII of 1889, the grant of a certificate to a minor through his next friend, nor was there any such prohibition in Act No. XXVII of 1860. Where the Legislature considered that probate or administration should not be granted to a minor, it said so expressly. Such prohibition will be found in sections 183 and 189 of Act No. X of 1865 and in section 8 of Act No. V of 1881. As far back as 1879, the Calcutta High Court in *Kali Coomar Chatterje v. Tara Prosunno Mookerjee*, 5 C. L. R., 517, inferentially decided that a certificate to collect debts under Act No. XXVII of 1860 might be granted to a minor through his next friend. In our opinion the Calcutta Court was right. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[In (1901) 28 Bom., 314, it was held that a certificate could be granted to the guardian of the minor, while this decision was followed in (1912) 15 I. C., 408 (Mad.) ; but dissented from in (1910) 10 I.C., 991 (Sindh). See also the criticism of Dr. Trevelyan in his 'Minors', IV Edn. (1912), p. 86, where he observed "The Court could not fix upon the minor the responsibility annexed to the holding of a certificate and the fact that he had applied through a next friend would not shift such responsibility upon the next friend."]

[20 All 354]

The 4th April, 1898.

PRESENT :

MR. JUSTICE BURKITT.

Harjas Rai and another.....Defendants

• versus

Rameshar.....Plaintiff.*

*Execution of decree—Sale in execution—Stay of sale upon payment into Court of decretal amount and costs—Civil Procedure Code, section 291,—
Act No. IV of 1882 (Transfer of Property Act) section 89.*

Held, that section 291 of the Code of Civil Procedure must be taken to have modified section 89 of Act No IV of 1882 when the debt and costs (including the costs of the sale are tendered to the officer conducting the sale, or when it is proved to his satisfaction

* Second Appeal No. 120 of 1897, from a decree of Pandit Raj Nath Sahab, Subordinate Judge of Moradabad, dated the 24th November 1896, confirming a decree of Munshi Shiva Prasad, Munsif of Bijnor, dated the 19th August 1896.

that the amount of such debt and costs has been paid into the Court that ordered the sale. *Raja Ram Singhji v. Chunni Lal*, I.L. R., 19 All., 205, followed.

[355] THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, and Munshi Madho Prasad, for the Appellants.

Munshi Gobind Prasad, for the Respondent.

Burkitt, J.—On the 13th of August 1870, one Chajju executed a mortgage of the property in suit to one Nathu Singh. A suit for sale was brought in July 1895, and after decree an order absolute for sale was passed on the 14th of November 1895. Under the order absolute the mortgagor's right to redeem became extinguished. That order absolute for sale is now vested by transfer in the appellant Kure. I may mention that there were three other mortgages over the same property held by the present plaintiff respondent Rameshar, and that Rameshar was in compliance with section 85 of the Transfer of Property Act made a party to the suit on the mortgage of 1870. As subsequent incumbrancer he could have redeemed within the period given by the decree under section 88, but he failed to do so. I may also add that no sale has yet taken place under the order absolute of November 1895. Subsequently Rameshar, the present plaintiff respondent, brought a suit for sale on the three mortgages he held, impleading under section 85 the defendant appellant Kure as transferee of the decree enforcing the prior incumbrance, and he also impleaded Harjas Rai, who had purchased the property by private sale in May 1893. At the same time the plaintiff respondent, inasmuch as he could not bring the property to sale without discharging the prior incumbrance held by Kure, paid into Court the amount due on Kure's incumbrance, expressing the payment to be made to the credit of Kure in discharge of his incumbrance. It is admitted by Kure's vakil that money was so paid in to his credit. The Lower Appellate Court found that two of the plaintiff's mortgages had been discharged and gave him a decree for sale on the third only. Kure now appeals contending that the payment into Court to his credit was improperly made, it being made in the plaintiff's suit and not in Kure's suit, and **[356]** also because it was made after the expiry of the two months fixed by the decree of July 1895. His contention is that the right to redeem is extinguished. Whether Kure, appellant, can now proceed to sell the property is hardly worth considering, seeing that if he were to do so he would at once be met by the admitted fact that the debt to recover which the property could be sold under the order absolute has now been paid into Court. In the recent case of *Raja Ram Singhji v. Chunni Lal*, I L. R., 19 All., 205, it was held that "section 291 of Act No. XIV of 1882 must be taken to have modified section 89 of Act No. IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is proved to his satisfaction that the amount of such debt and costs had been paid into the Court that ordered the sale." Here it is admitted that a sufficient amount has been paid in to satisfy the decree for sale held by the defendant appellant Kure. That being so, and in view of the ruling just cited, I cannot say that the Subordinate Judge was wrong in giving the plaintiff respondent a decree for sale of the property mortgaged to him under his mortgage of February 1892. The appeal therefore fails on that point. Another question was raised on behalf of the appellant, Harjas Rai. He had in December 1894, deposited in Court under section 83 of Act No. IV of 1882 the amount due to Rameshar on his mortgage of February 1892. Notices as required by law were duly served upon Rameshar, who took no notice of them. The Court for some unknown reason rejected the application which had been made to it under section 83. Harjas Rai

subsequently withdrew the money out of Court. The whole matter therefore falls to the ground. By his own stupidity Harjas Rai has lost a complete answer to Rameshar's suit, and for that he has only himself to thank. I dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1905) 28 All., 28.]

[357] *The 4th April, 1898.*

PRESENT :

MR. JUSTICE BURKITT.

Parmeshri Lal and others.....Judgment-debtors

versus

Mohan Lal.....Decree-holder.

Limitation Act No. XV of 1877 (Indian Limitation Act) schedule II, article 179—Act No. IV of 1882 (Transfer of Property Act) section 87—Execution of decree—Application for order absolute for foreclosure—Limitation.

An application for an order under section 87 of Act No. IV of 1882 is, like an application for an order under section 89 of the said Act, subject to the limitation prescribed by article 179 of the second schedule to Act No. XV of 1877. *Oudh Behari Lal v. Nageshar Lal*, I.L.R., 13 All., 278, and *Chunni Lal v. Harnam Das*, I. L. R., 20 All., 302, referred to.

IN this case one Mohan Lal obtained a decree under section 86 of the Transfer of Property Act on the 21st of September 1886. On the 21st January 1895 the decree-holder applied in the Court of the Munsif of Mainpuri for an order absolute under section 87. The Munsif dismissed this application as barred by limitation. The decree-holder appealed to the Subordinate Judge, who, relying on the cases of *Ranbir Singh v. Drigpal*, I. L. R., 16 All., 23, and *Tiluck Singh v. Parsotein Proshad*, I. L. R., 22 Cal., 924, held that there was no limitation prescribed for such applications, and accordingly decreed the appeal and remanded the case to the Court of the Munsif. The decree-holder appealed to the High Court.

Munshi Gobind Prasad, for the Appellants.

Munshi Madho Prasad, for the Respondent.

Burkitt, J.—Under the ruling of this Court in the case of *Chunni Lal v. Harnam Das*, I. L. R., 20 All., 302, it was held, following the case of *Oudh Behari Lal v. Nageshar Lal*, I. L. R., 13 All., 278, that an application to obtain an order absolute under section 89 of Act No. IV of 1882 is a proceeding in execution and is subject as such to all the rules relating to execution. The present application is not one under section 89, but is one under section 87 of the [358] Transfer of Property Act, its object being to have an order made debarring the judgment-debtor from all right to redeem the mortgaged property. I am unable sufficiently to distinguish proceedings under section 89 from those under section 87 of the Transfer of Property Act, so as to be able to say

* Second Appeal No. 133 of 1897, from a decree of Maulvi Muhammad Mazhar Hussain, Subordinate Judge of Mainpuri, dated the 17th November 1896, reversing an order of Maulvi Muhammad Inamul Haq, Munsif of Mainpuri, dated 8th June 1895.

that the former are, and the latter are not, proceedings in execution. I must hold, following the ruling of this Court quoted above, that the present application is an application in execution to which the provisions of art. 179 of sch. II of the Limitation Act apply. It is admitted that a period of more than three years has elapsed between the date of the decree and the date of the application. The application was therefore time-barred when made. I allow this appeal, and, setting aside the decree of the Court below, restore the decree of the Court of First Instance and dismiss the decree-holder's appeal to the Lower Appellate Court with costs.

Appeal decreed.

NOTES.

[The C.P.C., 1908, O. 34, rr. 3 and 5 have changed the law on the subject. See also (1902) 24 All., 542; (1906) 33 Cal., 867; (1903) 26 Mad., 780; (1911) 98 Cal., 912; (1913) 15 Bom., L. R., 841.]

[20 All. 388]

The 5th April, 1898.

PRESENT :

MR. JUSTICE KNOX.

Anwar-ul Haq.....Plaintiff
versus
 Jwala Prasad.....Defendant. *

*Pre-emption—Mortgage—Limitation—Date of accrual of cause of action—
 Act No. IV of 1882 (Transfer of Property Act) sections 86 and 87.*

Held, that where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act, 1882, the right to sue for pre-emption accrues, not from the date fixed in the decree under section 86 as the date upon which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under section 87 of the said Act. *Raghubir Singh v. Nandu Singh*, Weekly Notes, 1891, p. 134; *Ali Abbas v. Kalka Prasad*, I. L. R., 14 All., 105, and *Poresh Nath Mojumdar, v. Ramjodu Mojumdar* I. L. R., 16 Cal., 246, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Sundar Lal*, for the Appellant.

Munshi *Ram Prasad*, for the Respondent.

[389] Knox, J.—The question which arises for determination in this second appeal is whether a right of pre-emption accrues from the date upon which a mortgagor is, under a decree given under section 86 of the Transfer of Property Act of 1882, declared absolutely debarred of all rights to redeem the property, or from the date on which the mortgagee obtains an order absolute in terms of section 87 of the same Act. In order that the question may be more clearly apprehended, it will be well to set out the facts out of which this question arises. Har Prasad was the owner of the property, the subject-matter of this appeal. He transferred his interests under a deed of conditional sale to the father of one Mata Din. On the 11th of April 1893 Mata Din sued for foreclosure, and obtained a decree ordering Har Prasad to pay to the plaintiff or into Court the sum due on or before the 11th of October 1893, and declaring further that

* Second Appeal No. 1014 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 1st October 1896, reversing a decree of Maulvi Muhammad Tajammal Husain, Munsif of Orai, dated the 9th June 1896.

if the payment was not made on or before that date, Har Prasad would be absolutely debarred from all rights to redeem the property. The amount was not paid by the time fixed, and has not up to the present been paid. On 15th of March 1894, Mata Din sold his right under his decree of the 11th of April 1893 to Jwala Prasad, the present respondent, and on the 13th of April 1894 Jwala Prasad got his name entered in the village papers as mortgagee. On the 9th of March 1895, Anwar-ul Haq, the present appellant, purchased a share in the village in which the property in appeal is situated. Upon the 6th of April 1895 Jwala Prasad applied to the Court for, and obtained, an order absolute in the terms of section 87 of the Transfer of Property Act, and on the 2nd of April 1896 Anwar-ul Haq instituted the present suit. The defence made to the suit was *inter alia* that Anwar-ul Haq was not a sharer in the village on the 11th October 1893, when the date fixed by the Court for payment of the mortgage money by Har Prasad expired; that therefore he had no right of pre-emption; that on the said date the respondent's title of conditional vendee had become that of an absolute vendee and the sale had become [360] an absolute sale. The learned Judge accepted this contention: he held that the mortgagee having been all along in possession of the mortgaged property, "his title became complete when the mortgagor failed to pay before the 11th of October 1893. If the mortgagee chose to take further steps under section 87 such steps were merely proceedings in execution with the object of clearing his title. The title itself was acquired on the 11th of October 1893." Upon this view he held that the title to pre-empt arose on the 11th of October 1893, when the appellant was not a co-sharer. The appellant adheres to the case stated in the plaint, namely, that no right of pre-emption accrued to him till the 6th of April 1895, when, as he maintains, the sale in favour of the respondent became complete in law. In support of this contention he relied on the precedent, *Raghubir Singh v. Nandu Singh*, Weekly Notes, 1891, p. 134. Against that the learned advocate for the respondent referred me to a Full Bench ruling of this Court, *Ali Abbas v. Kalka Prasad*, I. L. R., 14 All., 405, and to certain other precedents of this Court, in which it has been laid down that applications for an order absolute under section 87 of the Transfer of Property Act are steps in execution. Neither of the cases above cited are any safe guide in the case before me. They were both decisions governed by Regulation No. XVII of 1806, and the law applicable was that which prevailed before Act No. IV of 1882, came into force. It has been held by this Court in *Ali Abbas v. Kalka Prasad* that on the expiration of the year of grace provided by sections 7 and 8 of Regulation No. XVII of 1806, if anything remained to be paid under the mortgage and the proceedings under the Regulation had been regular, the title of the conditional vendee became that of an absolute vendee and the sale became an absolute sale on the day when the year of grace expired. An important change was, however, introduced by section 87 of Act No. IV of 1882, and it is by this section that the present appeal is governed. This section provides that if payment be not made by the mortgagor on the day fixed by the Court the plaintiff may apply [361] to the Court for an order that the defendant be debarred absolutely of all right to redeem the mortgaged property; when he has so applied the Court shall then pass such order, and on the order being passed the debt secured by the mortgage shall be deemed to be discharged. These words are without meaning, it seems to me, and the procedure provided in section 87 is a purely superfluous procedure in the case of a mortgagee in possession, if his title has become complete and the sale an absolute sale as soon as the date fixed by the Court for payment of the mortgage money has expired. Under section 87 a Court can upon good cause shown from time to time postpone the day appointed

for payment. In other words, it can postpone the date on which the title of the mortgagee would become complete. This power was not given in Regulation No. XVIII of 1806, nor was there any provision made for an application for an order absolute like that provided for in section 87 of Act No. IV of 1882. The Calcutta High Court has held in the case of *Poresh Nath Mojumdar v. Ramjodu Mojumdar*, I. L. R., 16 Cal., 246, that a mortgagor can redeem at any time till the order absolute is made under section 87 of the Transfer of Property Act of 1882. I need not, and do not, determine that point here; but I am satisfied that the procedure enjoined by section 87 is not superfluous or procedure merely to clear title, and that until such an order absolute has been made a right to pre-empt does not accrue. The right to pre-empt accrues, not from the date fixed in the decree under section 86 as the date on which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under section 87 of the Transfer of Property Act of 1882.

I accordingly decree the appeal, set aside the judgment and decree of the Lower Appellate Court, and restore that of the Court of First Instance. Three months from the date of this decree is allowed for the payment of the pre-emption money.

Appeal decreed.

NOTES.

[This was followed in (1898) 20 All., 375.]

[362] *The 6th April, 1898.*

PRESENT:

MR. JUSTICE BURKITT.

Narain Singh and others.....Plaintiffs

versus

Chaturbhuj Singh.....Defendant.*

Act No. VII of 1870 (Court Fees Act), sections 10 and 12—Court fee—Procedure—Second Appeal—Appeal to Lower Appellate Court by respondent in High Court insufficiently stamped.

Where it was discovered in second appeal in the High Court that the respondent, when appellant in the Lower Appellate Court, had not paid a sufficient court-fee on his memorandum of appeal in that Court, and up to the date of the hearing of the appeal in the High Court, though called upon to do so, had not made good the deficiency, it was held that the proper procedure was not to dismiss the respondent's appeal to the Lower Appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondent until such time as the additional court fee due by him might be paid.

IN this case the plaintiffs came into Court claiming, first, a declaration of their proprietary right in respect of certain land, and, secondly, cancellation of an order of a Revenue Court. They paid a court fee of Rs. 10 on their plaint. The plaint was accepted and filed, the suit heard, the issue raised by the defendant as to insufficiency of stamp being decided against him, and a

* Second Appeal No. 100 of 1897 from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 1st December 1896, reversing a decree of Munshi Prem Behari, Munsif of Sahaswan, dated the 19th August 1896.

decree given in favour of the plaintiffs by the Court of First Instance (Munsif of Sahaswan).

The defendant appealed, paying on his memorandum of appeal the same Court fee as had been paid on the plaint. The Lower Appellate Court (District Judge of Shahjahanpur) allowed the appeal and dismissed the plaintiffs' suit. The plaintiffs appealed to the High Court. On this appeal being presented for report as to limitation and Court fee, it was reported that there was a deficiency of Rs. 10 on the plaint and a similar deficiency on the memorandum of appeal due by the plaintiffs, and a deficiency of Rs. 10 due by the defendant on his memorandum of appeal in the Lower Appellate Court. The deficiency due by the plaintiffs was made good, but at the time the appeal came on for hearing the deficiency due by the defendant was still unsupplied. Under these circumstances the appeal was put up for disposal.

[363] Mr. A. H. C. Hamilton, for the Appellants.

Mr. Karamat Husain, for the Respondent.

Burkitt, J.--In this case it appears that the respondent here, who was the successful defendant appellant in the Lower Appellate Court, did not pay a sufficient amount of Court fees on his memorandum of appeal in that Court. As far as that Court is concerned it must be assumed under the first paragraph of section 12 of the the Court Fees Act that the District Judge finally decided between the parties that the fee paid was sufficient. In this Court, however, it has been discovered that the defendant, respondent here, when appellant in the Court below did not pay a sufficient fee on his memorandum of appeal. The respondent here has been called on to pay the deficient duty, but has not done so. Mr. Hamilton for the appellant asks me to take action under the second clause of section 12 and the second clause of section 10 of the Court Fees Act and to dismiss the respondent defendant's appeal to the Lower Appellate Court. I am unable to see that I am authorized so to act under the second clause of section 10. That clause provides, with reference to the valuation of the properties referred to in section 7 paragraphs 5 and 6 of the Act, that when the Court fees paid are insufficient under the circumstances laid down in the first clause of section 10, the Court shall call on the plaintiff to pay the deficient Court fees and shall stay the suit until the additional fee is paid. It further provides that if the additional fee be not paid the suit shall be dismissed. The second paragraph of section 12 makes the procedure set forth in the second paragraph of section 10 applicable to the case when a Court of appeal, reference or revision considers that the question decided under the first paragraph of section 12 has been wrongly decided to the detriment of revenue. The question then arises in the present case what is the *suit* which is to be stayed until the additional fee is paid, and it is to be noted that the staying of the suit is the act which the Court has to perform before it can dismiss the suit. There is no suit before me except in the sense that all proceedings in a [364] suit up to decree are parts of the suit. What is before me is the appeal by the plaintiff against the decree of the Lower Appellate Court dismissing the suit. The appellant is undoubtedly no way in fault. He has paid up all the Court fees due from him in the lower Courts and in this Court. Does then the second clause of section 10 mean that because of the default of the respondent in the lower Court the appellant is to have his appeal in this Court stayed, and can it be held that the second clause of section 12, read with paragraph 2 of section 10, means that if the respondent wilfully persists in refusing to pay, the appellant, who is not in fault, is to be punished by having his appeal dismissed? I cannot believe that it was intended by the Legislature to work any such injustice. In my opinion the second clause of section 10 read with the second clause

of section 12 cannot be worked in a case like the present. If it were the appellant who was in fault and failed to pay the full Court fee due from him in the lower Court, this Court certainly could stay the hearing of his appeal, and, if the deficient fees were not paid, could dismiss his appeal, and no doubt would do so. But where the appellant is not in fault, it would be most unjust that the respondent by failing to pay the Court fee due from him in the lower Court should have it in his power to prevent the appellant from having his appeal heard.

For these reasons I decline in this case to take action under the second clause of section 10 and proceed to hear the appeal on the merits.

On the merits the learned counsel who appears for the appellant says he is not in a position to press the appeal. The appeal is therefore dismissed with costs. But I direct that the decree be not prepared or signed until the respondent pays the Court fees found due from him on his memorandum of appeal in the Lower Appellate Court.

Appeal dismissed.

NOTES.

[This was followed in (1905) 28 All., 270.]

• [366] *The 7th April, 1898.*

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Debi Das.....Plaintiff

versus

Nirpat and others.....Defendants.*

Parties to a suit—Suit for partnership debt—Representative of partner who dies pending the suit not a necessary party—Act No. IX of 1872 (Indian Contract Act), section 45.

In a suit to recover a debt due to a trading partnership in which it happens that a deceased person was a partner up to the time of his death, it is not necessary to join as a plaintiff any representative of the deceased partner. *Gobind Prasad v. Chandar Sekhar*, I.L.R., 9 All., 486; *Ram Narain Nursing Doss v. Ram Chunder Jankee Loll*, I.L.R., 18 Cal., 86, and *Motilal Bechardass v. Ghellabhai Hariram*, I. L. R., 17 Bom., 6, referred to.

THIS was a suit brought by one Abhe Singh and his alleged adopted son Debi Singh as partners in a trading concern to recover a sum of money said to be due on settlement of accounts between the parties. During the pendency of the suit Abhe Singh died, and the suit was continued by Debi Singh for himself and as legal representative of Abhe Singh, the Court of First Instance (Munsif of Jhansi) finding on an issue framed in the suit that Debi Singh was the adopted son of Abhe Singh. The Court of First Instance decreed the claim in favour of Debi Das.

On appeal by the defendants, the Lower Appellate Court (District Judge of Jhansi) found that it was not proved that Debi Das was the adopted son of

* Second Appeal No. 112 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 28th November 1895, reversing a decree of Maulvi Syed Muhammad Abbas Ali, Munsif of Jhansi, dated the 13th September 1895. •

Abhe Singh. It further found that Debi Das as surviving partner in the business was not entitled to collect debts due to the firm without obtaining a certificate of succession under Act No. VII of 1889, and that it was then too late to remedy that defect. The Lower Appellate Court accordingly decreed the appeal and dismissed the plaintiff's suit. The plaintiff appealed to the High Court.

Pandit *Sundar Lal*, for the Appellant.

The Respondents were not represented.

Blair and Burkitt, JJ.---This suit was brought by Abhe Singh and Debi Das to recover money due to them as partners [366] in a trading concern upon a partnership account. Before decree Abhe Singh died, and Debi Das, who claimed to be his adopted son, was entered upon the record as the representative of the deceased plaintiff. The suit was continued, and the Munsif gave the plaintiffs a decree. The defendants appealed, and the Lower Appellate Court dismissed the suit. The ground of such dismissal was that Debi Das was not an adopted son; was not a representative of Abhe; and was not entitled to recover Abhe's interest in the debt without production of a certificate under section 4 of the Succession Certificate Act, No. VII of 1889. The plaintiff Debi Das appeals upon the ground that, as the surviving partner of the firm to which the debt was due, he by himself was entitled to maintain the suit without joining any person as representative of the deceased member of the firm and therefore without producing any certificate. The second ground of appeal is not pressed. We consider ourselves concluded by the decision of this Court in the case of *Gobind Prasad v. Chandar Sekhar*, I.L.R., 9 All., 486. That decision, it is true, has been dissented from in the Calcutta High Court in the case of *Ram Narain Nursing Doss v. Ram Chunder Jankee Loll*, I. L. R., 18 Cal., 86. On the other hand, the decision of this Court has been followed and approved in *Motila Bechardass v. Chellathai Hariram*, I. L. R., 17 Bom., 6. We are not aware that the case decided in this Court has been dissented from in this Court. The principle therein laid down is in accordance with the English law, and is not in our opinion in contravention of section 45 of the Contract Act. It was quite unnecessary to bring Abhe's representative on the record. We do not consider that a decree such as may be passed in this case would be a decree against the debtor of a deceased person within the meaning of section 4 of Act No. VII of 1889; but it would be a decree against the debtor of a partnership concern; for, in a suit to recover a debt due to a trading partnership in which it happens that a deceased person was a partner up to the time of his death, it is not, in our opinion, necessary to join as plaintiff any representative whatever of the [367] deceased partner. When the representative of Abhe desires to recover from the partnership concern such interest as Abhe possessed in the firm, if he has to do so through the medium of a Court, he will have to obtain a succession certificate before he is entitled to a decree. We set aside the decree of the Court below dismissing the suit, and, as the case was wrongly dismissed upon a preliminary point, we remand it to the Lower Appellate Court for trial upon the merits.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1909) 13 C. W. N., 503; 9 C. L. J., 331; (1906) P. R., 10.]

[20 All. 367]

The 14th April, 1898.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Beni Rai and others.....Defendants

versus

Ram Lakhan Rai and another.....Plaintiffs.

Appeal to Her Majesty in Council—Civil Procedure Code, section 596—Decree affirming the decision of the Court immediately below—Decree dismissing an appeal to the High Court for default of prosecution.

Held that a decree of the High Court dismissing an appeal for want of prosecution—the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing—was a decree affirming the decision of the Court immediately below, within the meaning of section 596 of the Code of Civil Procedure.

THE facts of this case sufficiently appear from the order of the Court.

Mr. A. E. Ryves and Munshi Ram Prasad, for the Appellants.

The Hon'ble Mr. Conlan and Pandit Sundar Lal, for the Respondents.

Knox, Acting, C.J., and Banerji, J.—This is a petition for leave to appeal to Her Majesty in Council. The value of the subject-matter of the suit is over Rs. 10,000, but there arise two questions which have to be determined before leave to appeal can be granted. The first question is, whether the decree now appealed from affirms or not the decision of the Court immediately below; secondly, whether any substantial questions of law are shown to be involved by the petition. As regards the first question, we find on referring to the judgment of this Court that it runs as follows :—

[368] “ This appeal is not supported. It is therefore dismissed.” The petition of appeal sets out that the appeal came on for hearing on the 26th of April 1897, and could not be supported because the papers for the translation and printing of which the appellant had applied were not ready. A reference to the record shows that the appellants did, on the 25th of December 1895, apply for the translation and printing of the papers which they considered necessary for their purpose in order to place the appeal before this Court. They, however, took no steps to deposit the money necessary for this purpose and their application consequently abated. They took no further interest in the matter until the 12th of February 1897, when they put in a second application for translation and printing of the papers they then considered necessary. Their application was granted conditionally upon the hearing of the appeal not being delayed in consequence of the laches they had shown in taking no steps for nearly two years in order to have the necessary papers translated and printed under the rules of this Court. The appeal came on for hearing on the 25th of April 1897. The appellants apparently did not through their counsel show any sufficient cause to the Judges before whom the appeal came on for hearing which would justify those Judges in granting an adjournment or in permitting them to refer to the record in the vernacular. In consequence of this the appeal was not supported, and a decree was passed dismissing the appeal and affirming the decision of the lower Court. It has been contended before us that a mere order of dismissal does not and cannot amount to an affirmation as intended by section 596 of the Code of Civil Procedure, and in support of this contention we were referred to the precedent *Asghar Reza v. Haidar Reza*, I. L. R., 16 Cal., 211. It is obvious that that precedent does

not afford us any assistance in determining the matter now in dispute. That case was one in which the learned Judges of the High Court at Calcutta had before them for determination several issues of fact. The Court from which the appeal had been preferred had [369] contented itself with determining two issues only, considering them sufficient for the disposal of the case, and had left other issues untried. The High Court found on the two issues which had been tried contrary to the findings of the Court below, but they proceeded to try further questions of fact and their decision on those questions of fact led them to dismiss the appeal. They thus came finally to the same conclusion in the suit as the Court of First Instance, although they did not agree with the Judge who had tried the case on all his findings or in the reasons on which they were based. The learned Judge who gave leave to appeal to Her Majesty in Council found further that there were substantial questions of law involved which entitled the petitioners to a certificate that the case was a fit one for appeal. As regards the case before us the result of the appeal to us is that the findings of the Court below and the reasons on which they are based stand affirmed. There was no further finding of any kind by this Court. Under these circumstances we are unable to accept the contention of the learned counsel for the petitioners, and we hold that the decree of this Court did affirm the decree of the Court immediately below. The result of holding otherwise would be that an appellant, who, with the object of saving himself the expense of having the necessary papers translated for this Court, neglected to support his appeal before us, might claim leave to appeal direct to Her Majesty in Council by refraining from obtaining any determination by this Court upon the pleas raised. The appellants in fact want leave to ask Her Majesty in Council to do that which this Court might have done, but which the appellants by their own laches put it out of the power of the Court to do. The next question which arises is whether any substantial questions of law are involved in the appeal. We have gone through the various pleas raised. The only pleas that raise any question of law are the first and second pleas, and those pleas do not and will not arise where the decision on the question of fact is the same as that of the Court below. These questions [370] of law do not, in our opinion, arise. Consequently we find ourselves unable to grant the leave asked for, and dismiss this application with costs.

Application dismissed.

NOTES.

[See also (1902) 25 All., 109 P.C.]

[20 All. 370]

The 15th April, 1898.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Bansi Lal and others.....Plaintiffs

versus

Ramji Lal and another.....Defendants.*

Civil Procedure Code, section 32 Order adding defendant—Means of questioning such order—Practice—Decree in previous suit defining rights of a party to a subsequent suit—Effect of such decree as against such party until set aside by proper procedure.

Where an order adding a defendant under section 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh v. Chakardhari Singh*, I. L. R., 15 All., 119, referred to.

Where there is a subsisting decree in a previous suit which as regards the subject-matter of a subsequent suit would take effect under section 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. *Karamali Rahimbhoy v. Rahimbhoy Habibbhoy*, I. L. R., 13 Bom., 187, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Pandit Moti Lal and Pandit Baldeo Ram Dave, for the Appellants.

Babu Jogindro Nath Chaudhri and Pandit Sundar Lal, for the Respondents.

Knox, Acting C.J., and Banerji, J.—The property claimed in the suit out of which this appeal had arisen belonged originally to one Ishk Lal. He was the son of Jai Singh, who was one of five brothers, namely, Hardayal, Sawai, Ram Nath, Chunni Lal and Jai Singh. Hardayal's son was Daulat Ram, the father of the plaintiffs appellants. The respondent Ramji Lal is the [371] brother of Ishk Lal. It is asserted on the one hand and denied on the other that Ramji Lal was adopted by his uncle Sawai. Ishk Lal died in 1884 leaving him surviving his widow Shama Kuar, and his two daughters Jai Dai and Dhapo. His estate came into the possession of his widow Shama Kuar, and on her death in 1886 it was taken possession of by Ramji Lal, defendant, and Daulat Ram the father of the plaintiffs. In 1889 Jai Dai for herself and as the next friend of her minor sister Dhapo brought a suit against Ramji Lal and Daulat Ram for possession of the estate of Ishk Lal on the ground that they were entitled to it in preference to those persons. On the 12th of August 1889 the parties to that suit agreed to refer their dispute to arbitration, and the Court granted permission to Jai Dai to enter into the agreement of reference to arbitration on behalf of her minor sister Dhapo. On the 29th of June 1890 the arbitrators made their award, and in accordance with that award a decree was made on the 5th of July 1890, whereby a portion of the property claimed was decreed to the two daughters of Ishk Lal. It is admitted that in pursuance of that decree possession was obtained by the daughters in respect of the property decreed to them. The present suit is for a partition of the

* First Appeal No. 54 of 1894, from a decree of Pandit Bansidhar, Subordinate Judge of Meerut, dated the 18th November 1895.

remainder of Ishk Lal's property, and was brought against Ramji Lal alone by the plaintiffs, the sons of Daulat Ram, who has died since the decree of 1890. Ramji Lal in his defence pleaded the *jus tertii* of Musammat Dhapo, and set up a preferential title to the estate of Ishk Lal. Dhapo intervened and applied to be made a defendant under section 32 of the Code of Civil Procedure. In spite of the objection of the plaintiffs her application was granted, and she was arrayed as a defendant to the suit. She urged in answer to the claim that she alone was entitled to the estate of Ishk Lal; that neither the plaintiffs nor anyone else had a right to that estate; that Jai Dai her sister had no right to that estate in preference to her; that the proceedings connected with the former suit and the reference to arbitration were fraudulent and were taken in collusion between Jai Dai and the father of the [372] plaintiffs and Ramji Lal, and that the decree in that suit was not binding on her. It was asserted by the plaintiffs that the decree was binding on Dhapo and that according to the custom prevailing among Saraogis, to which sect the parties to the suit belonged, a daughter could not inherit.

The lower Court has found in favour of Dhapo and dismissed the claim. The plaintiffs have preferred this appeal.

Mr. *Moti Lal* on behalf of the appellants asked our leave to urge the plea that Dhapo had been improperly made a defendant to the suit, her interest being adverse both to the plaintiffs and to the original defendant Ramji Lal. As no appeal had been preferred under section 588 of the Code of Civil Procedure from the order adding Musammat Dhapo as a defendant to the suit, and as no plea was taken in the memorandum of appeal questioning the propriety of that order, we, following the ruling of this Court in *Tilak Raj Singh v. Chakardhari Singh*, I. L. R., 15 All., 119, refused to grant him the permission sought by him.

The main contention of behalf of the appellants is that the decree of 1890 is binding on Dhapo, and consequently it is no longer open to her to question the plaintiff's title as regards the property now claimed. There can be no doubt that if the decree of the 5th of July 1890 is binding on Dhapo the portion of the claim advanced on her behalf in the suit in which that decree was passed must, having regard to Explanation 3 of section 13 of the Code of Civil Procedure, be deemed to have been dismissed, and it is no longer open to her to contend that she is entitled as against the plaintiffs to the property claimed in the former suit, but not decreed to her. If, however, she is in possession of that property, she may probably resist the claim on the ground that the plaintiffs are not entitled to recover the property without proving their own right to it. It is, however, not necessary to decide that question, as it has nowhere been suggested that she is in such possession. The plaintiffs stated in their plaint that they were in possession of the property in dispute jointly with Ramji Lal. [373] and although Ramji Lal in his defence pleaded the *jus tertii* of the daughters of Ishk Lal he did not assert that they were in possession of the property claimed. Dhapo in her written statement did not allege that she was in possession. That being so, if the decree in the former suit is binding on Dhapo, she cannot resist the claim of the plaintiffs. We have therefore to determine whether the decree of 1890 is binding on Dhapo. The lower Court has held that decree and the arbitration proceedings which preceded it not to be binding, on the ground that Dhapo being the unmarried daughter of Ishk Lal was entitled to his estate in preference to his married daughter Jai Dai; that Jai Dai had consequently an interest adverse to that of Dhapo and could not act as the next friend of Dhapo, and that all the proceedings connected with the suit brought by Jai Dai on behalf of Dhapo, including the arbitration

proceedings, are null and void as against Dhapo. We may observe that the ruling in *Kalavati v. Chedi Lal*, I. L. R., 17 All., 531, on which the learned Subordinate Judge has relied has no bearing upon the question before us.

We are of opinion that so long as the decree of 1890 subsists it cannot be treated as a nullity. If it was obtained by fraud, or if for any other reason it is a decree which is prejudicial to the interests of Dhapo, she must get the decree set aside before she can avoid the operation of it. In this case the only ground on which the validity of the decree is impeached is that Jai Dai having an interest adverse to that of Dhapo could not, having regard to the provisions of section 445 of the Code of Civil Procedure, act as the next friend of Dhapo. In the first place, we observe that she did not claim any specific share for herself; in the next place, she was the *de facto* guardian of Dhapo, no other guardian being in existence. Moreover, under section 3 of Act No. XL of 1858, which was in force when the former suit was brought, no guardian of a minor could sue on behalf of the minor without obtaining a certificate of guardianship or the leave of the Court to sue for the minor. In the present instance [374] it must be presumed that leave was granted by the Court to Jai Dai to sue on behalf of the minor (*Parmeshwar Das v. Belu*, I. L. R., 9 All., 508). The further fact that the Court gave leave to Jai Dai to enter into the agreement of reference to arbitration on behalf of Dhapo also shows that the Court recognised her as a fit person to act as the next friend of Dhapo, and this notwithstanding the fact that the defendants to that suit questioned in their written statement the competency of Jai Dai to act as the next friend of Dhapo. If, as alleged in this case on behalf of Dhapo, the former proceedings were brought about by the fraud of Jai Dai, her remedy was to get the decree made in that suit set aside in the manner pointed out in *Karamali Rahimbhoy v. Rahimbhoy Habibbhoy*, I. L. R., 13 Bom., 137. In our opinion, as the decree of 1890 has not been set aside and is still a subsisting decree, it is binding on Dhapo, and it is not open to her to set up her own title as against the plaintiffs. The Court below has in our opinion erred in holding that the plaintiffs are not entitled to maintain the suit as against Dhapo. As we have said above, had Dhapo been in possession of any portion of the property now claimed, she might have put the plaintiffs to proof of their title, although she might not set up against them a title in herself, but she has not alleged that she is in possession, nor has she established her possession.

It has not been determined what the rights of the plaintiffs are as against Ramji Lal. In fact the case as between him and the plaintiffs has not been tried at all. This must now be done.

We allow this appeal, and, setting aside the decree below, we remand the case under section 562 of the Code of Civil Procedure with directions to readmit it under its original number in the register and to try it on the merits as against Ramji Lal. The plaintiffs will get their costs of this appeal. The costs hitherto incurred in the Court below will abide the event.

Appeal decreed and cause remanded.

NOTES.

[It was pointed out in (1899) 27 Cal., 11; (1902) 24 All., 242, that the decision in this case did not take account of the provisions of sec. 44 of the Indian Evidence Act, 1872.]

[375] *The 18th April, 1898.*

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Baham Ilahi Khan and others.....Plaintiffs

versus

Ghasita and others.....Defendants.'

*Pre-emption—Mortgage by conditional sale—Limitation—Act No. XV of 1877
(Indian Limitation Act) sch. II, art. 120—Act No. IV of 1882
(Transfer of Property Act) sections 86 and 87.*

A plaintiff sued for pre-emption, his claim arising out of the foreclosure of a mortgage by conditional sale of a share in an undivided zamindari village

Held, (1) that the limitation applicable to the suit was that prescribed by art. 120 of sch. II of Act No. XV of 1877, and (2) that limitation began to run from the date when the mortgagee obtained an order absolute for foreclosure under section 87 of Act No. IV of 1882. *Batul Begam v. Mansuar Ali Khan*, I. L. R., 20 All., 315; *Poresh Nath Mojundar v. Ramjodu Mojundar*, I. L. R., 16 Cal., 246, and *Anwarul Haq v. Jwala Prasad*, I. L. R., 20 All., 358, referred to

IN this case one Kamaruddin made a mortgage by way of conditional sale of a share in an undivided zamindari mahal in favour of one Sardar Khan on the 20th of September 1877. Sardar Khan brought a suit on this mortgage and obtained a decree for foreclosure under section 86 of the Transfer of Property Act on the 12th of May 1884. The time limited by that decree for the payment of the decretal amount being six months expired on the 12th of November 1884. Payment was not made, but the mortgagee took no steps to obtain an order absolute under section 87 till the year 1890. That order was obtained on the 19th of June 1890. On the 17th of April 1893 the suit out of which this appeal has arisen was brought for pre-emption of the mortgaged property. The Court of First Instance (Additional Munsif of Meerut) dismissed the suit as barred by limitation holding that limitation commenced to run from the date of the expiry of the time limited in the foreclosure decree for the payment of the mortgage debt, namely, the 13th of November 1884. The plaintiffs appealed. The Lower Appellate Court [376] (Subordinate Judge of Meerut) for similar reasons dismissed the appeal. The plaintiffs appealed to the High Court.

Mr. H. C. Niblett, for the Appellants.

Babu Jogindro Nath Chaudhri, for the Respondents.

Knox, Acting C. J.—In the suit out of which this second appeal arises a claim was made for pre-emption over a share in an undivided zamindari mahal. Both of the Courts below held that the right sued for had become barred by limitation, and the question which we have to consider is whether that claim was or was not so barred.

The facts, which are undisputed, are briefly as follows.—

One Kamaruddin made a mortgage by way of conditional sale on the 20th of September 1877, in favour of one Sardar Khan. Sardar Khan brought a suit and obtained a decree for foreclosure under section 86 of the Transfer of Property Act. The conditional decree granted to him is dated the 12th of

* Second Appeal No. 867 of 1894 from a decree of Syed Muhammad Sirajuddin, Additional Subordinate Judge of Meerut, dated the 20th August 1894, confirming a decree of Babu Mohan Lal Huku, Additional Munsif of Meerut, dated the 22nd August 1893.

May 1884, and it fixed a period of six months, as required by that section, for payment. That date expired on the 12th of November 1884. Payment was not made, but the mortgagee took no steps for obtaining an order absolute under section 87 until the 19th of June 1890. The plaint in the present suit for pre-emption bears date the 17th of April 1893. The Courts below held that the right to pre-empt accrued from the 12th of November 1884, and they accordingly held that the suit was barred. In a recent Full Bench judgment of this Court (*Batul Begam v. Mansur Ali Khan*), I. L. R., 20 All., 315, has been held, affirming a previous Full Bench, that a share in an undivided zamindari mahal is not susceptible of physical possession in the sense of article 10 of schedule II of Act No. XV of 1877, and further that the period of limitation for pre-emption in such cases is governed by article 120, which provides a period of six years. A second question, however, remains to be decided, and that is whether the date from which the right to pre-empt accrues runs from the conditional order made in the suit for foreclosure under [377] section 86 or from the expiry of the six months of grace granted under the same section or again from the date of the order absolute passed under section 87 of the same Act. In Second Appeal No. 1014 of 1896 decided by me on the 5th April 1898, I. L. R., 20 All., 358, I held that the right to pre-empt accrued, not from the date fixed in the decree under section 86 as the date on which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtained the order absolute under section 87 of the Transfer of Property Act, 1882. My reasons for the view I took are fully set out in that judgment, and I need say no more here than that I still adhere to the view I then took. The learned advocate for the respondent argued that the date should be calculated from the time on which the mortgagor having failed to make payment within the time of grace would find any application made by him for further grace barred, namely, three years from the expiry of the period of grace. This point did not arise in Second Appeal No. 1014 of 1896. It has been considered by the High Court of Calcutta in the case of *Poresh Nath Mojumdar v. Ramjodu Mojumdar*, I. L. R., 16 Cal., 246. It was there held, and I agree with the view there taken, that the mortgagor could redeem at any time until the order absolute under section 89 was made; in other words, that his right to redeem was not extinguished until such order was made. I am therefore of opinion that the view taken by the Court below was erroneous, and as that Court decided in error on a preliminary point I would set aside its decree and remand the suit to the Court of First Instance under section 562 of the Code of Civil Procedure.

Banerji, J.—I am of the same opinion. Two questions arise in this appeal. The first is as to the period of limitation applicable to a suit of this nature; the second is as to the date from which limitation should be computed. The first question is concluded by the recent ruling of the Full Bench to which the learned Chief Justice has referred. The property being a share in [378] an undivided zamindari mahal is not capable of physical possession: therefore article 10 of the second schedule of the Limitation Act is not applicable. There being no other specific article which can govern the suit, the only article which can apply would be article 120, which prescribes a limitation of six years.

As regards the second question, I also agree in holding that limitation should be computed from the date on which the order absolute for foreclosure was made under section 87 of the Transfer of Property Act. So long as the right of the mortgagor to redeem has not become extinct the mortgaged property does not vest absolutely in the conditional vendee. Section 87 provides that if payment is not made within the time fixed in the decree passed under

section 86; the plaintiff mortgagee may apply for an order that the mortgagor should be debarred absolutely of his right to redeem, and it further provides that on the passing of such order the debt secured by the mortgage shall be discharged. These provisions clearly show that so long as an order is not passed under that section the mortgagor's right to redeem and the mortgage debt do not come to an end. Consequently it is only on the passing of an order under section 87 that the mortgagee, conditional vendee, becomes the absolute vendee of the mortgaged property. That being so, a right to claim pre-emption in respect of a sale which has thus become absolute can only arise on the date of the order absolute for foreclosure made under section 87. The date from which limitation should be computed cannot be held to be the date on which the conditional vendee might have made his application for an order under section 87, because, as I have said, until the conditional vendee obtains his order under section 87 he continues to be the mortgagee, and it is only when he ceases to be the mortgagee and acquires the absolute right of the mortgagor that a claim for pre-emption can be preferred in respect of the transaction.

For these reasons I agree in holding that the plaintiff's claim was not barred, and that the Courts below have erred in [379] holding it to be so. I also agree in the order proposed by my learned colleague.

BY THE COURT.—The order of the Court is that the decrees of the Courts below are set aside, and the case is remanded to the Court of First Instance with directions to readmit it under its original number in the register and to proceed to determine the suit on its merits. The appellant will recover the costs of this appeal, and the costs hitherto incurred in the Courts below will abide the event.

Appeal decreed and cause remanded.

NOTES.

[See also (1898) 20 All., 446; (1902) 24 All., 479; (1905) 27 All., 501.]

[20 All. 379]

FULL BENCH.

The 20th April, 1898.

PRESENT :

MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, AND MR. JUSTICE AIKMAN.

Shiam Behari Lal and another.....Defendants

• versus

Rup Kishore and others.....Plaintiffs'.

Civil Procedure Code, sections 312 and 320—Act No. VII of 1868, sections 36 and 55—Execution of decree—Decree transferred to Collector for execution—Suit by auction purchaser to confirm a sale which had been set aside by the Collector.

At a sale of ancestral property held by a Collector executing a decree transferred to him under section 320 of the Code of Civil Procedure the plaintiffs, decree-holders, were the

* Second Appeal No. 1053 of 1895, from a decree of Lala Pyare Lal, Officiating Judge of Mainpuri, dated the 20th July 1895, confirming a decree of Maulvi Mazhar Hussain, Subordinate Judge of Mainpuri, dated the 35th September 1894.

auction purchasers. On the application of the defendants, judgment-debtors, the sale was set aside by the Collector. Thereupon the plaintiffs, decree-holders, auction-purchasers, filed a suit for a declaration that the auction sale was a valid one and that the order of the Collector setting it aside was ineffectual. *Held*, that such a suit was maintainable.

Shib Singh v. Mukat Singh, I.L.R. 18 All., 437, overruled. *Ugar Nath Tiwari v. Bhonath Tiwari*, Weekly Notes, 1891, p. 41, and *Diwan Singh v. Bharat Singh*, I. L. R., 3 All., 206, referred to.

THE plaintiffs in this case obtained a decree against the defendants, and in execution thereof they obtained an order for the sale of the ancestral property of the defendants. In accordance [380] with the rules prescribed by Government in respect of the sale of ancestral property, the execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure. The property of the defendants was put up for sale on the 20th of September 1893, and was purchased by the plaintiffs with the leave of the Court. The defendants then applied to have the sale set aside on the ground of irregularity in the publication of the sale. The Collector, by his order of the 16th of November 1893, set the sale aside. Thereupon the plaintiffs brought the present suit for a declaration that the auction sale was a valid one and that the order of the Court setting it aside was ineffectual. The Court of First Instance (Subordinate Judge of Mainpuri) decreed the claim. The defendants appealed. The Lower Appellate Court (District Judge of Mainpuri) dismissed the appeal. The plaintiffs appealed to the High Court, and were there permitted to take the plea, which had not been taken in their memorandum of appeal, that no such suit as that brought by the plaintiffs would lie. This question was referred to a Bench of three Judges.

Mr. *Roshan Lal* and *Munshi Gobind Prasad*, for the Appellants.

Pandit Sundar Lal and *Pandit Baldeo Ram Dave*, for the Respondents.

The judgment of the Court (BLAIR, BANERJI and AIKMAN, JJ.) was delivered by *Banerji, J.* :—

The simple question referred to this Bench is whether the present suit is maintainable. The facts out of which the suit arose were these. The plaintiffs obtained a decree against the present defendants, and in execution thereof they obtained an order for the sale of the ancestral property of the defendants. In accordance with the rules prescribed by Government in respect of the sale of ancestral property, the execution of the decree was transferred to the Collector under section 320 of the Code of Civil Procedure. The property of the defendants was put up for sale on the 20th of September 1893, and was purchased by the plaintiffs with the leave of the Court. The defendants then [381] applied to have the sale set aside on the ground of irregularity in the publication of the sale. The Collector, by his order of the 16th of November 1893, set the sale aside. Thereupon the present suit was brought by the plaintiffs for a declaration that the auction sale was a valid one and that the order of the Collector setting it aside was ineffectual. The Court of First Instance decreed the claim, and the Court of first appeal affirmed the decree of the first Court. The defendants prefer this appeal and the learned counsel who appears for them obtained the leave of the divisional Court which referred the case to this Bench to argue the question whether the suit was maintainable. In support of the contention raised on behalf of the appellants is the ruling of this Court in *Shib Singh v. Mukat Singh*, I.L.R., 18 All., 437. On the other hand, the contrary opinion is supported by the ruling in *Ugar Nath Tiwari v. Bhonath Tiwari*, Weekly Notes, 1891, p. 41. In consequence of these conflicting rulings the question whether a suit of this kind can be maintained has been referred

to this Bench. The decision in the case last mentioned followed the decision of the majority of the Full Bench in the case of *Diwan Singh v. Bharat Singh*, I. L. R., 3 All., 206. That case was decided with reference to the provisions of section 312 of Act No. X of 1877. Act No. XIV of 1882 has made no alteration in the wording of section 312. There can be no doubt that the last paragraph of that section is not happily worded. An order under that section must be either an order confirming the sale or an order setting aside the sale. An order of the latter description cannot be sought to be set aside on the ground of irregularity, that is, of the existence of irregularity in publishing or conducting the sale. The suit which is forbidden by the last paragraph of the section cannot therefore be a suit to set aside any order passed under the section, but must be a suit to set aside an order passed under the first paragraph of the section only. Consequently, as held by the majority of the Full Bench in the case referred to, there is no prohibition against the [382] institution of a suit to set aside an order refusing to confirm a sale unless by subsequent legislation an alteration has been made in the law in respect of the maintenance of such a suit. We must assume that when the Legislature re-enacted in Act No. XIV of 1882 the provisions of section 312 of Act No. X of 1877 it did not intend to make any alteration in the law as it was interpreted by the majority of the Full Bench in the case referred to. The learned Judges who decided the case of *Shih Singh v. Mukat Singh*, I. L. R., 18 All., 437, were of the opinion that Act No. VII of 1888, by which section 320 of Act No. XIV of 1882 was amended, took away from the Civil Courts the right to entertain a suit for the confirmation of a sale which had been set aside by the Collector in the exercise of the powers given to him under the rules framed by the Government in pursuance of the provisions of section 320 as amended by Act No. VII of 1888. With this opinion we are unable to agree. By section 30 of Act No. VII of 1888 the third, fourth and fifth paragraphs of section 320 as they now exist were added. The third paragraph empowers the Government to frame rules conferring upon the Collector or any gazetted subordinate of the Collector the powers which the Court which transferred the decree to the Collector might exercise in execution of the decree, if the execution thereof had not been transferred to the Collector. Such rules have been framed by the Government. The penultimate paragraph of that section provides that the powers conferred on the Collector, or any gazetted subordinate of the Collector, or upon any appellate or revisional authority, by the rules so framed, cannot be exercised by the Court or by any Court exercising appellate or revisional authority in respect to the decrees or orders of that Court. The words "the Court" clearly refer to the Court alluded to in the previous portion of the section, namely, the Court to which application was made for the execution of the decree and which as such Court transmitted the decree to the Collector for execution. So that the penultimate paragraph of [383] section 320 as amended by Act No. VII of 1888 does not take away the jurisdiction of any Court other than the Court referred to in it. If the execution of the decree had taken place in the Civil Court which transmitted it to the Collector, a suit of the nature of the present suit would, under the Full Bench ruling in *Diwan Singh v. Bharat Singh*, I. L. R., 3 All., 206, have been maintainable. The fact that the Collector exercises the powers which the Civil Court could have exercised but for the provisions of section 320 and the rules framed under it cannot deprive the ordinary Civil Courts of the jurisdiction to entertain such a suit. For the above reasons our answer to the reference is that the suit is maintainable.

Both the parties consent that this appeal be decided by this Bench. As the only point which really arises in this appeal was the plea which has been

disposed of by the above decision and the other pleas in the memorandum of appeal have been abandoned, the result is that this appeal fails and is dismissed with costs.

Appeal dismissed.

NOTES.

[This was followed in (1903) 25 All. 855 ; (1909) 5 N. L. R., 121.]

[20 All. 383]

APPELLATE CIVIL.

The 21st April, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Girdhar Das and others..Decree-holders

versus

Har Shankar Prasad.....Judgment-debtor.*

Execution of decree—Limitation—Civil Procedure Code, section 326—

Execution as to immoveable property of judgment-debtor stayed

by reason of the property being in charge of the Collector.

The plaintiffs obtained in 1874 a decree for money against the defendant. In 1879, by an order under section 326 of the Code of Civil Procedure, the immoveable property of the judgment-debtor was placed under the management of the Collector. Before this order was made, and during the period when the judgment-debtor's property was in charge of the Collector, various applications for execution were made by the decree-holders. Finally, in 1896, about [384] ten years after the last preceding application, the decree-holders applied for execution of their decree shortly after the property had been released by the Collector. Held that as regards the immoveable property of the judgment-debtors, against which execution was sought, the application was not barred by limitation, inasmuch as the decree-holders had no remedy by execution against that property until the Collector's management had ceased.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Baldeo Ram Dave and Babu Baidiya Nath Das, for the Appellants.

Munshi Ram Prasad, for the Respondent.

Burkitt and Dillon, JJ.—This is an appeal against an order dismissing an application for a certificate of non-satisfaction of a decree which prayed that the decree be sent to the Court of the Judge of Ghazipur for execution. The admitted facts are these. The decree was passed in 1874, and several applications for execution were made respecting it down to October 1879. In October 1879, by an order passed under section 326 of the Code of Civil Procedure, the Collector of Ghazipur was authorised to provide for the satisfaction of decrees due and outstanding against the judgment-debtor, one Babu Har Shankar Prasad. Under the provisions of section 326 the Collector is armed with all the powers given by sections 320 to 325C, both inclusive, and all the provisions of those sections apply in such a case. The appellants

* First Appeal No. 149 of 1897 from a decree of Babu Nilmadhub Rai, Subordinate Judge of Benares, dated the 27th March 1897.

here applied to the Collector to have satisfaction of their decree, but the request was refused, as will be seen from the case of *Girdhar Das v. The Collector of Ghazipur*, Weekly Notes, 1896, p. 69. It is quite unnecessary here to discuss the reasons why the appellants' application for satisfaction of their decree was refused by the Collector. Suffice it to say that it was refused. The appellants appear to have made some subsequent applications in 1880 and 1886, the results of which we do not know. The present application was made in July 1896, that is, not long after the Collector had completed the duties imposed on him by sections 322 to 326. It was urged in the [385] Court below that the application was time-barred, and the learned Subordinate Judge has affirmed that contention. In our opinion the decision appealed against is not correct. We have no doubt that under the last clause of the first paragraph of section 325A no Court could have issued any process of execution on the appellants' decree against any immoveable property in the district of Ghazipur belonging to the judgment-debtor as long as it was in the hands of the Collector. It may be that execution might have issued against the person or moveable property of the judgment-debtor, but with that we have no concern now. Turning now to the last paragraph of section 325A we find that, so long as the Collector is able to exercise any of the powers or duties imposed on him by sections 320 to 325C, which in this case was the period from October 1879 to March 1896, the period during which he exercised such powers shall be excluded from the period of limitation applicable to the execution of any decree affected by the provisions of section 325A in respect of any remedy of which the decree-holders have thereby, that is under this section, been temporarily deprived. Now we have no doubt that the decree in question here was affected by the provisions of section 325A, inasmuch as the last clause of the first paragraph of section 325A prevented a Civil Court in execution of a decree for money from issuing any process against the judgment-debtor's immoveable property in the hands of the Collector. The decree in this case is a decree for money. It follows therefore that the decree-holders were thereby, that is by the last clause of the first paragraph of section 325A, temporarily deprived of remedy against the immoveable property of their judgment-debtor in the district of Ghazipur. We think therefore that in respect of the property as to which they were temporarily deprived of their remedy, the decree-holders are now entitled to execution. But we desire to make it clear that the execution can be in respect only of the property referred to in the last clause of section 325A, that is to say, the property as to which their remedy for execution was [386] temporarily withheld. We allow this appeal. We set aside the decree of the lower Court with costs, and we direct that Court to issue a certificate of non-satisfaction if the decree has not been satisfied. The appellants will have their costs in this Court.

Appeal decreed.

[20 All. 336]

The 22nd April, 1896.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Hamid-ud-din.....Judgment-debtor

versus

Kedar Nath.....Decree-holder.*

Act No. IV of 1882 (Transfer of Property Act), section 90—Application for a decree over against non-hypothecated property—Balance legally recoverable—Limitation.

On an application under section 90 of the Transfer of Property Act, 1882, the time to be looked at in considering whether the balance sought to be recovered is legally recoverable from the mortgagor is the date of the institution of the suit and not the date of the making of the application under section 90. *Bageshri Dial v. Muhammad Naqi*, I. L. R., 15 All., 331, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Amir-ud-din*, for the Appellant.

Mr. *Abdul Majid*, for the Respondent.

Banerji and Aikman, JJ.—This appeal arises out of an application for a decree under section 90 of Act No. IV of 1882. The judgment-debtor is the appellant before us, and the grounds taken by him are two:—first, that the application was barred by limitation, and secondly, that the matter is *res judicata* in consequence of the decree passed in the original suit. The suit was one for sale upon a mortgage of the 16th of September 1889. The amount secured by the mortgage was payable on demand, and the mortgage-deed was a registered instrument. The suit for sale was brought on the 29th of January 1891. The plaintiff asked for a decree not only for sale of the mortgaged property, but also against the person and the other property of the mort-[387]gagor. The Court of First Instance refused to make a decree against the person of the mortgagor and against the other property, and limited its decree to one for sale of the mortgaged property. That decree was affirmed by the Court of First Appeal, which held that the claim for a decree against the mortgagor's person and other property was premature. The mortgagee caused the mortgaged property to be sold in execution of the decree obtained by him. The proceeds of the sale having proved insufficient to pay the amount due to him, he made the present application on the 3rd of August 1895 for a decree under section 90 of Act No. IV of 1882. It is contended that since the Court in the original suit refused to make a decree against the person of the mortgagor and against non-hypothecated property, it is not open to the decree-holder now to ask for such a decree under section 90. We are unable to accede to this contention. We agree with the observations contained in the judgment of this Court in *Musaheb Zaman Khan v. Inayat Ullah*, I. L. R., 14 All., 513. In that judgment it was observed:—"In our opinion section 13 of the Code of Civil Procedure would not apply to an application under section 90 for a decree, no matter whether the plaintiff had or had not claimed originally in his suit subsequent relief, or whether, if claimed, such subsequent relief, had been allowed or

* Second Appeal No. 165 of 1896 from an order of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 16th December 1895, reversing a decree of Babu Bhawani Chandar Chakravarti, Munsif of Sambhal, dated the 7th September 1895.

disallowed by the Court when making the decree under section 88, the time for adjudicating on the claim for subsequent relief not arriving until the decree under section 88 had been exhausted." As regards the second plea, namely, that of limitation, we have to consider whether, under section 90, the balance which must be legally recoverable should be a balance which might be legally recoverable on the date of the institution of the suit or on the date of the application for a decree under the section. We are clearly of opinion that the former is the date which must be looked to. If we were to hold otherwise, serious injustice might result. The debt might be a debt not barred by limitation and legally recoverable from the mortgagor personally on the date [388] of the institution of the suit, if the mortgagee chose to ask for a decree against his person only. If he sued for sale, the proceedings connected with the sale might be protracted, as they often are, for such a length of time that the mortgagee's personal remedy, if he were to claim such remedy after the sale, would be barred. This certainly could not have been contemplated by the Legislature. Our view is supported by the observations contained in the ruling already quoted, and also by the judgment of our brother BURKITT in *Bageshri Dial v. Muhammad Naqi*, I. L. R., 15 All., 331. For these reasons we are of opinion that if the balance would have been legally recoverable from the mortgagor otherwise than out of the mortgaged property at the date of the institution of the suit, the mortgagee would be entitled to a decree under section 90. We have next to consider whether on the 29th of January 1891, when the suit of the decree-holder was brought, the balance now sought to be realized was legally recoverable personally from the mortgagor. The Lower Appellate Court has found that payments were made of interest as such on the 22nd of June 1884 and the 26th of February 1886. As the period of limitation for a suit personally against the debtor was six years, by reason of the mortgage-deed being registered, these payments save the operation of limitation under section 20 of the Indian Limitation Act, as the first payment was made within six years of the date of the bond, that being the date on which limitation began to run, and the suit was brought within six years of the date of the second payment. Moreover, the Lower Appellate Court has found that letters acknowledging liability were written by the debtor on the 13th of September 1885 and the 17th of June 1888; from the dates of those letters also the suit was, with reference to section 19 of the Limitation Act, within time. For the above reasons we hold that the balance now claimed was legally recoverable, and the Lower Appellate Court has rightly overruled the objection of the judgment-debtor.

We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[The date of filing the suit is the one to be looked at:—(1908) 30 All., 388; (1906) 33 Cal., 867; (1906) 3 A. L. J., 403; (1901) A. W. N., 193.]

[389] REVISIONAL CRIMINAL.*The 25th April, 1898.***PRESENT:****MR. JUSTICE DILLON.**

Queen-Empress
versus
Chittar and another.*

Act No. XLV of 1860 (Indian Penal Code), section 215—Agreeing or consenting to take illegal gratification—Nature of agreement or consent.

In order to constitute the offence punishable under section 215 of the Indian Penal Code it is necessary that the person who is willing to take and the person who is willing to give the illegal gratification must agree not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take.

THIS was an application for revision of an order passed by a Deputy Magistrate of the Muzaffarnagar district convicting the petitioners Chittar and Nisar of an offence punishable under section 215 of the Indian Penal Code and sentencing them each to eighteen months' rigorous imprisonment. The order in question was confirmed on appeal by the Sessions Judge of Meerut on the 14th of March 1898.

It appears that a bullock belonging to one Boli was stolen on the night of the 2nd of January 1898. Boli, who was a resident of the village Bhahisa, took with him certain of the residents of that village and proceeded to the adjoining village of Harya Khara, of which village Chittar was the headman and Nisar the lambardar. There a panchayat was called at which Chittar and Nisar were both present. At that meeting the petitioners demanded thirty rupees as a reward for returning the bullock. Boli declined to pay this sum, but offered fifteen rupees, which offer was refused by the petitioners, and the negotiation therefore fell through. A few days afterwards another interview took place between the parties, when the demand and offer above indicated were renewed, and with a similar result.

It was argued on these facts that there had been neither an agreement nor consent to take a gratification within the meaning [390] of section 215 of the Indian Penal Code, nor an attempt to commit the offence defined by that section.

Mr. W. Wallach, for the Applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

Dillon, J.—This is an application for revision of an order passed by Pandit Prem Nath, Deputy Magistrate of Muzaffarnagar, convicting the petitioners of an offence under section 215 of the Indian Penal Code, and sentencing them to eighteen months' rigorous imprisonment each, which order was confirmed upon appeal by the Sessions Judge of Saharanpur on the 14th of March 1898.

The facts upon which the conviction was had are as follows:—A bullock belonging to Boli, the complainant in this case, was stolen on the night of the 2nd of January of this year. Boli, who was a resident of Bhahisa, took with him certain of the residents of that village and proceeded to the adjoining village of Harya Khara, of which the petitioner Chittar is the headman

* Criminal Revision No. 154 of 1898.

and the petitioner Nisar the lambardar. There a panchayat was called, at which the two accused were present. What happened at that meeting of the villagers is deposed to by the witnesses for the prosecution in this case. It is in evidence, and has been found as a fact by both the lower Courts, that the petitioners demanded thirty rupees as a reward for returning the bullock. The complainant declined to pay this sum, but offered fifteen rupees, which offer was refused by the petitioners, and the negotiation therefore fell through. A few days afterwards another interview took place between the parties, when the demand and offer above indicated were renewed, and with a similar result.

It is upon this statement of facts that the question arises whether the petitioners have committed an offence under section 215 of the Indian Penal Code, or whether they are guilty of an attempt to commit such offence.

The provisions of the section are as follows:—"Whoever takes, or agrees or consents to take, any gratification under [391] pretence or on account of helping any person to recover any movable property of which he shall have been deprived by any offence punishable under this Code, shall, unless he uses all means in his power to cause the offender to be apprehended and convicted of the offence, be punished with imprisonment of either description. * * *"

In the first place, I will consider the question whether the petitioners have committed the offence punishable under this section. Did the petitioners take, or agree or consent to take, any gratification? I think not. To my mind the words "takes, or agrees or consents to take," as used in this section imply that the person taking the gratification and the person giving it have agreed; not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take. Of course, if a person has actually taken a gratification from another, it must be assumed that he agreed to take, and the other to give it in that particular form or shape; but where the gratification has not actually passed and there is a disagreement as to the form or shape that the gratification is to take the idea of agreement or consent is negatived. In this view the petitioners neither took nor agreed nor consented to take any gratification, and did not therefore bring themselves within the purview of section 215 of the Indian Penal Code. It remains to consider whether they are guilty of an attempt to commit the offence mentioned in section 215 of the Indian Penal Code. In my opinion an attempt to take a gratification within the meaning of section 215 of the Indian Penal Code necessarily includes the idea of a concurrence of wills between the giver and taker; with this much superadded thereto, that some act has been done preliminary to the act of taking. In other words, an attempt is a stage in the commission of the offence which is intermediate between the agreement or consent and the actual taking.

Holding, as I do, this view of the law, it follows that in my opinion the petitioners have committed neither the offence made [392] punishable by section 215 of the Indian Penal Code nor that made punishable by section 215 read with section 511 of the Indian Penal Code; and it only remains to add that, acquitting them of the charge on which they have been convicted, I reverse their convictions under section 215 of the Indian Penal Code and the sentences passed on them thereunder, and as the petitioners are on bail, I direct that their bail bonds be cancelled.

[20 All. 393]

APPELLATE CIVIL.

The 28th April, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Nand Kishore Lal.....Defendant

versus

Suraj Prasad.....Plaintiff.*

Act No. IV of 1882 (Transfer of Property Act), sections, 122 and 123—Gift—Registration—Registration of deed of gift of immovable property after the death of the donor.

A gift of immovable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor. *Hardei v. Ram Lal*, I. L. R., 11 All., 319, referred to.

THE facts of this case sufficiently appear from the judgments of the Bench.

Mr. *Abdul Raoof* and Pandit *Sundar Lal*, for the Appellant.

Munshi *Gobind Prasad*, for the Respondent.

Blair, J.—The suit out of which this second appeal arises was a suit in which the heir-at-law of Gaya Prasad claimed possession of property late of Gaya Prasad. The defendant set up a deed executed by Gaya Prasad and alleged to be duly registered, which purported to be a deed of gift transferring to the defendant the property in question. The Court of First Instance dismissed the plaintiff's claim, holding the deed of gift to be a valid transfer to the defendant of the property in question. The Court of first appeal reversed the decision of the Court of First Instance upon [393] the finding that no good and valid deed of gift had ever been executed by Gaya Prasad and "completed by the donor, who died before it could be registered." That finding disposes of the appeal. The learned Judge did not enter upon the other questions raised in it. The defendant appeals to this Court upon the contention that under the circumstances of the case the deed in question is a good gift in law. The other grounds of appeal were not argued by the appellant's advocate, such arguments in his opinion being unnecessary at this stage. The provisions of the Transfer of Property Act in relation to deeds of gifts are to be found in sections 122 and 123. Section 122 defines gift, such definition covering all gifts whether of movable or immovable property. Section 123 in its first clause deals with instruments by which transfer by way of gift may be made of immovable property. There is a condition for the validity of every gift laid down in section 122 that there must be an acceptance by the donee during the lifetime of the donor and while he is still capable of giving. It might have well been provided by the Legislature, had it so intended, that such acceptance could not be effectively given until after the deed of gift had been registered. I find no such provision in that section, and am not inclined to impose restrictions not expressly enacted by law. Section 47 of the Registration Act provides that a registered deed shall operate from the time from which it would have commenced to operate if no registration thereof were required or made, and

* Second Appeal No. 218 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 4th February 1896, reversing a decree of Pandit Rai Indar Narain, Subordinate Judge of Gorakhpur, dated the 12th November 1895.

not from the time of its registration. In this case beyond doubt registration was effected *post mortem*, and we have the authority of the Full Bench case of *Hardei v. Ram Lal*, I. L. R., 11 All., 319, that such registration is not open to dispute. The question whether a good and valid acceptance of a gift may be made, in the case of immovable property, before registration, is not expressly decided in that case, but the effect of the decision apparently was to uphold the deed of gift in the case where the acceptance had been effected previous to registration. The result is that I would set aside the decree of the learned [391] Judge and remand the case under section 562 of the Code of Civil Procedure for disposal upon the merits. I would also grant the appellant costs of this appeal.

Aikman, J.—I also am of opinion that this appeal must be allowed, and I concur in the order proposed. The plaintiff's suit was to recover possession of the disputed property. This suit was resisted by the defendant on the strength of a deed of gift executed in his favour by Gaya Prasad, the last owner of the property. The Court of First Instance found in favour of this deed of gift and dismissed the plaintiff's claim. The plaintiff appealed to the District Judge. The first ground set forth in the memorandum of appeal to the lower Court is as follows:—"It is admitted by the lower Court that the deed of gift in dispute was not registered during the life-time of the donor, therefore its registration after the death of the donor is not sufficient to transfer the property." This plea was given effect to by the learned Judge. He says:—"As a matter of fact, there was no deed of gift completed by the donor, who died before it could be registered. The document was subsequently registered by the donor's widow, and respondent contends that this registration completed the gift. It did nothing of the sort. The registration may have been all right under section 35 of the Registration Act, and the document as being registered is fully admissible in evidence. But registration will not make a gift. The donee cannot accept until the donor has divested himself of his title. The donor can only divest himself of his title by a registered deed, and when the donor in this case died, there was no registered deed in existence." The learned District Judge has by the above decision held that section 123 of the Transfer of Property Act means that in order to be valid a deed of gift of immovable property must be registered during the life-time of the donor. In my opinion there is no ground for so holding. The word "registered" is defined in section 3 of the Transfer of Property Act, and there cannot be any doubt that the deed in question is a registered deed within the meaning of the definition. Section 4 of the same Act also provides that section 123 [396] shall be read as supplemental to the Indian Registration Act of 1877. There can be no doubt then with reference to these sections that the deed of gift is a "registered instrument." The Legislature might, had it seen fit, have enacted that for the purposes of making a gift of immovable property, the transfer must be effected by an instrument signed by or on behalf of the donor, attested by at least two witnesses, and registered in the life-time of the donor. But that is not what has been enacted. For the above reasons I am of opinion that the view taken by the District Judge is erroneous.

BY THE COURT.—The Order of the Court is that the appeal is allowed, the decree of the Lower Appellate Court is set aside, and the case remanded under the provisions of section 562 of the Code of Civil Procedure for decision of the other grounds raised in the memorandum of appeal to the lower Court. The appellant will receive his costs of this appeal.

Appeal decreed and cause remanded.

NOTES.

[This was approved in (1906) 33 Cal., 584; (1908) 32 Bom., 441. See, however, (1912) 14 I. C., 61 (All.).]

[20 All. 396]

The 4th May, 1898.

PRESENT :

MR. JUSTICE AIKMAN.

Muhammad Safdar Husen.....Defendant

versus

Puran Chand and others.....Plaintiffs.*

Civil Procedure Code, section 25—Transfer—Application to High Court after rejection of a similar application by the District Judge—Application disallowed.

Where an application to a District Judge to transfer a suit pending in the Court of the Subordinate Judge to his own file had been granted, the High Court declined to entertain an application for transfer of the same suit from the Court of the District Judge. *Farid Ahmad v. Dulari Bibi*, I. L. R., 6 All., 233, referred to.

THE facts of this case sufficiently appear from the order of the Court.

The Hon'ble Mr. Conlan and Mr. W. K. Porter, for the Applicant.

Pandit Moti Lal, for the Opposite Parties.

Aikman, J.—This is an application asking this Court to transfer a civil suit now pending in the Court of the District [396] Judge of Cawnpore to the Court of some native Subordinate Judge. The application is made by the defendant in the suit. A rule was obtained calling upon the plaintiff to show cause why the transfer asked for should not be made. The parties have appeared to-day. I have heard the arguments of counsel on each side and considered the affidavits and counter-affidavits filed by the plaintiffs and the defendant. In my opinion the rule must be discharged. It appears that the suit was instituted in the Court of the Subordinate Judge of Cawnpore on the 27th of March 1897. Owing to the pressure of case work in that Court the date fixed for the trial of the case was the 2nd of January 1899. On the ground that some of the witnesses who were to be examined were advanced in years, the plaintiffs moved the District Judge to call up the case to his own file in order that it might be taken up at an early date. The District Judge granted this application, and fixed the 30th of March 1898 as the date upon which the case was to be taken up. Before it came on for hearing the rule referred to above was obtained. The learned advocate for the plaintiffs in showing cause argued on the strength of the ruling in *Farid Ahmad v. Dulari Bibi*, I. L. R., 6 All., 233, that this Court ought not to grant the application for transfer, as to do so would be to review an order passed by the District Judge under section 25 of the Code of Civil Procedure, which in the case cited it was held this Court was incompetent to do. I am of opinion there is force in this contention. I am further of opinion that on the merits, and with reference to the counter-affidavit filed by the plaintiffs, sufficient cause has not been shown for removing the suit from the Court of the District Judge. If the parties think that the District Judge is not sufficiently acquainted with the character in which the disputed signatures are written, it will be open to

* Miscellaneous Application No. 94 of 1898.

them to call the evidence of experts. For the above reasons I discharge the rule with costs. Under Rule 213 of the Rules of Court of the 18th of January 1898, I fix the advocate's fee at Rs. 64.

Rule discharged.

NOTES.

[In (1910) 11 C. L. J., 218 this was explained to have proceeded on the merits of the case, without denying the jurisdiction to order a transfer.]

[397] *The 4th May, 1898.*

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Pirbhu Narain Singh.....Decree-holder

versus

Rup Singh.....Judgment-debtor. *

Execution of decree—Duties of executing Court—Act No. IV of 1882 (Transfer of Property Act), section 88—Decree for sale on a mortgage wrongly allowing interest after date fixed for payment.

Where a decree for sale under the Transfer of Property Act as framed is ambiguous, the Court executing it must put its own construction on it, and if possible will construe it as a decree properly framed according to law; but where there is no ambiguity in the decree, the executing Court is bound to execute it according to its terms, whether the decree be right or wrong. *Amolak Ram v. Lachmi Narain*, I. L. R., 19 All., 174, and *Badshah Begam v. Hardai*, Weekly Notes, 1898, p. 17, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the Appellant.

Babu *Parbati Charan Chatterji*, for the Respondent.

Burkitt and Dillon, JJ.—This is an appeal from an order of the Subordinate Judge of Mainpuri passed in execution of a decree which Maharaja Pirbhu Narain Singh had obtained against Raja Rup Singh. The suit in which the decree was passed was a suit upon a mortgage for recovery of a sum of money secured by the mortgage by sale of the property mortgaged. The decree under section 88 of the Transfer of Property Act was passed on the 27th of May 1895 and the order absolute under section 89 of the same Act on the 6th of March 1896. The decree was then sent for execution to the Collector, as the property ordered to be sold was ancestral property. During the course of those proceedings the judgment-debtor applied to the Subordinate Judge, objecting to the decree being executed for the full amount stated in the order absolute. The point he took was that the decree under section 88 did not allow interest on the mortgage debt after the 27th of November 1895. The Subordinate Judge, disregarding the order absolute which had been passed on the 6th of March 1896, allowed the objection, and, by order [398] dated the 27th of June 1897, directed that all interest subsequent to the 27th of November 1895 should be disallowed, and ordered the execution clerk to "prepare a correct account" of the money due on the mortgage; that is to say, the Subordinate Judge practically directed the preparation of a new order absolute, notwithstanding that no appeal had been preferred against the order absolute prepared on the 6th of March 1896. In our opinion the latter order absolute

* First Appeal No. 216 of 1897, from an order of Maulvi Muhammad Mazhar Husain Khan, Subordinate Judge of Mainpuri, dated the 26th June 1897.

is now final and conclusive in the case. It is contended by the respondent's *vakil* that his client was not properly served with notice of the application on which that order was made, and that he did not come to know of it until notice was served on him under section 248 of the Code of Civil Procedure. Whether that statement be true or not is immaterial here. If the respondent was unaware of the proceedings taken to have that decree prepared, he might perhaps have applied under section 108 of the Code of Civil Procedure to have that order absolute set aside, or he might have asked for a review of judgment, or he might have appealed against it to a higher tribunal. He adopted neither of these courses. That order absolute, as we have said before, is now final and conclusive, and this Court sitting as an execution Court cannot enter into the question as to whether that order absolute, which is the decree in execution before us, was or was not properly prepared. All that this Court as an execution Court can do is to see that that decree is executed as it stands. There can be no doubt that the order absolute does give the decree-holder interest after the 27th of November 1895. On this finding it is almost unnecessary for us to enter into the question as to whether the decree under section 88 passed on the 27th of May 1895 did or did not give interest after the 27th of November 1895. On that point, however, we have no doubt. That decree declared that on the date first mentioned Rs. 47,410-4 will be payable to the plaintiff. Of that sum Rs. 40,000 was the principal sum secured by the mortgage, Rs. 5,412 was for interest up to the date of suit as mentioned in the plaint, and the remainder, Rs. 1,984-4, were [399] for costs of the suit. This sum of forty-seven thousand four hundred and odd rupees did not include any interest after the date of the institution of the suit. The decree then goes on to provide for interest between the institution of the suit and the 27th of November 1895, by directing the judgment-debtor to pay Rs. 47,410-4-0 with interest during the pendency of the suit on the 27th of November 1895. It then went on to direct that the defendant should pay future interest at one per cent. *per mensem*. It does not in so many words say that that interest shall run up to the date of payment, but we have no hesitation in finding that such was the meaning and intention of the decree. Therefore, in our opinion the order absolute passed on the 6th of March 1896 was right in allowing interest subsequent to the 27th of November 1895. It was contended that the Court hearing the suit had no power to award interest after the 27th of November 1895, and in support of that proposition the case of *Amolak Ram v. Lachmi Narain*, I. L. R., 19 All., 174, was cited. In our opinion that case does not apply here, as explained by one of us in the case of *Badshah Begum v. Musammat Hardai*, Weekly Notes, 1898, p. 17. If there were any ambiguity in the decree under section 88 and the execution Court had to construe that ambiguous decree, the execution Court would no doubt be right in assuming that the decree was one strictly within the terms of the law and that it refused *post diem* interest. Such, however, is not the case here. We are of opinion that the decree under section 88 clearly and unambiguously allowed interest subsequent to the 27th of November 1895. For the above reasons we are of opinion that the order of the Subordinate Judge must be reversed. We therefore allow this appeal, and, setting aside the order of the Subordinate Judge, we direct that execution shall proceed as heretofore on the order absolute of March 1896, by which interest was allowed after the 27th of November 1895. The appellant will have his costs in this Court.

Appeal decreed.

NOTES.

[See also (1899) 21 All., 361 ; (1907) 35 Cal., 221.]

[400] *The 6th May, 1898.*

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Bandhu Prasad.....Opposite Party

versus

Dhiraji Kuar.....Petitioner.*

Act No. VIII of 1890 (Guardian and Wards Act), section 34—Joint Hindu family—Guardian and minor—Court not competent to appoint a guardian to the property of a minor who is a member of a joint Hindu family.

It is not competent to a Court to appoint a guardian to the property of a minor when such minor is a member of a joint Hindu family and has no other property than his share in the joint family estate. *Jhabbu Singh v. Ganga Bishen*, I. L. R., 17 All., 529, and *Gurja v. Moher Singh*, Weekly Notes, 1896, p. 30, referred to.

IN this case the District Judge of Azamgarh had appointed one Bandhu Prasad as guardian of the property of a minor relative, Shimbhu Nath. Bandhu Prasad and Shimbhu Nath were members of a joint Hindu family. The mother of Shimbhu Nath applied to the Judge's Court stating that Bandhu Prasad had been dealing with the minor's property adversely to the interests of the minor, and praying that the Court would take steps for the protection of the minor. On this petition the Court after hearing the parties ordered the guardian to find security in Rs. 30,000 under section 34 of Act No. VIII of 1890, and to pay into Court a sum of Rs. 2,904-7-1 which had come into his hands by sale of some of the minor's property. From this order Bandhu Prasad appealed to the High Court.

Pandit *Moti Lai*, for the Appellant.

Burkitt and Dillon, JJ.—The order of the District Judge in this case cannot be supported. When in the application to be appointed guardian it was stated by the intending guardian that he and the intended ward were members of a joint and undivided Hindu family, and that the ward had no property other than his interest in the joint property, it was not competent to the Court to appoint a guardian of the property of the minor, and the application as far as it affected the property should have been rejected. This rule has been laid down in the case of *Jhabbu [401] Singh v. Ganga Bishen*, I. L. R., 17 All., 529. See also *Gurja v. Moher Singh*, Weekly Notes, 1896 p. 30, and also certain cases of the Calcutta and Bombay High Courts cited in *Jhabbu Singh v. Ganga Bishen*. We set aside the order passed relating to the grant of a certificate of guardianship of the property of the minor Shimbhu Nath, and we cancel the certificate in that respect. If the certificate purports to constitute the appellant guardian of the person of the minor we refrain from interfering as to that matter. We allow this appeal.

Appeal decreed.

NOTES.

[The Privy Council gave a similar ruling in (1908) 25 All., 407. See also (1905) 30 Bom., 152; (1912) 23 M. L. J., 706.]

* First Appeal from Order No. 6 of 1898, from an order of H. D. Griffin, Esq. District Judge of Azamgarh, dated the 20th December 1897.

[20 All. 401]

The 6th May, 1898.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Imdad Hasan Khan.....Defendant

versus

Badri Prasad and another.....Plaintiffs.*

Act No. IV of 1882 (Transfer of Property Act), section 72—Mortgagee compelled to pay Government revenue which should have been paid by the mortgagor—Remedies of the mortgagee.

Where a mortgagee has been compelled to pay Government revenue which should have been paid by the mortgagor, the mortgagee may either add the amount which he has so been made to pay to the amount of the mortgage debt under section 72 of the Transfer of Property Act, 1882, or he may sue the mortgagor separately to recover the amount so paid. If, however, he has sued separately and obtained a decree against his mortgagor, he cannot then add the amount due to the mortgage debt ; his two remedies are not concurrent.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Abdul Majid*, Mr. *Roshan Lal* and Pandit *Moti Lal*, for the Appellant.

Pandit *Sundar Lal* and Munshi *Gobind Prasad*, for the Respondents.

Knox, Acting C. J., and Banerji, J.—This was a suit for redemption of a mortgage made on the 29th of November 1871, by one Makhan Singh in favour of Imdad Hasan, defendant, the appellant before us. The mortgage was usufructuary [402] and was redeemable in the month of Chait. The mortgagee, instead of taking actual possession of the mortgaged property, granted a lease of it to the mortgagor on the 20th of December 1871. The rent reserved by the lease was equivalent to the interest payable on the mortgage, being Rs. 371-0-0 calculated at the rate, annas 11 per cent. per mensem. Both the deeds were registered on the same date, namely the 10th of January 1872. On the 29th of July 1876, Imdad Hasan, the mortgagee, sub-mortgaged the property to Chaudhri Jagan Singh and Chaudhri Man Singh, and on the 3rd of August 1876, he executed an agreement in favour of the aforesaid persons, undertaking to pay Rs. 540 per annum as interest. Man Singh died, leaving Anup Singh, defendant, as his heir. Under a private partition between Jagan Singh and Anup Singh the sub-mortgage was allotted to the share of Anup Singh, so that Jagan Singh has no longer any interest in the mortgaged property. In 1878 Makhan Singh sold twelve biswas out of the twenty biswas mortgaged by him to one Irfan Ali. Out of the amount of consideration for the sale-deed executed in favour of Irfan Ali the amount of the mortgage referred to above was left in his hands for payment to Imdad Hasan, the mortgagee, but no payment was made by him. Mohan Lal, the father of the present plaintiffs, held several simple mortgages over the same property from Makhan Singh, all of dates subsequent to that of the mortgage of the 29th of November 1871. He obtained a decree upon his mortgages in 1883 against Makhan Singh and Irfan Ali and in execution thereof he caused the property now in suit to be sold by auction and purchased it himself in 1886 and 1887.

It is by virtue of these purchases that the plaintiffs have brought the present suit for redemption of the mortgage of 1871. By the terms

* First Appeal No. 46 of 1896, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 7th November 1895.

of the lease granted to Makhan Singh by Imdad Hasan the former was to pay the revenue payable to Government. Default having been made in the payment of revenue, Imdad Hasan paid the same, and brought a suit against [403] Makhan Singh and Irfan Ali and obtained a decree on the 24th of December 1885, for recovery of the amount so paid by sale of the mortgaged village. In execution of that decree he caused a four biswa share to be sold in 1889 and purchased it himself. Subsequently he obtained other decrees against Makhan Singh for arrears of revenue and sought to bring the mortgaged property to sale. Mohan Lal, the father of the plaintiffs, preferred objections to the sale, and those objections prevailed. Thereupon Imdad Hasan brought a suit for possession against Makhan Singh, Irfan Ali and Mohan Lal and obtained a decree for possession on the 11th of December 1893. In 1894 the plaintiffs brought a suit for redemption of the mortgage of 1871, but that suit was dismissed on the ground that tender of the mortgage money had not been made in accordance with the terms of the mortgage in the month of Chait. The plaintiffs then deposited in Court Rs. 4,500-0-0 the principal amount of the mortgage, and brought the present suit for redemption against Imdad Hasan, the principal mortgagee, and Anup Singh, the sub-mortgagee from Imdad Hasan.

The suit was defended on two grounds: first, that the four biswa share which Imdad Hasan had purchased at auction had absolutely passed to him, and that the plaintiffs had no right to claim redemption of that share, and, secondly, that a sum of Rs. 23,340-0-0 was due upon the mortgage, and unless payment of that sum was made the plaintiffs could not redeem. It was alleged that, in addition to the principal amount of the mortgage, Rs. 10,897-3-5 were due on account of revenue payable for the mortgaged village, which the mortgagor had not paid, and which the mortgagee had paid for him, and for which he had obtained decrees against the mortgagor; that a further sum of Rs. 7,942-13-0 was due on account of arrears of interest payable on the mortgage for the years 1289 to 1295 Fasli, the measure of the interest being the amount of profits payable under the lease granted to the mortgagor; and that these [404] two sums together with interest amounted to the Rs. 23,310 referred to above.

The Court below has decreed the plaintiff's claim. It was of opinion that the Government revenue had all along been paid by Makhan Singh, the mortgagor, and that the mortgagee was not entitled to any amount on account of revenue. As for the profits, it held that there was no charge on the mortgaged property for the profits, and therefore it was not incumbent on the plaintiffs, in order to redeem the mortgage, to pay the arrears of profits that might be due to the mortgagee in his capacity of lessor.

The defendant mortgagee has preferred this appeal, and two questions have been raised on his behalf. First, whether the plaintiffs are entitled to claim redemption of the four biswa share purchased by Imdad Hasan, that is to say, what is the effect of the purchase of that share by Imdad Hasan, and, secondly, whether the mortgagee is entitled as such to the revenue paid and to unpaid profits.

As regards the first point we are of opinion that the contention of the appellant must fail. The principal ground upon which it is urged that it is no longer open to the plaintiffs to claim redemption of the four biswa share is, that in the suit brought by Imdad Hasan in 1893 he claimed proprietary possession of the four biswa share and obtained a decree. It appears, however, from the judgment of the Court in that suit (appellant's second book, page 1) that the question of proprietary right in regard to the four biswas was not

determined in that suit. On the contrary, as we read the judgment, the Court abstained from deciding that question. It simply held that Imdad Hasan being the mortgagee of the whole property was entitled to the possession of it, and that it was immaterial whether he had acquired any other rights in regard to any portion of that property. In this view the plaintiffs are not precluded from raising the question whether they are entitled to redeem the four biswa share purchased by Imdad Hasan. It is true that the decree in execution of which that share was sold was a decree which directed the sale of the whole of the mortgaged [405] property, but at the time when that suit was brought the mortgaged property had passed to Mohan Lal, the father of the plaintiffs, by virtue of the auction sales held in 1886 and 1887 at which he purchased the property. He was therefore a necessary party to Imdad Hasan's suit, and, as he was not impleaded in that suit, his right of redemption has not become extinct. Further, the mortgages in satisfaction of which Mohan Lal purchased the property were of dates prior to that of the charge created in favour of Imdad Hasan by the decree obtained by him in 1893, in execution whereof he caused that four biswa share to be sold. On this ground also the plaintiffs have priority over Imdad Hasan, and they are in our opinion entitled to sue for the redemption of the four biswa share referred to above. For these reasons we repel the first contention raised on behalf of the appellant.

The second contention of the appellant relates, as we have said above, to (1) the amount of revenue alleged to have been paid by the mortgagor for the mortgagor, and (2) the amount of profits payable under the lease taken by the mortgagor and not paid by him. Whilst it is urged on the one hand that the mortgage-deed and the lease constitute one mortgage transaction; that the relation between the parties as regards both the instruments is that of mortgagor and mortgagee; that the mortgagee is entitled under section 72 of Act No. IV of 1882 to add the amount of the revenue paid by him to the principal amount of the mortgage; that the amount of profits payable under the lease is in reality the amount of interest payable under the mortgage, and that redemption cannot be effected without payment of the amounts referred to above; it is contended on the other hand that the lease is a separate transaction by itself; that the rights and obligations arising under it are rights and obligations which exist between a lessee and his lessor, and that the amount which might be due to the mortgagee in this character of lessor cannot be taken into account in the present suit. The determination of the question raised on behalf of the appellant therefore turns upon the construction to be placed on the mortgage-deed and the lease. In [406] considering the nature of the transaction entered into by the parties under those documents what we have to look to is the intention of the parties, whether both the documents were intended to be parts of one and the same transaction or whether one was meant to have no connection with the other. After giving the two documents our best consideration we have come to the conclusion that they form one and the same transaction, namely, a usufructuary mortgage, the condition of that mortgage being the conditions contained in both the deeds. Our reason for arriving at that conclusion is that one of the two deeds cannot be considered apart from the other. In the mortgage-deed reference is made to the lease, and the latter deed refers to the former. In the mortgage-deed mention is made of the payment of interest, but the amount or rate of interest or the mode of payment is not distinctly specified or provided for. All that it says is that the mortgagee has been put into possession in this way that the mortgagor has agreed to pay him lease money under a lease "by fixing the profits at the rate of 11 annas per cent. per mensem," and that at the time of

redemption no reduction of interest would be asked for. The lease, however, provides for these matters in detail. It recites first the fact of the mortgage, and then states that the amount of the mortgage, Rs. 4,500, would be paid by four instalments, each payment being endorsed on the deed. Such a statement seems to be out of place in a deed which is a lease pure and simple. The deed next provides that after deduction from the principal of the amounts paid, "profits will be reduced in proportion to the reduction in the principal." It then goes on to say that the total amount payable, calculated at the rate of eleven annas per cent. per mensem, is Rs. 371, which is to be paid to the "mortgagee" (not lessor) "year by year, harvest by harvest, instalment by instalment, within each year," and in "case of default in payment of the profits within the year, at the expiry of an instalment, interest at the rate of one rupee per cent. per mensem will be charged."

If the transaction had been one of a lease independent of the mortgage, the rent reserved by the lease would not have been [407] calculated with reference to the amount of the mortgage, and it would not have been made liable to reduction proportionately to the reductions that might take place in that amount. It may, therefore, be reasonably inferred that the lease was only a mode adopted for the payment of interest on the mortgage money. Another circumstance which in our opinion indicates the true nature of the transaction is that the lease is terminable with the mortgage and cannot be surrendered so long as the mortgage subsists. Both the documents were completed on the same day and were presented for registration on the same date, viz., the 10th of January 1872. The lease, it is true, is of a date subsequent to the date of the mortgage-deed, but the fact that reference is made to the lease in the mortgage-deed shows that the whole matter was arranged and agreed upon at the same time, and the registration of both the documents on the same date shows that they were intended to take effect from the same date. These circumstances to our minds clearly indicate that the mortgage and the lease form one transaction, namely, that of a usufructuary mortgage, the lease providing the manner in which the usufruct was to be taken in lieu of interest. The relation between the parties is therefore that of mortgagor and mortgagee, and any rights and liabilities arising under the lease must be considered as arising out of that relation.

In this view the arrears of lease money due to the mortgagee must be deemed to be arrears of interest. As under the terms of the mortgage the mortgagee is entitled to remain in possession until the principal amount and interest have been realised, he has the right to continue in possession so long as the interest payable to him is in arrear, and the plaintiffs are not entitled to redeem without payment of the arrears. The lease money, *quid* lease money was undoubtedly not a charge on the mortgaged property; but, *quid* interest it is a charge on the property, and the mortgagee is entitled to hold the property as security, not only for his principal mortgage money, but also for interest. We are of opinion that the plaintiffs must pay to the mortgagee the [408] arrears of interest due to him in addition to the principal, and that the Court below has erred in holding the contrary.

The amount of arrears due has in our opinion been calculated upon a wrong basis. The mortgagee appellant has claimed as arrears Rs. 540 a year, that being the amount which he agreed to pay to his sub-mortgagees. As there was no privity between the mortgagor and the sub-mortgagees, there is none between the latter and the plaintiffs who stand in the shoes of the mortgagor, Makhap Singh. The plaintiffs are therefore liable only to pay the amount which Makhan Singh agreed to pay under the instrument of the 20th of

December 1871, namely, Rs. 371 per annum, and, as default was made in the payment of that amount, they are liable to pay interest on the amount in arrear at the rate of one rupee per cent. per mensem. It is not denied that the amounts payable for the years mentioned in the statement appended to the written statement of Imdad Hasan (P. 11 of the Paper-book) have not been paid. We hold that the mortgagee Imdad Hasan is entitled to arrears of interest at the rate of Rs. 371 per annum and not at the rate claimed.

As regards the amount of Government revenue alleged to have been paid, the obligation to pay the revenue was, under the terms of the contract embodied in the instrument of the 20th of December 1871, on the mortgagor. If the mortgagor did not pay that amount and the mortgagee had to pay it in order to protect the mortgaged property, he was competent under section 72 of Act No. IV of 1882 to add the money so paid by him to the principal money. But he was also entitled to sue the mortgagor on his covenant for the amount paid for the mortgagor. He elected to pursue the latter remedy, and what he claims now is the amount of the decrees obtained by him on various dates. We are of opinion that the mortgagee having preferred to seek one remedy is no longer entitled to the remedy given to him by section 72 of the Transfer of Property Act, 1882. The debt has become merged in the decrees, and is only payable under the decrees. We are unable to agree with the contention of the learned advocate for the [409] appellant that a mortgagee may at the time of redemption exercise the right given to him by section 72, although he has already sought and obtained another remedy in respect of the same matter, and we have not been referred to any authority which supports this contention. The ruling of their Lordships of the Privy Council in *Hemanchal Singh v. Jowahir Singh*, I. L. R., 16 Cal., 307, cited by Mr. *Moti Lal*, does not, in our opinion help him. The judgment of their Lordships is very brief, but it seems from the facts of the case that the tender made in that case was held not to be a sufficient tender within the terms of the mortgage-deed, inasmuch as the interest for the second year had not been paid at the close of that year. In our judgment the mortgagee is not entitled to concurrent remedies. Any other conclusion may lead to anomalous results and cause serious injury to the mortgagor. As has happened in this case, the mortgagee may have assigned to strangers the decrees obtained by him against the mortgagors. There would be nothing to preclude the assignees from executing the decrees transferred to them, and, if the mortgagee may add to the principal money the amounts for which he has obtained his decrees, the mortgagors may have to pay the same amount twice over. In our opinion the claim for the revenue alleged to have been paid by the mortgagee and for which he has obtained decrees cannot be sustained, and it is not stated that any other amount is due for which he has not obtained a decree.

The result is that in our judgment the plaintiffs are entitled to obtain a decree for redemption upon payment, not only of the principal mortgage money, but also of arrears of interest for the period claimed by the appellants calculated at the rate of Rs. 371 per annum, together with interest thereon at the rate of one per cent. per mensem from the date of non-payment to the date of the institution of the suit. We vary the decree below to the extent indicated above, and we order the parties to pay and receive costs in this Court and in the Court below in proportion to their failure and success. We fix the 1st of September 1898, as the date on or [410] before which the amount decreed by us should be paid, and we direct that the said amount be paid into Court. We make the order last mentioned because we deem it unnecessary to determine in this suit which of the two sets of defendants is entitled to the mortgage

money. The amount decreed by us should be calculated and entered in the decree of this Court.

Decree modified.

NOTES.

[A personal remedy is open to the mortgagee for necessary charges which should have been paid by the mortgagee:—(1906) 34 Cal., 92.

As regards usufructuary mortgages and the lien on the property, see also (1899) 22 Mad., 332; (1904) 27 All., 403; (1907) 4 A. L. J., 176.

The case of a lease for a single year was distinguished in (1901) 11 M. L. J., 186.]

[20 All. 410]

The 10th May, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Umda Bibi and others.....Opposite-parties

versus

Naima Bibi.....Petitioner.*

Suit in forma pauperis—Review of judgment—Court fee—Act No. VII of 1870 (Court Fees Act), sch. I, cl. (5)—Civil Procedure Code, section 410.

Held, that when an application for review is presented in a suit *in forma pauperis*, that application, like the plaint in the suit, is not liable to any Court fee.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi *Ghulam Mujtaba* and Pandit *Madan Mohan Malaviya*, for the Appellants.

Mr. *Amir-ul-din*, for the Respondents.

Burkitt and Dillon, JJ.—This is an appeal against an order of the Subordinate Judge of Gorakhpur admitting a review of judgment. The plaintiff, respondent here, had sued to recover certain property and had got permission to sue *in forma pauperis*. Some time afterwards a petition was presented purporting to be on behalf of the plaintiff, and alleging that she and the defendants had compromised the suit on certain terms, and asking that a decree should be drawn up in the terms of the compromise. The Court ordered a decree to be drawn up as prayed. Within three months the plaintiff applied to the Court, substantially, though not formally, for a review of its judgment and of the decree passed on the compromise. In this application the plaintiff alleged that she had been cheated by her own legal adviser in collusion with the defendants; that the compromise as drawn up [411] was not that to which she had agreed, and that she knew nothing of the compromise as presented to the Court. The usual proceedings having been taken, this application for review was admitted, and from the order admitting it the present appeal has been brought. The first contention, which has been most strenuously and ably argued by Maulvi *Ghulam Mujtaba*, was that under clause 5, schedule I of the Court Fees Act the applicant ought to have paid on her application for review of judgment half the Court fee which would have been leviable on the plaint and that the Court below was wrong in admitting the application until that fee had been paid. As a matter of fact the only fee

* First Appeal from Order No. 22 of 1898, from an order of Maulvi Syed Jafar Husai Khan, Subordinate Judge of Gorakhpur, dated the 31st January 1898.

paid on the application was an eight-anna Court fee. Having heard *Maulvi Ghulam Mujtaba* at great length on this point we are of opinion that the answer to his contention is to be found in section 410 of the Code of Civil Procedure. That section is one of the sections in the chapter treating of "Suits by paupers." Its provisions are that as soon as an application to sue *in forma pauperis* has been granted "the application shall be numbered and registered and shall be deemed to be the plaint in the suit, and the suit shall proceed in all other respects as a suit instituted under Chapter V." It then goes to make an exception in favour of a pauper plaintiff by providing that "the plaintiff shall not be liable to any Court fee (other than fees payable for service of process) in respect of any petition, appointment of a pleader or other proceeding connected with the suit." Now the word "suit" undoubtedly means the suit instituted on permission to sue as a pauper being given. That suit is then to proceed as an ordinary suit under the Act. One of the incidents of such a suit is that a party aggrieved by a decree or order in that suit may under certain circumstances present an application for review. The presentation of such an application is in our opinion a "proceeding connected with the suit," such as is contemplated by the final words of section 410. We think then that when an application for review is presented in the course of the proceedings in a suit *in forma pauperis*, that application, like the plaint in the [412] suit, is not liable to any Court fee. To hold otherwise might, in our opinion, be productive of great injustice and hardship. For instance, in the present case the pauper plaintiff in order to get her application for a review of judgment admitted would have to pay something, like Rs. 2,500 in Court fees, while her plaint is not liable to any Court fee. The second matter which was argued for the appellants in this case was that the order admitting the application for review was in contravention of the provisions of section 626 of the Code of Civil Procedure. The only provision of section 626 on which the learned vakil relied was the second, and as to that it is sufficient to say that he has failed to show anything which would have brought the case within that provision. For the above reasons we dismiss this appeal.

Appeal dismissed.

[20 All. 412]

PRIVY COUNCIL.

The 20th April and 3rd May, 1898.

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Saadatmand Khan.....Appellant

versus

Phul Kuar.....Respondent.

[On appeal from the District Court of Farrukhabad.]

Civil Procedure Code, section 287—Misrepresentation of value in the proclamation of intended judicial sale—Substantial injury within section 311.

The value of property of which the sale has been ordered in execution of a decree, when stated in the proclamation of the intended sale, is a material fact within sub-section (e) of section 287 of the Code of Civil Procedure.

An under-statement of the value of the property having been made in such a proclamation, which was calculated to mislead bidders, and to prevent them from offering adequate prices, or from bidding at all, and the sale having resulted in a price altogether inadequate. — *Held*, that such misstatement was a material irregularity in publishing or conducting the sale, although there might be no rule requiring publication of the value in that proclamation; and that the special remedy, provided in section 311, was applicable, as substantial injury had resulted.

APPEAL from an order (30th January 1892) of the District Judge of Farrukhabad reversing an order (13th July 1891) of the Munsif of Kaimganj.

[413] The appellant was the auction purchaser of property sold on the 20th April 1891 in execution of a decree, dated the 8th April 1890, held by one Chunni Lal against Musammat Phul Kuar, the present respondent, in whose hands the property, which was land, had been attached; she being the heiress, and representative in estate, of her husband, deceased in 1888.

Her petition, dated the 16th May 1891, was rejected by the Munsif, but the District Judge, Mr. R. S. Aikman, reversed that order, and set aside the sale under section 311 of the Code of Civil Procedure on the ground that the proclamation of intended sale, issued under section 287, had so much misrepresented the actual value of the property that substantial injury to the petitioner had resulted. The District Judge's order was not appealable to the High Court, under section 588 of the Code of Civil Procedure.

The petition alleged irregularity in the auction sale, whereby property worth Rs. 10,000 was sold for Rs. 670; that ancestral land had been sold as not ancestral; that notices had not been properly placed and that the petitioner had no knowledge of the execution proceedings. Chunni Lal, the decree-holder, was named as objector and served, but did not appear. The other objector, Saadatmand Khan, the present appellant, denied the alleged irregularities, and the statements in the petition generally.

Among the Munsif's reasons for disallowing the petition, he was of opinion that, although the Rs. 800 stated in the sale proclamation as the value of the property was incorrectly stated, and the real value was much greater, still it was not by law obligatory that any entry of value should have been made at all. The fact of a wrong value having been mentioned in the schedule was not, in his judgment, a material irregularity upon which the sale should be set aside.

The District Judge's finding was as follows:—

"This is an appeal under the provisions of section 588, clause (16), Civil Procedure Code, against an order of the [414] Munsif of Kaimganj refusing to set aside a sale of immovable property.

"It is proved and admitted that an estate belonging to the appellant, a wealthy par-da-nashin lady, was sold in execution of a decree for Rs. 652-3-9; that the value of the estate is not less than Rs. 8,000 or Rs. 9,000, and that notwithstanding this, and the fact it has no incumbrances on it, it was sold by auction to a mukhtar practising in the Collector's Court for Rs. 670, or less than one-twelfth of its value.

"The first ground of the appeal is that all the proceedings were taken behind the back of the appellant, the judgment-debtor. The decree-holder, at whose instance the property was sold, does not appear to defend. It is argued on behalf of the auction-purchaser that the mere fact of a decree having been passed is sufficient notice to her. I cannot assent to this contention. Rule V, paragraph 9, of the Civil Rules and Orders if properly carried out, secures that due notice of an impending sale shall be given to the

judgment-debtor. In this case due notice was not given : all that was done was to affix notice to the wall of the house of the judgment-debtor's deceased husband." After adverting to the evidence that the petitioner was not there at the time, and intimating that the Court below ought not to have accepted the imperfect mode of service reported by the peon, the District Judge continued :

"It is pointed out, in the next place, that the decree-holder in his affidavit put down the value of the property at Rs. 800, i.e., about one-tenth of the real value, and that this was the value notified in the sale-proclamation. This, I must hold, was a gross misrepresentation on the part of the decree-holder. The last clause of section 245 of the Code of Civil Procedure provides that in the case of a decree for money, the 'value of the property attached shall, as nearly as may be correspond with the amount for which the decree has been made.' I have found that Subordinate Courts appear to be under the [415] impression that the inquiry prescribed by Rule VI, page 9, Civil Rules and Orders, should be confined to finding out whether the property proposed to be sold is ancestral or not. But this is a mistake. The inquiry should be for the purpose of ascertaining the particulars specified in section 287 of the Code of Civil Procedure. Amongst the heads which, according to section 287, should be specified in the sale-proclamation 'as fairly and accurately as possible' is 'every other thing which the Court considers material for the purchaser to know in order to judge of the nature and value of the property.' Had the inquiry held by the Munsif under Rule VI been worthy of the name, I think he could not fail to have been struck by the very peculiar circumstance that whilst the annual land revenue of the property was put down at Rs 543-10-6, its estimated value was entered as only Rs. 800. The utter absence of proportion between the amount of Government revenue and the estimated value entered in the sale-proclamation would of itself be enough to deter intending purchasers, and induce them to think that there was something wrong with the title." On this, the sale was set aside.

On an application to the District Judge for a certificate under section 598 of the Code of Civil Procedure he referred to the judgment of the Full Bench of the High Court in *Azim-ud-din v. Baldeo*, (1881) 1. L. R., 3 All., 554, and decided that the above order was final within section 595.

Mr. R. C. Saunders, for the Appellant, argued that the grounds on which the District Judge had reversed the order of the first Court were insufficient. Saadatmand Khan was a purchaser, for all that appeared, in good faith, and for value, who had been no party to any misrepresentation. He was in no way responsible for what was stated in the decree-holder's affidavit as to the value of the property, that having been the cause of the subsequent official statement, which was entered [416] in the column of particulars as to the nature and value of the property in the schedule attached to the sale-proclamation. Whatever irregularity there might have been in the understatement of value, there was no direct evidence that, in consequence of that error in the statement, the property was sold for an inadequate price. Accordingly, there was no sufficient evidence of the "substantial injury" of which section 311 required proof as occasioned by the irregularity. The sale therefore, should not, under the circumstances, have been set aside.

Mr. H. Cowell, for the Respondent, was not called upon.

On the 3rd May their Lordships judgment was delivered by Lord Hobhouse:—

The respondent is the proprietor of an estate in the mauza of Jira Rahimpur in Farrukhabad. In April 1890 one Pati Ram obtained a decree

for the sum of Rs. 565-9 against her and another as heirs of a recently deceased owner who was Pati Ram's debtor. This decree was transferred to Chunni Lal. On the 10th December in the same year Chunni Lal applied for the attachment and sale of the property. It was put up for sale on the 20th April 1891, and was bought by the appellant for the sum of Rs. 670. The property is valued at eight or nine thousand rupees.

In May 1891, within the time allowed by law, the appellant filed a petition in the Court of the Munsif of Kainganj for the purpose of setting aside the sale under section 311 of the Code. The Munsif held that, notwithstanding the inadequacy of price, there had been no irregularity within that section which justified him in setting the sale aside, and accordingly he dismissed the petition. On appeal the District Judge took a contrary view and decreed that the sale should be set aside. That is the decree appealed from.

The respondent alleged several irregularities in the execution proceedings, as to the existence or the effect of which the two Courts took opposite views. Their Lordships do not [417] think it necessary to mention more than one ground for impeaching the sale. It is indeed something more than the kind of irregularity which is commonly alleged, for it is a mis-statement of the value of the property which is so glaring in amount that it can hardly have been made in good faith, and which, however it came to be made, was calculated to mislead possible bidders, and to prevent them from offering adequate prices, or from bidding at all.

Section 287 of the Code orders that the Court shall cause a proclamation of the intended sale to be made. The proclamation is to specify "as fairly and accurately as possible" several enumerated particulars; and, finally, "every other thing which the Court considers it material for the purchaser to know in order to judge of the nature and value of the property."

The proclamation in this case appears to have followed an affidavit of Chunni Lal, the decree-holder, in which he stated that the property is valued at about Rs 800. It states, among other things, that the sale is for the recovery of Rs. 652-3-9 and interest, and that the particulars specified in the schedule are filled in to the best of the knowledge of the Court. The schedule contains several columns. One shows that the jama of the property is Rs. 543-10. Another is headed, according to the English translation,— "Other particulars, whatever ascertained regarding the nature and value of the property," and it contains the figures Rs. 800. This means that the value of the property to sell was estimated by the Court at Rs. 800.

The Munsif considered that this misrepresentation of value was not a material irregularity for which a sale could be set aside. His reason was, that no rule required that the value of the property should be mentioned in the proclamation; and that as the entry was uncalled for and not legally obligatory, to give a wrong value is no reason for setting aside a sale.

[418] This is a very mistaken view. It is true, as before observed, that the mis-statement is something more grave than an ordinary irregularity of procedure, but the fact that it is so, and that it was made gratuitously by the decree-holder and the Court, does not prevent it from being "a material irregularity in publishing or conducting" the sale, such as to bring the case within the special remedy provided by section 311. Whatever material fact is stated in the proclamation (and the value of the property is a very material fact) must be considered as one of those things "which the Court considers material for the purchaser to know," and it is enacted in terms (though

express enactment is hardly necessary for such an object) that those things shall be stated as fairly and accurately as possible. It must have been possible to state the value of this property with very much greater approach to fairness and accuracy than was done in the proclamation. The learned District Judge holds that there was a gross misrepresentation on the part of the decree-holder, and he intimates his opinion that the Court ought to have seen from the amount of the jama that the value could not be as stated. Certainly it seems that there must have been blameable carelessness on the part of whatever officer was responsible for the terms of the proclamation.

The learned District Judge points out two circumstances calculated to enhance the amount of injury done to the debtor by such a mis-statement. One is, that section 245 of the Code orders that the value of the property attached "shall, as nearly as may be, correspond with the amount for which the decree has been made;" so that an intending purchaser would readily accept the assurance of the Court that an estate attached for Rs. 565 was worth no more than Rs. 800. Another is, that the disproportion between the jama* and the total value was calculated to excite suspicion of something wrong with the title, and so to deter biddings. Their Lordships have to express entire agreement with the learned District [419] Judge, and they humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Appeal dismissed.

Solicitor for the Appellant: *Mr. H. Percy Becher.*

Solicitors for the Respondent: *Messrs. Ranken, Ford, Ford and Chester.*

NOTES.

[In the following cases, this decision was applied:—(1900) 23 Mad., 568; (1902) 6 C.W.N., 836; (1901) 6 C.W.N., 48; (1901) 8 C.W.N., 257; (1902) 30 Cal., 1; (1905) 32 Cal., 542; (1902) 6 O.C., 61; (1906) P.R., 132; (1910) 13 C.L.J., 192; (1910) 15 C.W.N., 577; (1911) 14 C.L.J., 541; (1910) 16 C.L.J., 98.

In (1904) 31 Cal., 922, it is pointed out that this decision does not lay down how the executing Court is to ascertain the material facts. See also (1908) 1 I.C., 246.

In (1899) 26 Cal., 324, the appealability of an order of the kind was considered.]

[20 All. 419]

APPELLATE CIVIL.

The 10th May, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Narain Das and another.....Defendants

versus •

Ram Saran Das..Plaintiff.*

Pre-emption—Wajib-ul-arz—Co-sharers in the Khalisa Mahal distinguished from owners of separate plots of muafi lands in the mahal.

The co-sharers in a mahal and the owners of separate plots of muafi land included in the area of the mahal have as a rule no connection with one another, and it by no means follows that the custom adopted by or existing among the members of the khalisa co-parcenary body would be applicable, to the owners of the muafi plots. Strict evidence is always necessary to

* First Appeal No. 15 of 1898, from an order of H. G. Pearce, Esq., District Judge of Meerut, dated the 4th February 1898.

prove that the same custom is applicable to each. *Kalyan Mal v. Madan Mohan*, I. L. R., 17 All., 447, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Moti Lal*, for the Appellants.

Munshi *Ram Prasad* and Babu *Jogindro Nath Chaudhri* for the Respondent.

Burkitt and Dillon, JJ.—This is an appeal in a suit for pre-emption. The suit was brought by a share-holder in one of several resumed *muafi* plots situate in mauza Hapar to pre-empt a sale of a portion of the same plot. The suit was resisted on the ground that no custom of pre-emption has been established in respect of the *muafi* plots. That view was accepted by the Court of First Instance, which dismissed [420] the suit. The District Judge, however, on appeal, held that the custom was established, and remanded the suit under section 562 of the Code of Civil Procedure. Hence the present appeal. In addition to the large co-parcenary body of the village divided among themselves into five pattis, there are several plots or scraps of confiscated *muafi* lands, that is, lands which formerly were held revenue-free, but in modern times have been resumed and the plots included for revenue purposes in the mahal within whose area they are situated. The arrangement usual in such cases is that the revenue of the resumed *muafi* is paid through the lambardar of the khalisa mahal within which it is situated, but the co-sharers of the mahal and the owners of the *muafi* plots, whether they be called co-sharers or not, have as a rule no connection whatever with one another, and it by no means follows that the custom adopted by or existing among the members of the khalisa co-parcenary body would be applicable to the owners of the *muafi* plots. Strict evidence is always necessary to prove that the same custom is applicable to each. Here it is contended that the custom as to pre-emption set forth in the *wajib-ul-arz* of the khalisa mahal applies to the *muafi* plots. In that matter we are unable to agree with the decision of the Court below. We are unable to see anywhere in the *wajib-ul-arz* any provision which renders its rule as to pre-emption applicable to the *muafi*. Some arguments were founded on the second clause of the *wajib-ul-arz* in which the owners of the *muafi* and khalisa were spoken of as "co-sharers." That argument is unsound. The clause in question simply provides in a business-like way for the object intended by it, namely, the arrangement of the manner in which the Government revenue was to be paid by the co-sharers of the village and by the *muafidars*. If it had been intended that the custom or the contract of pre-emption should apply to *muafidars*, nothing could have been easier than to add a few words to the *wajib-ul-arz*. Nothing of the kind has been done. We are left to [421] formulate a custom by implication from various unconnected clauses of the *wajib-ul-arz*. We cannot find any provision in the *wajib-ul-arz* for the existence of the custom of pre-emption in the *muafi* lands. The case of *Kalyan Mal v. Madan Mohan*, I. L. R., 17 All., 447, was referred to in argument. Strictly speaking that case is the converse of the case before us. It was a case in which a co-sharer in the khalisa mahal sought to pre-empt land in the *muafi*, and it was held that the *wajib-ul-arz* of the khalisa mahal did not affect the *muafi*. We allow this appeal. We set aside the decision of the District Judge with costs; we dismiss the plaintiff's appeal to the District Judge, and we restore the decree of the Court of First Instance.

Appeal decreed.

NOTES.

[This was followed in (1902) 22 A.W.N., 69; (1904) A.W.N., 118; (1907) A.W.N., 173. See also (1898) 3 O. C., 110.]

[20 All. 421]

The 11th May, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Abdul Rashid.....Plaintiff

versus

Gappo Lal.....Defendant.*

*Civil Procedure Code, section 276 —Alienation of attached property—
Alienation valid so long as it does not interfere with any claim
enforceable under a subsisting attachment.*

The alienation which section 276 of the Code of Civil Procedure is intended to prevent is an alienation which, if permitted, would defeat claims legally enforceable under the decree in execution of which the property alienated has been attached. Where a private alienation of attached property is made under such circumstances that it in no way interferes with the rights secured by his decree to the attaching decree-holder, section 276 is no bar to such alienation. *Narain Das v. Sheoambar Ahir*, Weekly Notes, 1897, p. 37, and *Anund Loll Doss, v. Jullodhur Shaw*, 14 Moo. I. A., 543, referred to.

THE plaintiff in the suit out of which this appeal arises held a mortgage, dated the 21st of March 1889*, over a 7 anna share out of the mortgagor's aggregate interest of 10 annas 8 pies in a certain village. The defendant held a mortgage of an earlier date on a 4 anna share out of the same 10 annas 8 [422] pies. The defendant obtained a decree on his mortgage on the 12th of May 1885, for sale of the 4 anna share mortgaged to him. On the 22nd of April he caused to be attached under this decree, not merely the 4 anna share mortgaged to him but the whole 10 anna 8 pie share of the mortgagor. After this attachment, but before any effective means were taken to execute the decree, the plaintiff's mortgage was executed. On the 6th of May 1892, the plaintiff applied to the Court executing the defendant's decree to notify the incumbrance created by the plaintiff's mortgage; such notification was ordered, and with such notification the whole of the mortgagor's interest, 10 annas and 8 pies, was sold in execution of the defendant's decree and bought by the defendant himself. The plaintiff then sued to enforce his mortgage of the 21st of March 1889 in respect of the portion of the mortgagor's interest not covered by the defendant's mortgage. The defendant objected that the effect of section 276 of the Code of Civil Procedure was to make the plaintiff's mortgage null and void.

The Court of First Instance (Subordinate Judge of Gorakhpur) found that, inasmuch as the money borrowed on the plaintiff's mortgage had been used to pay off a third mortgage prior to that held by the defendant, the plaintiff was entitled to use that mortgage as a shield, and it accordingly decreed the plaintiff's claim in part.

The defendant appealed. The Lower Appellate Court (District Judge of Gorakhpur) held that it had not been proved that the money borrowed on the mortgage to the plaintiff had in fact been applied to the satisfaction of a third mortgage as alleged, and, reversing the decree of the Court of First Instance, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

* Second Appeal No. 219 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 19th December 1895, reversing a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Gorakhpur, dated the 26th June 1895.

Maulvi Ghulam Mujtaba, for the Appellant.

Munshi Ram Prasad, for the Respondent.

Blair, J.—This second appeal arises out of a suit for sale based on a mortgage, dated the 21st of March 1889. The [423] mortgagor was possessed of a 10 anna 8 pie share of the mortgaged property. The plaintiff's mortgage was for a 7 anna share out of what was the mortgagor's aggregate interest. An earlier mortgage had been effected upon a 4 anna share of this whole property, and the prior mortgagee, one Gappo Lal, defendant in this suit and respondent here, got his decree for sale on his mortgage on the 12th of May 1885. The decree was in terms limited to the 4 anna share. On the 22nd of April 1886, an attachment under this decree was effected, not of the 4 anna share which formed the subject of the decree, but of the 10 anna 8 pie share, which is the entire holding of the mortgagor. After this attachment and before any effective means were taken to execute the decree, the plaintiff's mortgage was executed. That was the present mortgage on the 7 anna share, so that the interest affected by the two mortgages was a greater interest than the mortgagor possessed. The present plaintiff has disposed of all difficulty on that score, by asking for sale only of what remains of the mortgagor's interest over and above the 4 anna share mortgaged to Gappo Lal. On the 6th of May 1892, the plaintiff, appellant here, applied to the Court executing Gappo Lal's decree to notify the incumbrance created by the mortgage of the 21st of March 1889; and such notification was ordered, and with such notification the whole of the mortgagor's interest, 10 annas and 8 pies, was sold in execution of Gappo Lal's decree, to Gappo Lal himself. The plaintiff now claims to enforce the mortgage of the 21st of March 1889: He is met by the contention that section 276 of the Code of Civil Procedure makes his mortgage null and void. That section was originally framed so as to make a mortgage effected upon attached property absolutely void. But in the Act now in force are appended the material words which seem to us unquestionably words of limitation. They are:—"shall be void as against all claims enforceable under the attachment." We are entirely unable to see that any claim could be enforceable under the attachment which was not a legal claim. This matter [424] has been before one member of this Bench, and it has been adjudicated upon in the case of *Narain Das v. Sheoumbar Ahir*, Weekly Notes, 1897, p. 37. That the interpretation put upon those words is the correct interpretation, this Bench has no doubt whatever. The object of the section thus guarded and limited, was to secure that no private alienation subsequent to attachment should take effect to obstruct the legal claim of the decree-holder in whose interest and at whose instance the attachment had been made. The plaintiff at the hearing in the Court of First Instance put forward a further contention which upon a finding of fact has failed. He contended that his mortgage of 1889 was effected to pay off incumbrances prior in date to that of the defendant in this suit. He failed to establish that such prior incumbrances were in fact paid off by his mortgage. He has therefore to depend solely upon the construction to be put on section 276. In our opinion the mortgage of 1889 in no way stands in the way of the execution of Gappo Lal's decree to the extent of his legal claim. Indeed, the position of Gappo Lal seems to us one which upon no ground of equity could be maintained. He bought subject to a notification of lien, and we cannot doubt that the existence of that lien limited the price he paid for the property. He now proposes to retain what he purchased as an incumbered property, and at the price of an incumbered property, as property wholly and entirely unincumbered.

I would allow this appeal, setting aside the decree of the Lower Appellate Court with costs, and restore the decree of the Court of First Instance, and would give the appellant his costs of this appeal.

Aikman, J.—I am of the same opinion, and concur in the order proposed. Even when the law stood as it did when Act No. VIII of 1859 was in force, in which Act the section which corresponds to section 276 of the present Code of Civil Procedure, did not contain the concluding words now to be [425] found in the section "as against all claims enforceable under the attachment," it was held—*vide Anund Loll Doss v. Jullodhur Shaw*, 14 Moo. I. A., 543, at p. 549, that the object was to make the sale null and void, so far as it might be necessary to secure the execution of the decree. In my opinion the words "enforceable under the attachment," in section 276, must be read as meaning legally enforceable under the attachment; and to see what was legally enforceable under the attachment we must have recourse to the decree. So long as the decree-holder gets what was decreed to him he has got no ground for complaint. No private alienation made during the continuance of the attachment can be allowed to defeat the decree-holder's right, but if those rights are not affected by the alienation there is in my view no bar to any private alienation.

The respondent Gappo Lal had by his decree an indefeasible right to have a 4 anna share of his mortgagor's property sold in execution of his decree, but he had no right to restrain his judgment-debtor from alienating any property, other than that referred to in the decree, so long as the alienation did not prejudice any rights which had been decreed to him.

For these reasons I am of opinion that the appeal must be allowed.

BY THE COURT.—The order of the Court is, that the appeal is allowed, the decree of the lower Court set aside with costs, and the order of the Court of First Instance restored. The appellant will have his costs of this appeal.

The time for payment of the mortgage money is extended to the 11th of November 1898.

Appeal decreed.

NOTES.

[See also (1911) 35 Bom., 516.]

[426] REVISIONAL CRIMINAL.

The 11th May, 1898.

PRESENT:

MR. JUSTICE DILLON.

Queen-Empress^{*}

versus

Tirbeni Sahai.*

Criminal Procedure Code, section 342—Evidence—Accused persons under trial separately for a substantive offence and for abetment of that offence competent witnesses on each other's behalf.

Prisoner A was tried for an offence under section 403 of the Indian Penal Code and was convicted, but was sent to a Magistrate of higher powers than the convicting Magistrate to

* Criminal Revision No. 216 of 1898.

be sentenced. Whilst his case was pending before the second Magistrate, prisoner *B*, being on his trial separately for abetment of the offence for which *A* had been tried, applied for *A* to be summoned as a witness on his behalf. *B*'s application was refused. *Held*, that section 342* of the Code of Criminal Procedure was no bar under the circumstances to *A*'s giving evidence for *B*, and that *B*'s application ought to have been granted.

ONE Ram Narain picked up a currency note for Rs. 100, which had been dropped by a person on his way from the Currency Office, and in the presence, and, as was found by the Court, with the assistance of one Tirbeni Sahai, got the note cashed and appropriated the proceeds. Ram Narain was tried for an offence punishable under section 403 of the Indian Penal Code and convicted, but the trying Magistrate having only third class powers, sent the case, under the provisions of section 349 of the Code of Criminal Procedure, to the Cantonment Magistrate. While Ram Narain's case was pending before the Cantonment Magistrate, Tirbeni Sahai was put upon his trial before the same Magistrate who tried Ram Narain for an offence punishable under section 403 read with section 109 of the Indian Penal Code. In the course of his trial he applied to have Ram Narain summoned as a witness on his behalf. The Magistrate, however, declined to summon Ram Narain, being of opinion that he was debarred from so doing by section 342 of the Code of Criminal Procedure. Tirbeni Sahai was convicted and sentenced. He applied in revision to the High Court—his appeal to the Sessions Judge having been dismissed [427]—on the main ground that the Magistrate was wrong in refusing his application to summon Ram Narain as a witness.

Mr. *Roshan Lal*, for the Applicant.

The Government Pleader (*Munshi Ram Prasad*), for the Crown.

Dillon, J.—This is an application for revision of an order passed by the Cantonment Magistrate of Allahabad, convicting the petitioner of an offence under section 403 read with section 109 of the Indian Penal Code, and sentencing him to three months' rigorous imprisonment. The conviction and sentence were affirmed by the Sessions Judge on appeal. Amongst other points taken on behalf of the petitioner, there is one which refers to the procedure of the Magistrate in refusing to summon and examine as a witness on behalf of the petitioner one Ram Narain, who had been convicted of the substantive offence under section 403 of the Indian Penal Code by a third class Magistrate of Allahabad, but whose case had been referred by the said Magistrate for a severer sentence under section 349 of the Code of Criminal Procedure. Ram Narain's case was pending before the Cantonment Magistrate under section 349 of the Code of Criminal Procedure, at the time the application to summon him as a witness was made, and therefore it cannot be said that his

* [Sec. 342 :—For the purpose of enabling the accused to explain any circumstances appearing in the evidence against him, the Court may, at any

Power to examine the stage of any inquiry or trial, without previously warning the accused, put such questions to him as the Court considers necessary, and shall for the purpose aforesaid, question him generally on the case after the witnesses for the prosecution have been examined, and before he is called on for his defence.

The accused shall not render himself liable to punishment by refusing to answer such questions, or by giving false answers to them; but the Court and the jury (if any) may draw such inference from such refusal or answers as it thinks just.

The answers given by the accused may be taken into consideration in such inquiry or trial and put in evidence for or against him in any other inquiry into, or trial for, any other offence which such answers may tend to show he has committed.

No oath shall be administered to the accused.]

trial was concluded. At the same time he had not been jointly indicted with the petitioner, nor was the offence of which he had been convicted the same offence as that with which the petitioner was charged. Under these circumstances I do not think that the prohibition contained in the last clause of section 342 of the Code of Criminal Procedure applies. On a careful perusal of that section it will be apparent that the examination of the accused person for which that section provides, is an examination touching the matter on which he is being tried, and the inference is therefore obvious that the prohibition contained in the last clause of section 342 applies to the examination referred to in that section, and does not apply to an examination in another case in which the person who is being examined is not himself an accused person. [428] If the Magistrate's view were correct, it would follow that no man while he stood charged with a criminal offence could possibly be examined as a witness in any criminal trial whatever. I do not think that the Legislature intended this. In this view of the case I hold that the petitioner was entitled to have Ram Narain summoned and examined as a witness, and that he has been prejudiced by the Magistrate's refusal to summon and examine the said Ram Narain. Under these circumstances I set aside the conviction and sentence had before the Cantonment Magistrate of Allahabad, and direct that the petitioner's case be restored to his file, and that he take it up at that stage when he called on the accused for his defence, and that then with reference to the above remarks he proceed according to law.

[20 All. 428]

APPELLATE CIVIL.

The 12th May, 1896.

PRESENT:

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Onkar Singh and another.....Judgment-debtor
versus

Mohan Kuar.....Decree-holder.*

Execution of decree--Civil Procedure Code, sections 320, 322A--Decree transferred for execution to Collector--Collector not authorized to hear objections to execution of decree transferred.

Held, that where a decree for money has been transferred for execution to the Collector under the provisions of section 320 of the Code of Civil Procedure, the Collector is not authorized under section 322A to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the Appellants.

Babu Jogindra Nath Chaudhri, for the Respondent.

* First Appeal No. 265 of 1897, from an order of Syed Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 28th August 1897.

Burkitt and Dillon, JJ.—This is a case of an execution of a decree for money. The original judgment-debtor died since the decree, and his sons have been brought on the record as his [429] representatives. During the course of the execution proceedings the sons, on the 29th of May 1897, raised an objection to the execution to the effect *inter alia* that the property had not been properly attached during the life-time of their father, the original judgment-debtor. A date was fixed for hearing that objection, but neither the representatives of the judgment-debtor nor the execution creditor appeared. No steps whatever were taken to hear and decide the objections, and they were struck off. Shortly afterwards, the property being ancestral, the case was transferred to the Collector for execution under the rules framed in pursuance of section 320 of the Code of Civil Procedure. The execution application was struck off the file of the Subordinate Judge on the 9th of July, 1897. On the 20th of the same month the representatives of the deceased judgment-debtor again raised the same objection before the Subordinate Judge to the execution of the decree. On these objections the Subordinate Judge recorded an order to the effect that the case had been transferred for execution to the Collector, and that the Collector would issue a notice under section 322A and that thereupon any person who had any objection to take in respect of the property advertised for sale could take that objection. Now in making this order the Subordinate Judge was wrong throughout, and it is so admitted by the learned advocate who appears for the decree-holder respondent. The Collector under section 322A is not authorized to hear any objection, by parties interested in the property advertised for sale, to the sale of that property. When a money decree is transferred to the Collector for execution by sale of certain property, that property is usually attached before the decree is sent to the Collector, and the Collector may then, under section 322 A, call on all persons holding money claims against the judgment-debtor to come in and prove their claims, so as to enable the Collector to make arrangements to avoid if possible the sale of the attached property. It is no part of the Collector's duty under section 322A to decide whether the property has or has not been properly attached. That is the duty of the Court to which the application for execution is made and [430] which transmits the decree to the Collector. But the learned advocate for the decree-holder attempted to support the order of the Subordinate Judge on another ground referring to the proceedings taken on the objection of the 29th of May 1897. His contention was that the representatives of the deceased judgment-debtor having taken their objection and having failed to prosecute it could not be further heard on the same ground. In our opinion this contention is not sound and is disposed of under the ruling in the case of *Dhankal Singh v. Phakkar Singh*, I. L. R., 15 All., 84, in which it was distinctly laid down that where an application for execution has been simply struck off without any order adverse to the right on the merits, that application might be renewed again and again till judicially decided adversely to the applicant. The same principle applies to an objection raised by a judgment-debtor to the execution of the decree. We do not think that the fact that between the application of the 29th of May 1897, and the 20th of July 1897, execution was transferred to the Collector is in any way material here. We allow this appeal. We set aside the order of the Subordinate Judge, and we direct him now to take up and judicially determine the objections taken by the representatives of the deceased judgment-debtor on the 20th of July 1897. The appellants are entitled to their costs.

Appeal decreed.

[20 All. 430]

The 13th May, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Phul Chand.....Decree-holder

versus

Shankar Sarup and others.....Judgment-debtors.*

Civil Procedure Code, section 583—Restitution of benefit obtained under a decree subsequently reversed on appeal—Interest allowable on amount so recovered.

Where, in consequence of a decree having been reversed on appeal, the decree-holder is entitled to recover under section 583 of the Code of Civil Procedure any sum which before such decree was reversed he had been obliged [431] to pay in execution of that decree, such decree-holder is entitled also to receive interest on the amount so recoverable. *Rodger v. The Comptoir D'Escompte de Paris*, L. R., 3 P. C., 465; *Jaswant Singh v. Dip Singh*, I.L.R., 7 All., 432; *Ram Sahai v. The Bank of Bengal*, I.L.R., 8 All., 262; *Bhagwan Singh v. Ummatul Hasnain*, I. L. R., 18 All., 262; *Ayyavayyar v. Shastram Ayyar*, I. L. R., 9 Mad., 506, and *Hatti Prasad v. Chatarpal Dube*, Weekly Notes, 1888, p. 287, referred to. *Mewa Kuar v. Banarsi Prasad*, Weekly Notes, 1897, p. 76, dissented from.

IN this case the respondents brought a suit against the appellant and obtained a decree from the Court of the Subordinate Judge of Meerut. The appellant appealed from this decree to the High Court, but before his appeal was decided the respondents took out execution of their decree and realized the whole amount thereof. Subsequently the respondents' decree was set aside by the High Court, the suit being dismissed. The appellant then applied to the Court of the Subordinate Judge for a refund of the amount realized by the respondents under their decree which had been set aside by the High Court, together with interest upon the amount so realized. The Subordinate Judge allowed the application except so far as related to the claim for interest. Against this disallowance of interest the applicant appealed to the High Court.

Mr. Abdul Raoof, for the Appellant.

Babu Jogindro Nath Chaudhri and Babu Durja Charan Banerji, for the Respondents.

Burkitt, and Dillon, JJ.—In this case it appears that on suit by the plaintiffs respondents against the appellant a decree was given against the latter for payment of a sum of money. The defendant paid that money into Court, and it was drawn from the Court by the plaintiffs. Subsequently on appeal to this Court the decree in favour of the plaintiffs was reversed and their suit was dismissed.

The present proceeding is an application by the successful defendant appellant under section 583 of the Code of Civil Procedure, for restitution to him, with interest, of the sum [432] paid by him into Court under the decree, and drawn out by the plaintiffs respondents.

The only question to be decided is whether the applicant is entitled to interest on his money during the time it was in the hands of the plaintiffs respondents. On that point there have been some conflicting rulings in this Court. We would refer to the cases of *Jaswant Singh v. Dip Singh*, I. L. R.,

* First Appeal No. 1 of 1898, from an order of Pandit Rai Inder Narsin, Subordinate Judge of Meerut, dated the 25th September 1897.

7 All., 432, *Ram Sahai v. The Bank of Bengal*, I. L. R., 8 All., 262, *Bhagwan Singh v. Ummtul Hasnain*, I. L. R., 18 All., 262, *Mewn Kuar v. Banarsi Prasad*, Weekly Notes, 1897, p. 76. *Hatti Prasad v. Chattarpal Dube*, Weekly Notes, 1888, p. 287, and there is also the case of *Ayyavayyar v. Shastram Ayyar*, I. L. R., 9 Mad., 506. In our opinion, however, the case before us is concluded by the authority of their Lordships of the Privy Council in the case of *Rodger v. The Comptoir D'Escompte de Paris*, L. R., 3 P. C., 465. We especially refer to the observations of Lord CAIRNS made therein, which are set forth and explained at length in *Jaswant Singh v. Dip Singh*, I. L. R., 7 All., 432. It appears to us that the view of their Lordships in that case cannot have been brought to the notice of the Benches of this Court which held that interest could not be awarded under section 583. In all the other case there is a distinct mention of that case, and it is cited as the authority for awarding interest. Following the authority of their Lordships in that cases, we allow this appeal. We set aside the order of the lower Court, and we direct that interest at the rate of six per cent. per annum be allowed on the sum which has been ordered to be restored to the appellant here. The appellant is entitled to his costs in this Court.

Appeal decreed.

NOTES.

[This was approved in (1898) 21 All., 1.

The C. P. C., 1898, sec. 144, is very comprehensive in its scope and wider than sec. 583, C. P. C., 1882.]

[433] *The 16th May, 1898.*

PRESENT :

MR. JUSTICE BURKITT, AND MR. JUSTICE DILLON.

Imtiaz-un-nissa... ..Applicant

versus

Anwar-ul-lah... ..Opposite Party.*

*Act No. VIII of 1890 (Guardian and Wards Act), section 47—Appeal—
Order refusing to direct the removal of a guardian.*

Where an applicant for a certificate of guardianship applied for a two-fold relief, namely, that the existing guardian might be removed and that she herself might be appointed guardian, and her application was dismissed, it was held that no appeal would lie from the order of dismissal, such order being an order refusing to direct the removal of a guardian, *Mohima Chunder Biswas v. Tarini Sunker Ghose*, I. L. R., 19 Cal., 487, *Pakhwanti Dai v. Indra Narain Singh*, I. L. R., 23 Cal., 201 and *In re Bai Harkha*, I. L. R., 20 Bom., 667, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. Amiruddin, for the Appellant.

Maulvi Ghulam Mujtaba, for the Respondent.

* First Appeal No. 19 of 1898 from an order of F. E. Taylor, Esqr., Additional Judge of Moradabad, dated the 27th November 1897.

Burkitt, and Dillon, JJ:—In this case a preliminary objection to the hearing of this appeal is raised by Maulvi *(thulam Muftaba)* for the respondent. His objection is that though under section 47 of the Guardian and Ward Act, No. VIII of 1890, an appeal is given by clause (8) of that section against an order directing the removal of a guardian, no appeal is given against an order refusing to direct the removal of a guardian.

To understand this case certain facts and dates must be set out. On the 10th of April 1897, a certificate of guardianship of the person and property of the minors was granted to the respondent Muhammad Anwarullah. On the 26th of April 1897, the appellant Musammat Imtiazunnissa, mother of the minors, applied to the Court, asking that she might be appointed guardian of their persons and property, and by a further application dated the 23rd June 1897, she alleged that she had no knowledge of the appointment on the 10th of April of Anwarullah, and prayed that his appointment as guardian, made on the 10th of April, might be cancelled, and she herself be appointed as guardian. The District Court in its proceedings on this application removed [434] Anwarullah, (it is said, with his consent) from the office of guardian of the persons of the minors and appointed Musammat Imtiazunnissa in his place, but refused to discharge or remove Anwarullah from the office of guardian of the property. That is the order which is now in appeal before us.

It was ingeniously argued by the learned counsel for the appellant, that the appeal was one under clause (a) of section 47, and that by it, the refusal to appoint Musammat Imtiazunnissa as guardian was called in question. That argument, however, is in our opinion, unsound. Before an order could be passed appointing Musammat Imtiazunnissa guardian of the property of the minors it would have been necessary to remove Anwarullah from that office. The appeal must be considered to be one against the Judge's order refusing to remove Anwarullah from the office of guardian of the property of the minors. Against such an order, we are of opinion, no appeal lies. In this opinion we are supported by the case of *Mohima Chunder Biswas v. Tarini Sunker (those,* I. L. R., 19 Cal., 487, where it is distinctly laid down that no appeal lies against an order of the District Judge refusing to remove a guardian. To the same effect is the case of *Pakhuant Dai v. Indra Narain Singh*, I. L. R., 23 Cal., 201. That case is very much on all fours with this case, inasmuch as in it the District Judge cancelled that portion of the certificate of guardianship appointing the respondent guardian of the persons of the minors. And lastly there is the case of *In re Bai Harkha*, I. L. R., 20 Bom., 667, which was also a case in which, after the appointment of a guardian of the property, the mother of the minors sought to have the appointment cancelled. The District Judge refused to interfere with the appointment, and the High Court held that no appeal lay from the order of refusal. Following the above cases, with all of which we are in full accordance, we hold that in this case no appeal lies to this Court. We therefore reject the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1912) 14 I.C., 56 (Punjab).]

[436] *The 17th May, 1898.*

PRESENT :

MR. JUSTICE BURKITT, AND MR. JUSTICE DILLON.

Lachmin Kuar and another.....Judgment-debtors

versus

Debi Prasad.....Decree-holder.*

*Hindu law—Joint Hindu family—Joint family or self-acquired property—
General education acquired at the expense of the joint family funds.*

Held, that the mere fact that a member of a joint Hindu family had acquired a certain general education of a not very advanced character at the expense of the joint family funds would not have the result of making all the subsequent earnings of that member joint family property, but they would remain his self-acquired property. *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty*, I. L. R., 1 Mad., 252, and *Krishnaji Mahadev v. Moro Mahadev*, I. L. R., 15 Bom., 32, referred to and followed.

THE facts of this case sufficiently appear from the judgment of the Court.

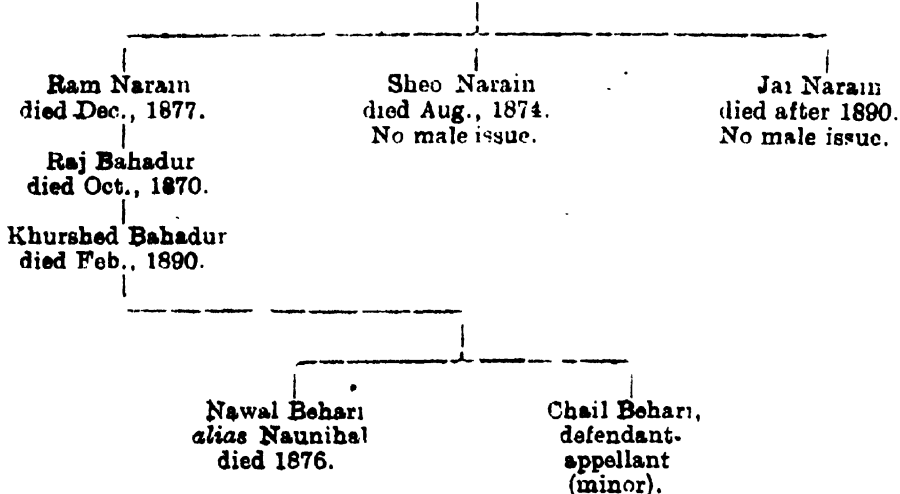
Munshi Ram Prasad and Pandit Moti Lal, for the Appellants.

The Hon'ble Mr. Conlan and Pandit Sundar Lal, for the Respondent.

Burkitt and Dillon, JJ.—This is an appeal from an order of the Subordinate Judge of Cawnpore, by which it was decided that certain movable property was liable to attachment and sale in execution of a decree obtained by the respondent against the representatives of one Khurshed Bahadur, deceased. In a previous case in this Court it was decided that the decree could not be executed against any ancestral joint property of the family. The question now to be decided is, does the property sought to be sold come within that description, or is it to be treated as having been the self-acquired property of the debtor Khurshed Bahadur.

The following genealogical table shows the members of the family:—

[436] BHOLA NATH.



The property in dispute consists of a house in Cawnpore and of two villages. Admittedly that property stood recorded in the name of Sheo

* First Appeal No. 262 of 1897, from an order of Rai Kishen Lal, Subordinate Judge of Cawnpore, dated the 29th September 1897.

Narain, the second of Bhola Nath's sons. On his death it was transferred to the name of Nawal Behari, then an infant. There is some dispute as to how that transfer was made. The respondent, through his witness Jiwan Ram, set up a nuncupative will alleged to have been made by Sheo Narain. We do not believe the allegation as to the will. We do not believe that any will was formally made, even in the loose form of a nuncupative will. We believe that the evidence of Jiwan Ram has been constructed to fit and account for the fact that after Sheo Narain's death the property in dispute was recorded in Nawal Behari's name. The latter was a great-grandnephew of Sheo Narain. During his father's life-time he had no claim whatever to succeed to Sheo Narain's estate. But we are quite prepared to believe that Sheo Narain and his brother Ram Narain (who survived him for more than three years) did arrange that the property should be transferred to Nawal Behari. Both the brothers must have been anxious to save the property from getting into the hands of Khurshed Bahadur, who had taken to a licentious, immoral and debauched course of life, as mentioned in the judgment of this Court in F. A. No. 56 of 1893, decided on the 29th January 1896. The minor boy Nawal Behari [437] unfortunately did not long survive his great-grand uncle Sheo Narain, and predeceased his great-grandfather Ram Narain. On the boy's death his father Khurshed Bahadur inherited the property in dispute.

The question we have to decide is —What was the nature of that property in the hands of Sheo Narain? For the appellants it is contended that the property was a portion of the joint undivided property of a joint Hindu family, possessed as such of this and of other property. On the other hand, the contention for the respondent—a contention which has been affirmed by the lower Court—is that the property in dispute was the self-acquired property of Sheo Narain.

As to the early history of the family there is little, if any, room for doubt. Their ancestral house is at Belhaur, in the Cawnpore district, and that house is at present the joint and undivided property of Bhola Nath's descendants in the male line. It is perfectly clear that there has been no partition of the ancestral house. The three brothers went out into the world and obtained employment in the Commissariat Department, and in course of time each acquired considerable wealth. They are not shown to have had any assistance from the joint family funds excepting their support in early years and the usual rudimentary education. It is not shown that any money was raised on the ancestral house to start any of them in life. They did not work jointly, each being separately employed, and no one of them is shown to have had any concern with the savings and accumulations of either of the other two brothers, though no doubt funds may have been remitted by one or other to the others for investment. Such being the case, we have no doubt that the property in dispute was, when in the hands of Sheo Narain, his self-acquired property over which he had full powers of disposal. It was argued for the appellant that because Sheo Narain was educated when a boy at the family expense all his subsequent earnings and accumulations remained joint family property. This contention is described by their Lordships of the Privy Council in [438] *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty*, I. L. R., 1 Mad., 252, as being a "somewhat startling proposition of law," and their Lordships expressed their disapproval of some cases in the Madras High Court which went that far. All the cases on the point have been very fully considered and discussed by the Bombay High Court in the case of *Krishnaji Mahadev v. Moro Mahadev*, I. L. R., 15 Bom., 32, in which it was held with respect to a person in much the same position as Sheo Narain that as he had received only a rudimentary

education from the joint family funds his earnings were self-acquired, as also was any property purchased with those earnings. The fruits of an ordinary elementary education could not, it was held, be regarded as the "gains of science" acquired at the expense of ancestral wealth.

Having fully considered the rule laid down in the cases cited above, we find ourselves entirely in accordance with it. Following that rule, we hold in the present case that the property in dispute was the self-acquired property of Sheo Narain. It follows, therefore, that both in the hands of Nawal and of Khurshed it was self-acquired property and liable as such to be seized in satisfaction of the respondent's decree. We dismiss this appeal with costs to be paid out of the proceeds of the property in dispute.

Appeal dismissed.

NOTES.

[General or elementary education does not, by itself, make one's acquisitions joint property :—(1902) 22 A.W.N., 20 ; (1900) C.P.L.R., 116 ; (1910) 32 All., 305 (even if it be in that branch of learning by which he afterwards was able to earn).]

[20 All. 438]

The 19th May, 1898.

PRESENT :

MR. JUSTICE BURKITT.

Bansidhar.....Plaintiff

versus

Dip Singh and others.....Defendants.*

Lambardar and co-sharer — Powers of lambardar to deal with co-parcenary lands—Lease of such lands for ten years at an inadequate rent.

Held, that a lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or the particular season may require. *Jagan Nāth v. Hardyāl*, Weekly Notes, 1897, p. 207, followed.

IN this case the plaintiff was owner of almost the whole of two mahals known as Bangar and Khadar in mauza Chitaura [439] Mohiuddinpur. The small residue was owned by the defendants, one of whom, Puran Singh, was the lambardar. Owing to disagreements between the plaintiff and the lambardar the plaintiff applied for partition of his shares in these mahals. Puran Singh filed objections, which were disallowed in respect of mahal Bangar, but allowed in the case of mahal Khadar. Subsequently Puran Singh executed a lease for 10 years of the munj grass produce of both mahals at an annual rent of Rs. 12. After the partition proceedings had been concluded, all but the actual putting of the parties into possession of the shares allotted to them, the plaintiff filed his suit for cancellation of the lease given by Puran Singh. The Court of First Instance (Additional Munsif of Meerut) dismissed the suit. The plaintiff appealed. The Lower Appellate Court (Additional Subordinate Judge of Meerut) dismissed the appeal. The plaintiff appealed to the High Court.

* Second Appeal No. 844 of 1897, from a decree of Babu Prag Das, Additional Subordinate Judge of Meerut, dated the 26th February 1897, confirming a decree of Tlakur Udit Narayan Sinha, Additional Munsif of Meerut, dated the 23rd December 1896.

Pandit Sundar Lal, for the Appellant.

Pandit Moti Lal, for the Respondents.

Burkitt, J.—In this case it appears that one Puran Singh, the lambardar of a village which was under partition, and to the partition of which his objections had been disallowed on the 8th of August 1894, granted on the 24th of December of the same year, a lease, for a period of no less than ten years, of more than 400 bighas of land producing valuable munj grass, at the utterly inadequate rent of Rs. 12 per annum. The Subordinate Judge says, and perhaps with truth, that no fraud was proved; but in my opinion we have only to look at the lease itself to see that it was given by a disappointed litigant, whose power as lambardar was soon about to cease, with the intention of damnifying his successful opponent in the partition proceedings. For that reason alone I would direct the lease to be set aside; but, further, there is distinct authority in this case, in the case of *Jagan Nath v. Hardyal*, Weekly Notes, 1897, p. 207, in which it was distinctly ruled that a lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or [440] particular season may require. That no doubt was a case of a perpetual lease, but the reasons for the decision apply with equal strength to the ten years' lease in the present case. I fully concur in the rule of law laid down in the case just cited, and, following the principle contained in it, I set aside the decrees of the two lower Courts, and, allowing this appeal, I give a decree in favour of the plaintiff appellant. I cancel the lease dated the 24th of December 1894, so far as it concerns an area of 144 bighas 7 biswas and 13 biswansis pukhta out of mahal Bangar of Chitaura Mohiuddinpur, and I direct that possession of that area be given to the plaintiff appellant by the dispossession of the defendant lessee. The plaintiff appellant will have his costs in this Court.

Appeal decreed.

NOTES.

[This was followed in (1906) 29 All., 20. See also the explanation of this decision in (1907) 29 All., 554; (1906) 3 A.L.J., 655.]

[20 All. 440]

REVISIONAL CRIMINAL.

The 26th May, 1898.

PRESENT :

MR. JUSTICE AIKMAN.

Queen-Empress

versus

Nihal Chand.*

Act No. I of 1879 (Indian Stamp Act), section 61—Stamp—Promissory note—Person receiving an under-stamped promissory note not liable under section 61.

Under section 61 of Act No. I of 1879 the "person accepting" a promissory note not duly stamped is the person who executes such note as acceptor, not a person who merely receives the note. The mere receiver of an unstamped or insufficiently stamped promissory

* Criminal Revision No. 227 of 1898.

note is not as such liable to any penalty under this section either as principal or abettor. *Queen v. Gulam Husain Saheb*, I. L. R., 7 Mad., 71; *The Queen v. Nadi Chand Poddar*, 24 W. R., C. R., 1; *Empress v. Janki*, I. L. R., 7 Bom., 82; and *Empress v. Gopal Das*, Weekly Notes; 1883, p. 145, referred to.

THIS was a reference made by the Sessions Judge of Saharanpur under section 438 of the Code of Civil Procedure. The facts of the case sufficiently appear from the judgment of the Court.

Aikman, J.—This is a case reported for the orders of this Court by the learned Sessions Judge of Saharanpur. It appears [441] that two men, Makunda and Chanda, were indebted to one Nihal Chand. In payment of their debt they gave him a promissory note which was not duly stamped. Nihal Chand, it appears, sued in a Civil Court on the promissory note, and there the breach of the stamp law was discovered. The matter having been brought to the notice of the Collector, the prosecution of the makers of the note, as well as of Nihal Chand, was directed. This prosecution resulted in all three being convicted of the offence punishable under section 61 of the Indian Stamp Act, 1879. The Magistrate sentenced Nihal Chand to a fine of Rs. 35, or in default to 15 days' rigorous imprisonment.

As the offence of which Nihal Chand was convicted is an offence punishable with fine only, the imprisonment in default ought to have been simple — see sections 67 and 34 of the Indian Penal Code. This mistake the Magistrate himself subsequently discovered.

The learned Sessions Judge has submitted the case to this Court with a recommendation that the conviction of Nihal Chand should be set aside as illegal. In my opinion the learned Sessions Judge is right. The material part of the section under which Nihal Chand has been convicted runs as follows:—"Any person drawing, making, issuing, endorsing or transferring or signing, otherwise than as a witness, or presenting for acceptance or payment, or accepting, paying or receiving payment of, or in any manner negotiating any bill of exchange, cheque or promissory note without the same being duly stamped.....shall for every such offence be punished with fine which may extend to five hundred rupees." The Magistrate has apparently looked on the word "accepting" here as equivalent to "receiving." But, as was held in *Queen v. Gulam Hussain Saheb*, I. L. R., 7 Mad., 71, "the term 'accepting' in section 61 of the Stamp Act does not mean 'receiving,' but 'executing as an acceptor.'" In the case *The Queen v. Nadi Chand Poddar*, 24 W. R., C. R., 1, JACKSON, J., observed:—"If an instrument called a [442] promissory note or other document of that kind, and as such liable to the duty imposed by the Act, is not duly stamped, it appears to me that the person subject to penalty is the person who makes it, and not the person in whose favour it is made." That was a prosecution under section 29 of the Stamp Act then in force, namely, Act No. XVIII of 1869, which does not differ materially from section 61 of the present Act. It was there held that the person in whose favour a document not duly stamped is made, incurs the risk of being debarred from producing it in evidence, but does not render himself liable to penalties under the fourth chapter of the Act. It has been contended that in such cases a person who receives a document not duly stamped abets the commission of an offence under section 61; but, as was remarked in the case *Empress v. Janki*, I. L. R., 7 Bom., 82, "it is not abetment of the execution of an unstamped document to receive it, any more than acceptance of stolen property is abetment of theft." This case was followed in this Court in *Empress v. Gopal Das*, Weekly Notes, 1883, p. 145. I think the view taken by the learned

Sessions Judge is right. I quash the conviction of Nihal Chand for an offence under section 61 of Act No. I of 1879 and the sentence of fine imposed thereunder, and direct that the fine, or such portion of it as may have been paid, be refunded.

[20 All. 442]

APPELLATE CIVIL.

The 6th June, 1898.

PRESENT :

MR. JUSTICE BLAIR.

Fateh Chand and others.....Plaintiffs

versus

Mansab Rai.....Defendant.*

Civil Procedure Code, section 53—Verification of plaint—Plaint verified when in an incomplete state—Amendment of plaint.

The substantial portion of a plaint, consisting of the statement of the claim of the plaintiffs and the prayer, was written upon two sheets of plain paper and verified by the plaintiffs. Subsequently to the affixing of the plaintiffs' [443] signatures a front sheet, consisting of a piece of stamped paper with the name of the Court and the names and addresses of the parties, was added, and the plaint thus composed filed in Court.

Held, that the verification was defective; but that the suit ought not to have been dismissed. The plaintiffs ought to have been allowed an opportunity of amending the plaint by making a proper verification.

THE material facts of this case, as stated in the judgment of the Lower Appellate Court, are as follows:—

“The plaint purports to have been verified by the plaintiff Fateh Chand at Kairana on the 16th July 1895, by the plaintiff Ranjit Singh at Gadhi Husenpur on the 13th July, and by Musammatt Shibbi, next friend of Somat Prasad, minor plaintiff, on the 11th July at Saharanpur. It was presented to the Court of the Munsif of Kairana on the 17th July 1895. It purports also to bear the signatures at another place, but it is not expressed when these signatures were affixed. The plaint consists of three leaves, and the signatures and verifications are contained on the last leaf, and the plaintiffs' signatures are wanting on the first two leaves, though rule 424, clause (5), of the rules of the 4th April 1894, framed by the High Court, required the plaintiffs' signatures on each leaf. The first leaf is the stamp paper used to denote the court fee. It was purchased at the Kairana* tahsil on the 17th July 1895. The stamp paper contains the name of the Court and the names, description and place of abode of the parties. It should also have contained a substantial portion of the statement of the claim, according to the said rules, but it does not.

The Subordinate Judge found:—“It is evident that the particulars stated on the first leaf, namely, the stamp paper, were not verified by the plaintiffs. I find that neither the verification nor the signatures of the plaintiffs apply to what is written on the first leaf, which was not in existence when they were apparently affixed. Musammatt Shibbi deposed that she affixed her mark on

* Second Appeal No. 376 of 1897, from a decree of Rai Shankar Lal, Subordinate Judge of Saharanpur, dated the 3rd March 1897, reversing a decree of Munsibi Shiya Sahai, Munsif of Kairana, dated the 26th February 1896.

three papers, which may mean in two places on the plaint and on the vakalat-nama, dated the 7th July 1895. There is nothing to show that the plaintiffs' signatures [444] were affixed on the 17th July 1895, or on dates different from those of the verifications. The verification had been affixed before the 17th July 1895."

On these findings the Lower Appellate Court came to the conclusion, with reference to the case of *Kutesar Nath v. Aggarwal*, Weekly Notes, 1894, p. 96, that the plaint was void *ab initio* and incapable of amendment, and dismissed the plaintiffs' suit. The plaintiffs thereupon appealed to the High Court.

Pandit *Moti Lal*, for the Appellants.

Maulvi *Abdul Majid*, for the Respondent.

Blair, J.—The facts of this case fall within the ruling in two unreported cases of this Court. The one is the case F. A. No. 269 of 1893, (*Gangai Sahai v. Muhammad Ali Jan Khan*),* [445] decided on the 9th of December 1895, and the other is F. A. No. 149 of 1895 (*Munshi Fakir Chand v. Mahesh Das*),† decided on the 1st of April 1897. No reported cases have been cited to me which are at all on all fours with the matter at issue in the present appeal. I see no reason to differ from the conclusions of the Judges who decided those two unreported appeals, and I accordingly make the same order which they did. I set aside the decree below and remand the case to the lower Court with the direction that it should re-admit the suit under its original number in the register and return the plaint to the plaintiffs for amendment according to law. This order is made under section 562 of the Code of Civil Procedure. The Court of First Instance will then proceed to decide the case on the merits.

Appeal decreed and cause remanded.

NOTES.

[See now the C.P.C., 1908, O. 6, r. 15.]

* The judgment in this case was as follows:—

Banerji and Aikman, JJ.—The suit out of which this appeal has arisen has been dismissed by the Subordinate Judge on the ground that the plaint filed on behalf of the plaintiffs was not properly signed and verified. What took place was this:—The plaint was drawn up on two sheets of plain paper, and it was signed and verified at the foot by the plaintiffs as required by section 51 of the Code of Civil Procedure: this was done by the plaintiffs at Bulandshahr. They sent the plaint to a pleader at Meerut for the purpose of its being filed in the Court there. The pleader instead of attaching to the plaint the stamp paper requisite for the court-fees payable on the plaint, as he should have done, took out the first sheet and transcribed the contents of it on the stamp paper. This was certainly a reprehensible proceeding on the part of the pleader; he should have known that the plaint to be filed in Court was the document which the plaintiffs had signed and verified, and not a document which consisted partly of matter which had been signed and verified, and partly of matter which had been written after signature and verification. The plaint in this case as filed was therefore defective, but we are of opinion that the Subordinate Judge should have returned it to the plaintiffs for amending it by signing and verifying it as it stood; he ought not to have dismissed the suit. It was the duty of the Court to return the plaint before settlement of issues, and the mere fact that issues were settled could not deprive the plaintiffs of the opportunity which they might otherwise have had and ought to have had of curing the defect which existed in the plaint.

We set aside the decree below and remand the case to the lower Court with the direction that it should readmit the suit under its original number in the register and return the plaint to the plaintiffs for amending it by signing and verifying it according to law.

The parties will bear their own costs of this appeal.

† The judgment in this case was as follows:—

Banerji and Aikman, JJ.—The suit out of which this appeal has arisen has been dismissed by the lower Court on the ground that the plaint was not properly verified. The

[446] The 6th June, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Nihali.....Applicant

versus

Mittar Sen and others.....Opposite Parties.*

Act No. IV of 1882 (Transfer of Property Act) sections 86 and 87—Mortgage—Redemption—Redemption possible at any time prior to the passing of the order absolute under section 87.

A mortgagor who has obtained a decree for redemption of his mortgage can pay in the redemption money and obtain redemption at any time until an order absolute under section 87 is made against him. *Poresh Nath Mojumdar v. Ramjodu Mojumdar*, I. L. R., 16 Cal., 246, and *Raham Ilahi Khan v. Ghasiti*, I. L. R., 20 All., 375, referred to.

THIS appeal arose out of an application by the defendant, judgment-debtor, in a suit for foreclosure of a mortgage, in execution of the decree against him. The plaintiffs obtained their decree for foreclosure on the 21st of August 1894. By that decree the judgment-debtor was ordered to pay the mortgage money within three months from the date of the decree, otherwise the mortgage would be foreclosed. The judgment-debtor did not pay in the money, but appealed to the High Court. This appeal was dismissed, and the order of the lower Court affirmed on the 13th of August 1897. On the 6th of November 1897, the judgment-debtor paid the sum then due into Court with notice to the decree-holder, who refused to receive it on the grounds that the judgment-debtor's right to redeem was forfeited by his failure to comply with the order to pay within three months from the 21st of August 1894, which order was not affected by the decree of the High Court; and further, that the decree-holders had in virtue of their decree obtained possession of the property. The Court executing the decree allowed the decree-holders' contention and dismissed the application of the judgment-debtor. The judgment-debtor thereupon appealed to the High Court.

Babu *Durga Charan Banerji*, for the Appellant.

Mr. *S. S. Singh*, for the Respondent.

verification has been held to be defective for two reasons. First, that after the whole of the plaint as it was filed in Court had been prepared the plaintiff did not verify it, but what was done was this:—The plaint was written out on four sheets of foolscap paper, and at the end was signed and verified by the plaintiff; but the pleader who filed the plaint, instead of attaching to it the stamps required for the claim, took out the first two sheets and caused their contents to be copied on the stamp papers. The second ground on which the Subordinate Judge considered the plaint to be defective is that, although the plaintiff verified the whole of the statements contained in the plaint as true to his knowledge, it appeared as to some matters that he had no personal knowledge. As regards this second ground, the conclusion of the Subordinate Judge is erroneous. The plaint on the face of it was properly verified in accordance with the provisions of the law, and for the purposes of ascertaining whether the verification was a good verification in form, the fact whether it was true was wholly immaterial. As to the first ground, as we held in First Appeal No. 269 of 1893, which was a case on all fours with the present, the Subordinate Judge should not have dismissed the suit, but should have returned the plaint to the plaintiff in order that it might be properly verified.

We allow this appeal, and, setting aside the decree below, remand the case under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number on the register and dispose of it on the merits, after causing the plaint to be amended by being properly verified. Costs will abide the event.

* First Appeal No. 73 of 1898 from an order of J. J. McLean, Esq., District Judge of Shahjahanpur, dated the 10th January 1898.

Blair and Burkitt, JJ.—We concur with the judgment and the reasons for that judgment given by the Calcutta Court in the case of *Poresh Nath Mojumdar v. Ramjodu Mojumdar*, [447] I. L. R., 16 Cal., 246, which has been acted upon by a Bench of this Court in the case of *Rahim Ilahi Khan v. Ghasita*, I. L. R., 20 All., 375. In this case a decree was made under section 86 of the Transfer of Property Act, but had not been brought to maturity by an order absolute under section 87. The money to be paid for redemption of the mortgage was tendered and deposited in Court. In our opinion, if the sum tendered were sufficient, it ought to have been accepted and an order given for redemption. That must now be done. We allow the appeal. The appellant will have his costs.

Appeal decreed.

NOTES.

[This was followed in (1903) 25 All., 231. See also (1902) 24 All., 479; (1906) 2 N.L.R., 187; C.P.C., 1908, O. 34.]

[20 All. 447]

PRIVY COUNCIL.

The 21st April and 14th May, 1898.

PRESENT:

LORDS WATSON, HOBHOUSE, MORRIS AND DAVEY, AND SIR R. COUCH.

Hakim Muhammad Ikram-ud-din.....Defendant-Appellant

versus

Najiban.....Plaintiff-Respondent.

On appeal from the High Court for the North-Western Provinces, Allahabad.

Sale of villages by a wife to her husband.

The purchase money had not been paid on what purported to be a deed of sale of villages by a Muhammadan wife to her husband for a price which, however, the deed acknowledged to have been paid. After her death two of her relations, disputing the due execution of the sale deed, sued the husband, who had obtained possession claiming, in the alternative, either that they should obtain their shares in the property of the deceased, or, if the sale of the villages should be maintained that they should receive their proportion of the price as due to the estate left by her.

The two Courts below concurred in finding that the wife, a *parda-nashin*, was capable of managing her own affairs, and that she had not received the price.

The first Court inferred from the state of things that the wife had in a manner made a gift of the villages to the husband. The High Court reversed that judgment, and decided

that with regard to the probability of influence on the part of the husband, the absence of any independent advice for the wife and other circumstances, the transaction was without effect.

[448] The Judicial Committee found that there had not been a case of undue influence exercised either made by the plaintiff or raised by the issues; they found no evidence that the price stated was inadequate, or the sale an improvident one, or that the husband had been released from having to pay the price. From the findings on the evidence the presumption was that the wife intended to pass the property for some purpose, and that, the suggestion of a gift being excluded, the deed operated as a sale according to what it purported to be.

They did not throw any doubt on the sound doctrine, laid down in numerous cases, as to the obligations upon persons taking benefits from *parda-nashin* ladies.

To the one surviving plaintiff was awarded a moiety of the price payable by the husband, who himself inherited the balance.

CONSOLIDATED appeals, one by special leave, from two decrees (7th January 1891) of the High Court, in the same suit, modifying a decree (23rd January 1889) of the Subordinate Judge of Bareilly.

This suit was brought on the 7th February 1888 by Najiban and her sister, Zahur Begam. The latter died in 1888, and Najiban was entered on the record as her heir and representative before the judgment in the Court of First Instance. The defendant, now appellant, was the husband of Imami Begam, sister of the two plaintiffs, who survived her and on her death claimed to share in the estate that she left.

This appeal related to twenty shares in each of two mauzas, one Jabida Chapri and the other Pachtaur, in the Bareilly district, the yearly *jama* of the one being Rs. 1,000, and of the other Rs. 200. They were the subject of a registered deed of sale dated the 9th November 1887, by which Imami Begam purported to have sold them to her husband, having transferred possession to him for Rs. 30,000 then paid as the deed said. He obtained *dakhil kharij*. As to the title of the plaintiffs to sue, there were concurrent findings of fact in the Courts below, and it was not now disputed that the wife, Imami Begam, and the plaintiffs, were three daughters of the same mother, Waziran, deceased. There was no appeal preferred from the decision of the High Court that they were not her legitimate daughters—facts which, according to the High Court, entitled the two plaintiffs to one [449] moiety between them as their combined shares in the late Imami Begam's estate, the other moiety going to the surviving husband. There were also concurrent findings below that the payment of the consideration acknowledged in the deed of the 9th November 1887 had not taken place.

The principal question on these appeals was whether the *parda-nashin* wife had executed that deed with full comprehension of its effect, and free volition on her part that the transaction should be carried out, with the result of the transfer of her property to her husband.

These facts are stated in their Lordships' judgment.

The Subordinate Judge was of opinion that the effect of the sale deed, without the payment of the consideration having been made, was virtually that there was a voluntary transfer or gift of the property by the wife to the husband, which was valid according to the Muhammadan law. This in

the Judge's view had deprived the plaintiff Najiban of all right to the villages, or to any part of the consideration for which they were ostensibly alienated; he therefore dismissed the suit. Both parties appealed to the High Court from the decision of the first Court, the plaintiff Najiban contesting the validity of the transaction of the 9th November 1887, and the defendant objecting to her claiming as a sharer in the estate inherited from her alleged sisters. The question as to the proportionate share which the daughters of one mother would take, under the circumstances, was decided by the High Court as above stated, with the result that their decision on that point was not disputed at the present hearing. On Najiban's appeal the decision of the Bench (Sir JOHN EDGE, C. J., and KNOX, J), was given in one judgment, which dealt with both questions. They reversed the finding of the lower Court that there had been a gift to Ikram-ud-din.

After referring to the written statement of the latter and the evidence, the judgment of the Chief Justice concluded as follows:—

[450] “ Under these circumstances the view I take is that, if Mussammat Imami Begam really understood what the transaction was, it was not the transaction which was evidenced by the sale deed, i.e., a transaction of sale; it was not the transaction which the defendant in his pleadings and in his evidence put before the Court. Although this lady could not fairly be described as a drunkard, she undoubtedly had impaired her health by drink. She was a person very liable to be influenced by her newly-married husband, who was many years her junior; and although she might have desired to confer a benefit upon him, either by making a free gift of those villages to him, or by transferring them to him for an inadequate consideration, still I think we ought not to give Ikram-ud-din a decree in respect of these villages unless, having regard to the circumstances, we are satisfied that this old lady had independent advice, and thoroughly understood what she was doing on that occasion. It has not been shown to us that this lady had any independent advice; and under these circumstances, and having regard to the doubt and mystery in which Ikram-ud-din himself has involved the transaction of the 9th November 1887, I think we should hold that Ikram-ud-din has not made out a title other than his title as heir of his wife Imami Begam to these villages, or any part of them. As the surviving husband of Imami Begam he is entitled to one-half of these villages; Najiban in her own right, and has heiress of her sister, is entitled to the other moiety.”

Mr. H. H. Cozens-Hardy, Q. C., and Mr. H. Cowell, for the appellant, argued that the two villages were not part of the divisible estate left by the wife, but had been effectively transferred to the husband, who was exclusively entitled thereby to the property. Effect should be given to the facts found, in concurrence by the Courts below, that Imami had executed the sale deed with knowledge of its effect, she being a capable woman who understood the transaction. The inference from these facts, with that of the transfer of possession was that Imami intended [451] to convey the property; proof of payment of the price was not essential in order to establish the sale. The general requirement that a *parda-nashin* lady parting with her property should have the advice of some independent person, was not disputed; but here it was contended that the principle had no application, for the sufficient reason that the evidence showed that Imami was in this instance fully competent to manage her own affairs. That the wife was desirous of favouring her husband would not of itself be any proof of the husband having influenced her unduly; of the latter there was no evidence. Reference was made to *Neddy v. Neddy*, (1852) 5 DeGex and Smale, Chy. R., 377; *Ranee Khujooroo-*

nissa v. Mt. Roushun Jehan, (1867) L. R., 3 I. A., 291, 307; I. L. R., 2 Cal., 184; *Kamarunnissa Bibi v. Husaini Bibi*, (1880) I. L. R., 3 All., 266; *Rujabai v. Ismail Ahmed*, (1870) 7 Bom., H. C. Rep., 27; *Mahomed Buksh Khan v. Hosseini Bibi*, (1888) L. R., 15 I. A., 81; I. L. R., 15 Cal., 684.

Mr. J. D. Mayne, and Mr. C. E. A. Ross, for the respondent, argued that the judgment of the High Court was right. That the transaction could not be supported as a gift was clear, for if the wife was intelligent enough to understand what took place on the 9th November 1887, she must have understood it to be a sale to her husband for value and no gift. As a sale, moreover, the husband relied upon the transaction. That it should now be held a gift would contravene the general principle expressed in *Eshenchunder Singh v. Shamachurn Bhutto*, (1866) 11 Moo., I. A., 7, at p. 24. A different case would be made from that which was then put forward if the transaction could be held to be a gift. The High Court was also right in declining to give effect to the sale deed when the circumstances under which the husband sought to have it maintained were all before them. There was direct concealment in the matter of the non-payment of the money. A fiduciary relation subsisted between the parties to the deed at the time, the husband having on the 3rd of the same month accepted his wife's general power as her agent over her property. [452] The wife's ill-health, her secluded state, the entire absence of independent advice, or means for her getting it, were rightly considered, and had had the right decree of weight given to them by the High Court. Thus the claim in respect of the villages had been rightly allowed, and the judgment should be upheld. In reference to transactions entered into by a *parda-nashin* were cited.—*Geresh Chunder Lahoree v. Mussumat Bhuggobutty Debia*, (1870) 13 Moo., I. A., 419, at p. 431; *Tucoordeen Tewary v. Nawab Syed Ali Hossein Khan*, (1874) L. R., 1 I. A., 192, 108; *Sudisht Lal v. Mussumat Sheobarat Koer*, (1881) L. R., 8 I. A., 39, 43; I. L. R., 7 Cal., 245; *Mahomed Buksh Khan v. Hosseini Bibi*, (1888) L. R., 15 I. A., 81; I. L. R., 15 Cal., 684.

Mr. H. H. Cozens-Hardy, Q. C., replied. Afterwards, on May 14th, their Lordships' judgment was delivered by LORD DAVEY.

In October 1887 the present appellant was married to Mussamat Imami Begam; she was then about sixty years of age, and the appellant was some sixteen years younger. Mussamat Imami Begam had been twice previously married, and from one of her former husbands she had inherited a considerable fortune, and at the date of her marriage to the appellant was a woman of large wealth. On the other hand, the appellant appears to have been a person of very small means.

Mussamat Imami Begam executed a power-of-attorney, dated the 3rd November 1887, in favour of the appellant, by which she empowered him to collect her rents and grant receipts, and exercise other large powers over her property.

A few days afterwards Mussamat Imami Begam executed a sale deed dated the 9th November 1887, by which she declared that she had sold two villages to the appellant for Rs. 30,000; and having received the sale consideration in full from the aforesaid vendee, had put him in proprietary possession of the property sold, like herself. Jamna Prasad, the Special Sub-Registrar, in his report stated that he had attended at the house of Mus- [453] samat Imami Begam on the 11th November 1887, and that the Mussamat heard word by word the contents of the sale deed, and admitted from behind a screen the execution and completion thereof, and admitted that she had already received gold mohurs worth Rs. 20,000; and the Sub-Registrar further reported that the appellant, the vendee, paid in his presence ten bags

containing Rs. 10,000 to the Mussamat, the vendor. Fifteen days afterwards she executed a power-of-attorney, dated the 24th November 1887, for the purpose of obtaining mutation of names, the execution of which was also verified by a commissioner.

Mussamat Imami Begam died in the month of January 1888, and shortly afterwards the present respondent and her sister, since deceased, alleging themselves to be the lawful sisters and co-heiresses of the Mussamat, commenced this suit against the appellant. By their plaint the plaintiffs denied the marriage between the Mussamat and the appellant, and alleged that he had taken exclusive possession of, and appropriated without any title, the bulk of her movable and immovable property. As to the sale deed they alleged that the Mussamat had no knowledge of that deed, nor was it read out to her, nor could she have understood it, as she was under the influence of liquor, and that in short the sale deed being spurious, forged, and without consideration was void. The prayer of the plaint was for possession of the villages (including the two in question) and other property as detailed; and that should the defendant prove the sale of the two villages to be genuine, the sale consideration thereof, instead of possession, should be awarded to the plaintiffs against the defendant, along with the movable property, and for possession of the Mussamat's movable property, or payment of its value. The appellant by his statement of defence denied the title of the plaintiffs, and relied on the sale deed.

The Subordinate Judge found that the respondent and her co-plaintiff were the legal heirs of Mussamat Imami Begam and, that a marriage had taken place between the appellant and the Mussamat. The first finding was varied by the High Court, [454] who found that, although the respondent and her co-plaintiff were daughters of the same mother as the Mussamat, they were illegitimate. The result of this was that the plaintiffs became entitled to one moiety only and the defendant (the appellant) to the other moiety of the property. These findings as varied by the High Court are not now in dispute.

The 4th and 5th issues relating to the sale deed were as follows:—

"4. Did Musammat Imami Begam execute the sale deed, dated 9th November 1887, conveying certain villages to the defendant, and did she do so while she was in a sound state of mind, or when she was not in her senses, but in a state of intoxication, without understanding what she was doing; that is to say, whether the contents of the said documents were understood by her, or she was not capable of understanding them?

"5. What is the actual value of the property sold? Was Rs. 30,000 a fiction, or the actual amount of the sale consideration? Was the sum of Rs. 10,000 alleged to have been paid in presence of the Sub-Registrar and the commissioner actually paid, or was the transfer without consideration?"

It is unnecessary to discuss at any length the evidence given on those issues, because the two Courts are in substantial agreement as to the effect of it, although they are not agreed as to the legal result or consequence. Both Courts were satisfied that the Musammat was not intoxicated at the time of verification of the sale deed, and that she was a woman capable of managing her affairs, and that she did in fact manage them, and that she undoubtedly executed by her own hand the sale deed and power-of-attorney for the purpose of mutation of names being effected; and as to the consideration for the sale that, although the Musammat acknowledged receipt of Rs. 20,000, it was not in fact paid, and that the bags purporting to contain rupees were produced before the Sub-Registrar, but there was no actual evidence of their contents, or where

the rupees (if rupees there were) came from, or afterwards went to, and in short that no part of the [455] consideration was proved to have been paid by the appellant to the Musammât.

On these findings of facts (in which their Lordships entirely agree) the subordinate Judge held that the presumption was that out of affection the Musammât gave the property to the appellant as a matter of favour, and through some policy called that gift a sale, and that, instead of a deed of gift, she executed a deed of sale in order to sustain the honour and respectability of the appellant, who belonged to an old respectable family of the town, to screen him from any exposure. The learned Judges in the High Court dissented from this view, and their Lordships agree with them. There is no evidence of any intention to make a gift, and there is no suggestion in the pleadings that the villages had been given to the appellant or that his wife intended to remit to him, or release him from payment of, any part of the purchase money. The acknowledgment of the previous receipt of Rs. 20,000 would no doubt enable the vendor to transmit the property to a second purchaser, as between whom and the vendor the latter would not be entitled to deny the payment of that portion of the purchase money; but as between the vendor and vendee it had not the effect of discharging him.

But while their Lordships so far agree with the High Court, they do not altogether agree on the result, though probably the difference is more one of form than substance. The High Court seems to have thought that in the circumstances there was a presumption of undue influence on the part of the appellant and that he ought to have shown that the old lady had independent advice, and thoroughly understood what she was doing, and accordingly the Court set aside the transaction altogether. Their Lordships doubt whether this was right, or altogether consistent with the previous findings by the Court. There is no case of undue influence made by the plaintiffs in their plaint or raised in the issues on which the case was tried; and there is no evidence that Rs. 30,000 was an inadequate price, or that [456] the sale was an improvident one if the price had been paid. From the findings on the evidence their Lordships think it must be presumed that the Musammât intended to pass the property for some purpose; and, as the suggestion of a gift is excluded, the deed must operate (if at all) according to what it purports to be, *viz.*, as sale. In coming to this conclusion in the case before them, their Lordships do not intend to throw the slightest doubt on the sound doctrine laid down in numerous cases as to the obligations of persons taking benefits from a *parda-nashin* lady.

Their Lordships therefore will humbly advise Her Majesty that relief be given to the surviving plaintiff (the present respondent) in accordance with the fourth paragraph of the prayer of the plaint, and for that purpose the decree of the High Court be varied by inserting after the words "specified below" the words "except the two villages Jabida Chapri, with the garden and houses, and Pachtaur, in the pargana of Nawabganj, but including the sum of Rs. 15,000, being one moiety of the sum of Rs. 30,000, the price of the said two villages, payable by the defendant" and after the words "date of possession" the words "and together with interest on the said sum of Rs. 15,000 from the 9th November 1887 up to date of payment" at the rate usually allowed by the Court, and instead of the words "the amount whereof shall be" the words "the respective amounts of such mesne profits and interest to be," and that in all other respects the said decree ought to be affirmed and the appeal dismissed.

As the appellant came before their Lordships to claim the property as a gift without any payment, and never in the course of the proceedings offered to pay or give credit for the price as part of Mussamat Imami Begam's estate, their Lordships will not advise Her Majesty to make any alteration in the disposal of the costs by the High Court, and for the same reason, and because the respondent has substantially succeeded, they do not think that the variation made by them in the decree should relieve the [457] appellant from the payment of the costs of these appeals, which the appellant must therefore pay.

Appeal allowed, decree varied.

Solicitors for the Appellant—*Messrs. Ranken, Ford, Ford and Chester.*

Solicitors for the Respondent—*Messrs. Pyke and Parrott.*

NOTES.

[See (1905) 2 A.L.J., 436.]

[20 All 457]

APPELLATE CIVIL.

The 9th June, 1896.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Abbasi Begam.....Plaintiff

versus

Afzal Husen and another.....Defendants.*

Muhammadan law—Pre-emption—Talab-i-ishtishhad—Reference to talab-i-mawasibat necessary.

A pre-emptor claiming pre-emption under the Muhammadan law is bound at the time when he makes his *talab-i-ishtishhad* to state distinctly that he has already made *talab-i-mawasibat*. *Rujjub Ali Chopedar v. Chundi Churn Bhadra*, I. L. R., 17 Cal., 543, followed.

IN this case the appellant, a Muhammadan lady, was plaintiff in a suit for pre-emption, in respect of a share in certain zamindari and house property. The Court of First Instance (Munsif of Hawali, Bareilly) decreed the claim. The defendant vendee appealed. The Lower Appellate Court, (District Judge of Bareilly) decreed the appeal and dismissed the suit. The District Judge found that, while the plaintiff had, on hearing of the sale which gave rise to her claim for pre-emption, at once declared that she was the *shafi*, thereby making the *talab-i-mawasibat* properly according to Muhammadan-law, she had, in making the *talab-i-ishtishhad*, which was made through an agent, omitted to refer to the fact of the *talab-i-mawasibat* having been made. The learned Judge accordingly held, that the strict formalities required by the Muhammadan law had not been complied with, and, as [459] stated above, dismissed the plaintiff's suit. The plaintiff thereupon appealed to the High Court.

Mr. Amir-uddin, for the Appellant.

Maulvi Ghulam Mujtaba, for the Respondents.

* Second Appeal No. 381 of 1896, from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 18th February 1896, reversing a decree of Munshi Girraj Kishore Datt, Munsif of Hawali, Bareilly, dated the 4th December 1895.

Blair and Burkitt, JJ.—This is a second appeal of a plaintiff in a pre-emption suit. The lady who is the pre-emptor and appellant here has been defeated by a finding of the Lower Appellate Court that she has not fully satisfied the requirements of the Muhammadan law in making the *talab-i-istihsad*. The facts are, as found by the Lower Appellate Court, that the lady was inside her house when she received intelligence of the transaction which gave rise to her pre-emptive right. She at once declared that she was the *shafi*. That is beyond doubt a sufficient compliance with the requirements of the law as to the immediate demand.* She thereupon instructed an agent to communicate to the vendee, who was outside the house, her intention of exercising her right. The learned Judge says that certain persons appear to have accompanied the agent as witnesses. It is admitted that when the second demand was made to the vendee no words were used referring to the prior demand which had been made inside the house. This is found by the Judge to be an insufficient compliance with the law. We think that he was right for the reasons set forth in the judgment of the Full Bench of the Calcutta Court in the case of *Ruggub Ali Chopedar v. Chundi Churn Bhadra*, I. L. R., 17 Cal., 543. The decision of that Court is one in which we concur. We are informed that this ruling has been followed in other cases in this Court.†

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1898) 20 All., 499.]

[459] APPELLATE CRIMINAL.

The 13th June, 1898.

PRESENT:

SIR LOUIS KERSHAW, KT. CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Queen-Empress

versus

Prag Dat and others. †

Criminal Procedure Code, (1882), section 417—Appeal by Government from an acquittal on the same footing as on appeal from a conviction—Act No. XLV of 1860, sections 96 et seqq—Right of private defence.

When a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises.

In the Code of Criminal Procedure there is no apparent distinction between the right of appeal against an acquittal and a right of appeal against a conviction. *Empress v. Gyadin*, I. L. R., 4 All., 148, and *Queen-Empress v. Gobardhan*, I. L. R., 9 All., 528, referred to.

THE facts of this case are fully stated in the judgment of the Court.

* See *Ali Muhammad Khan v. Muhammad Said Husain*, I. L. R., 18 All., 809.—ED.

† See *Akbar Husain v. Abdul Jalil*, I. L. R., 16 All., 383.—ED.

‡ Criminal Appeal No. 323 of 1898.

The Officiating Government Advocate (Mr. A. E. Ryves), with whom Messrs C. Dillon and B. E. O'Connor, for the Crown,

Mr. W. Wallah and Babu Jogindro Nath Chaudhri, for the Respondents.

Kershaw, C. J., and Knox, J.—This is an appeal presented by the Government Advocate from an original order of acquittal passed by the Sessions Court of Farrukhabad. That Court had before it six Chaube Brahmans, all relatives, and a Gadaraya, the servant of the Brahmans, charged with offences under sections 148 and 302 of the Indian Penal Code, committed at Madhonagar on the 23rd of July 1897.

There can be no room for doubt that the case is one of conflict between the Thakurs and Chaube Brahmans of Madhonagar. They are at dispute over a strip of waste land. The Chaubes assert that the land appertains to a grove which is admitted to belong to them. The Thakurs, on the other hand, maintain that the disputed land is part of their cultivation, which as a fact does adjoin it.

[460] On the 23rd of July the dispute between the parties resulted in a fight, and in this fight one Ajudhia, a servant of the Thakurs, was shot dead. Laltu, the Gadaraya, is charged with having fired the gun. The prosecution says that he fired in pursuance of the common object of the Brahmans, who were attempting by show of force to enforce their alleged rights over this strip of land. Hence the charge laid under the sections above quoted against all the seven respondents. Both the Thakurs and the Brahmans have been arrested on account of this disturbance.

As usual in cases of this kind the police have found it difficult to secure independent testimony of what did take place. Those of the villagers who were present and looking on would probably by sympathy and bias be so attached to one or other of the disputing parties that it would be hopeless to get disinterested and reliable evidence from them. Three witnesses have been found, a barber and a weaver of Bhawan Sarai, and a carpenter of Akramabad, both of them villages within a mile's distance from Madhonagar. It is not suggested by the defence that any one of these three is suspected of bias or partisanship. It is upon their evidence that the Sessions Court acquitted the Brahmans, and it is upon their evidence that the Government Advocate asks us to convict the Brahmans.

We have examined this evidence most minutely, and have been assisted in doing so by careful criticisms on the part of the Government Advocate and the learned counsel who appears for the accused. Undoubtedly these statements differ in points of detail, but they all agree on the following facts:— That the Thakur party consisted of from thirty to fifty men, and that one of that party had a gun and the rest were armed with lathis; that on the other side were arrayed the seven accused; one of them, Laltu, carried a gun; the others had nothing in their hands except that, according to Chedda and Buddha, they carried sticks. All agree in saying that the Thakurs gave orders for the demolition of a *thaonla*, or mud wall, probably three feet high, round a neem tree; that upon this the Chaubes interfered and begged that the matter be referred [461] to Court. Words ensued, then blows, and almost immediately Laltu fired at Ajudhia on the Thakur's side and shot him dead on the spot. Upon this all are said to have run away. The defence put forward on behalf of two of the accused is an *alibi*. The others say that they went to the assistance of Ganga Bakhsh; that they were beaten; that they had no weapons of any kind, and beat no one. Ganga Bakhsh says he was on the spot gathering flowers; found the Thakurs intent upon demolishing the *thaonla*; remonstrated,

and was beaten and became unconscious. Laltu says he carried no gun on that day.

The contention of Mr. *Wallach*, who appeared for the defence, is that upon the evidence of these very three witnesses it is established that the Chaubes were on the spot for a lawful purpose; that they continued throughout a lawful assembly; that Laltu did not come on the spot with them, but after them and quite independently. Laltu had been out shooting birds, and his act, even according to the witnesses for the Crown, was an independent act done in the lawful exercise of the right of private defence. He accordingly contends that none of the accused was guilty of any offence, and that the order of acquittal passed by the Sessions Court of Farrukhabad was the right and proper order. He further contended, on the authority of *Queen-Empress v. Gnyadin*, I. L. R., 4 All., 148, and *Queen-Empress v. Chotu*, I. L. R., 9 All., 52, that this Court has held that the extraordinary powers conferred by section 417 of the Criminal Procedure Code should be most sparingly enforced, and in respect of pure decisions of fact, only in those cases where, through the incompetence, stupidity or perversity of a subordinate tribunal, such unreasonable or distorted conclusions have been drawn from the evidence as to produce a positive miscarriage of justice. In the present case the judgment cannot be said to be open to any of these criticisms, and is therefore not a judgment to be interfered with.

Upon turning to the judgment we find that the reasons given by the learned Sessions Judge for acquitting the accused are that [462] they were a lawful assembly; that Laltu fired and was justified in firing, and he had reason to apprehend that the Brahmans might otherwise be killed, and that therefore there was no riot committed; and it has not been shown that Ajudhia was shot in pursuance of any common object of the assembly of Chaubes, or that the shooting was contemplated by the Chaubes as likely.

The contention that Laltu did not form part of the assembly of Chaubes, but came up independently, is based by Mr. *Wallach* upon a few words which occur in the cross-examination of the witness Buddha. They are to this effect:—

"I saw Prag Dat and Becha Lal (both of them Chaubes) when they came up. Laltu came afterwards. He came from shooting somewhere from the direction of the grove south." The other two witnesses say simply that they saw the Chaubes opposed to the Thakurs, and among the Chaubes was Laltu, Gadariya. Even Buddha places Laltu among the Chaubes from the very commencement of the fight. Laltu was a servant of the Chaubes, and we are satisfied, without any question of doubt, on the evidence of all three witnesses compared together, that Laltu was there in concert and full understanding with the Chaube party. His prompt appearance on the spot, and the precision and readiness with which he, only a servant, acted in concert with his masters, satisfies us that all seven were acting with a common understanding and common intent, and that intent was to prevent the demolition of the *thaonla*, if possible without violence, if necessary by resort to violence, and to extreme violence. We cannot leave out of consideration that the dispute was practically over the removal of a mud wall which could have at any moment been reconstructed at a nominal cost, and the demolition of which would not dissipate all possibilities of recovery of possession, if recourse had been had to Courts of law. If a body of men go down to meet another body of men evidently intent upon picking a quarrel over a piece of mud wall, go down armed with a loaded gun and use that gun within a short interval of their arrival, it is for them to rebut the inference which at once [463] arises that their intention was by means of criminal force, or show of

criminal force, to enforce their rights or supposed rights. We cannot agree with the view taken by the learned Judge, that the Chauhes were in this case entitled to defend their possession *prima facie* by force. The use of force in defence of property by private individuals is a matter defined by law. The presence of Laltu with his gun, unexplained as it is by any evidence for the defence, proves that the Chauhes were prepared to defend this mud *thaonla* even to the voluntarily causing of death; and the burden lay heavily upon them of proving that they acted under reasonable apprehension that death or serious hurt would be the consequence if the right of private defence were not exercised. The harm intended was so slight that persons of ordinary sense and temper would have, and should have, refrained from taking the law into their own hands.

As regards Laltu, the defence is more explicitly and directly a defence that he acted in exercise of the right of private defence. The law in India is that when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code is upon the accused, and it is directed by the Statutes that the Court shall presume the absence of such circumstances. The learned Sessions Judge has entirely overlooked this provision of the law. He has not presumed the absence of circumstances bringing the case within the general exceptions which permit the plea of the right of private defence being raised. The fact that forty or fifty persons began the attack, and that after the attack began Laltu fired a shot which struck Ajudhia, is not enough to show that Laltu was justified in firing. Laltu had to prove that he had reason to apprehend that the Brahmans might be killed. He gave no evidence of this, or of facts from which we could hold it proved. In criminal appeal No. 280 of 1897, *Queen-Empress v. Rupa*, decided on the 27th of March 1897, Sir JOHN EDGE held that when a body of men are determined to vindicate their rights, or supposed rights by unlawful force, and when they engage in a fight with men who, on the other [464] hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. Neither side is trying to protect itself, but each side is trying to get the better of the other. This appears to us to be a true and sound exposition of the law. The learned Judge, in taking the view he did, has erred both in matter of fact and matter of law, and his order must, in the interests of justice, be set aside. With reference to the contention based upon *Queen-Empress v. Gayadin*, I. L. R., 4 All., 148, it must not be forgotten that the learned Chief Justice and Mr. Justice STRAIGHT, in *Queen-Empress v. Gobarahan*, I. L. R., 9 All., 528, did not consider that they were departing from and doing violence to the principles laid down in *Queen-Empress v. Gayadin*, and did set aside an order of acquittal where they were satisfied that the Sessions Judge had overlooked important circumstances. Indeed it is not easy to see any distinction in the Criminal Procedure Code between the right of appeal against an acquittal and a right of appeal against a conviction. In both cases the appellant has to satisfy us that there does exist some good and strong ground apparent upon the record for interfering with the deliberate determination by a Judge who has had all the evidence before him and has arrived at the determination with that great advantage in his favour.

We are satisfied upon the evidence that all the seven accused did go down to the field with the intention of enforcing their rights, or supposed rights, by show of criminal force, and, if need arose, by use of criminal force, and that they thus were members of an unlawful assembly; further that force was used by Laltu in prosecution of the common object of such assembly. All the accused are therefore guilty of the offence of rioting. In prosecution of the common object of the assembly Laltu caused the death of Ajudhia by shooting

him, and with the knowledge that what he did was so imminently dangerous that it must in all probability cause his death. We find Prag Dat, Beche Lal, Ganga Bakhsh, Jamna Prasad, Chote Lal, Din Dial and Laltu guilty [465] of the offence of murder committed in the course of rioting, and by virtue of section 149, read with section 302 of the Indian Penal Code, we direct that Prag Dat, Beche Lal, Ganga Bakhsh, Jamna Prasad, Chote Lal, Din Dial and Laltu suffer each and all of them transportation for life.

NOTES.

[See also (1904) P.R., 7; (1903) P.R., 15 where the distinction between the two kinds of appeals in *practice* is pointed out.

As regards the right of private defence, this was followed in (1901) 24 All., 143; (1908) 35 Cal., 368.]

[20 All. 465]

APPELLATE CIVIL.

The 14th June, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Umrao Bibi.....Defendant

versus

Jan Ali Shah.....Plaintiff.*

Suit for cancellation of a deed—Muhammadan law—Plea that the deed was inoperative according to the personal law of the parties.

Held, in the case of a deed of gift between Muhammadans, that it was no ground for cancellation of the deed that, possession of the property, the subject of the deed, not having been made over to the donee, the deed might be, according to the Muhammadan law, inoperative.

THIS was a suit for cancellation of a deed of gift, dated the 4th of January 1895, executed by the plaintiff in favour of the defendant his niece, and assigning to the latter a one anna share in a certain village. The plaintiff alleged, that he had really intended to convey the share in dispute to his own daughter, but, that the defendant's husband had fraudulently caused the deed to be executed in favour of the defendant. The plaintiff further pleaded that possession of the property, the subject of the deed had not been made over, and that the deed was therefore void according to the Muhammadan law.

The Court of First Instance (Munsif of Bansi) found against the plaintiff on the allegation of fraud, but, finding that possession had not been delivered under the deed, held that the gift, being not complete, was liable to be revoked, and accordingly decreed the plaintiff's claim.

The defendant appealed, and the Lower Appellate Court (District Judge of Gorakhpur) dismissed the appeal, affirming the decree of the Munsif. The defendant thereupon appealed to the High Court.

[466] Babu Jogindro Nath Chaudhri and Babu Satya Chandra Mukerji for the Appellant.

Mr. Amiruddin, for the Respondent.

Blair, J.—The plaintiff's suit was for cancellation of a deed of gift. It was based on the allegation that the execution of the deed had been obtained

* Second Appeal No. 416 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 5th March 1896, confirming a decree of Babu Keshab Deb, Munsif of Bansi, dated the 15th November 1895.

by fraud. There was an allegation in the plaint, apparently intended to support the plaintiff's statement that he never made such a deed, to the effect that he had never given up to the defendant possession of the property the subject of the deed of gift. The allegation of fraud has been found not to have been proved, and the plaintiff relies upon the ground that a deed of gift, made without possession being given of the subject of that deed, is void in law. The plaintiff is in this dilemma. If the deed is a nullity for lack of giving over of possession, it is a document from which the plaintiff can entertain no reasonable apprehension of injury. If, on the other hand, possession was non-essential to its validity, then it would be a good deed of gift. In either the one or the other case it is not a document which a Court can be properly called upon to cancel. I would allow the appeal and dismiss the plaintiff's suit with costs.

Burkitt, J.—I am also of the same opinion, and am of opinion that the appeal must be allowed and the suit dismissed.

The plaintiff came into Court alleging an act of fraud against the defendant, in that he (the plaintiff) had been fraudulently made to execute a deed of gift in favour of the defendant, who was his niece, he at the time believing that it was in favour of his own daughter. Further on in his plaint he alleged that no transfer of possession had taken place, apparently adducing that matter in corroboration of the allegation of fraud. In the first Court the plaintiff failed to prove the allegation of fraud, and as to possession it was found that no transfer had taken place. The Munsif thereupon records:—"I find that defendant did not take possession of the gifted property, and hence the gift not being complete is liable to be revoked. Hence I give a decree for the plaintiff for [467] cancellation of the deed." Now as to those words, it is to be remarked that the plaintiff nowhere asserted any revocation of the deed of gift; so the Munsif set up for the plaintiff a case he had not made and a case totally inconsistent with the plaintiff's case; and though the Munsif says:—"Hence I give a decree," he has not referred to any authority justifying such action. The defendant being defeated in the first Court, appealed to the District Judge, and of course based her appeal on the question decided against her by the Munsif, *i. e.*, the question of transfer of possession. On that issue the Judge in appeal concurred with the Court below, and affirmed the decree cancelling the deed. The ground on which the deed has been cancelled has been explained to us to-day by the learned counsel for the respondent to be because it violated the rule of Muhammadan law, which requires that transfer of possession shall accompany a gift of immoveable property. It may be that the deed of gift is open to that objection; it may be that it is a deed not worth the paper it is written on; it may be that no action could successfully be taken on it in any Court, and that it is perfectly ineffectual for the purpose it purports to effect; I do not decide any of those points. But, assuming that the deed is open to all those objections, assuming it is waste paper, I am of opinion that that is no reason why a Court of Justice should be called on solemnly to cancel that which had no existence in law. Had the plaintiff made out the allegation of fraud, the case would have been different. Proof of that allegation would have been ample reason for cancelling the deed, but that allegation having failed, I see no reason why the document should be set aside simply because it may turn out to be one which has not complied with the provisions of the Muhammadan law.

Appeal decreed.

NOTES.

[See also (1899) 3 O.C., 231.]

[468] *The 15th June, 1898.*

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Tota Ram and others...Defendants

versus

Lala.....Plaintiff.*

Act No. IV of 1882 (Transfer of Property Act), section 135—Actionable Claim—Sale of mortgagor's interest in mortgaged property.

The sale by a mortgagor of his interest in the property mortgaged is not the sale of an actionable claim within the meaning of section 135 of the Transfer of Property Act, 1882.

THIS was a suit for redemption of a usufructuary mortgage. One Lala, the uncle of Diwan Singh, defendant, executed a usufructuary mortgage of certain property for Rs 600 in favour of Man Singh, and put the mortgagee in possession. Man Singh sold his rights in the mortgaged property to Diwan Singh and four others, defendants, and gave the vendees possession. Lala, the mortgagor, died and was succeeded by Diwan Singh, his nephew. Diwan Singh sold his interest as a mortgagor to the plaintiff Lala. Lala, plaintiff, brought a suit for redemption, and paid the mortgage money (Rs. 600) into Court. The defendants, other than Diwan Singh, who, not impleaded at first, was added by the Court to the array of defendants, pleaded that out of a nominal sale consideration of Rs. 1,000 only Rs. 50 had in fact been paid, and they claimed the benefit of section 135 of the Transfer of Property Act, alleging that they were entitled to defeat the plaintiff's suit on payment of the actual price paid (stated by them to be Rs. 50) and the expenses of the sale. They pleaded also a right to take the property mortgaged as pre-emptors; that there was another mortgage on the property which the plaintiff was also bound to redeem, and that the sale in favour of the plaintiff was executed without consideration.

The Court of First Instance (Munsif of Khurja) gave the plaintiff a decree for redemption and possession as prayed. The defendants appealed. The Additional District Judge confirmed the decree of the Munsif and dismissed the appeal. From that decree the defendants appeal to the High Court.

[469] Pandit *Sundar Lal* (for whom *Babu Jivan Chandar Mukerji*) for the Appellants.

Munshi *Ram Prasad*, for the Respondent.

Blair and Burkitt, JJ.—This appeal, one ground only, the third, being urged upon us, is based on the contention that the purchase of the mortgagor's interest in land subject to a mortgage is a purchase of an actionable claim within the meaning of section 135 of the Transfer of Property Act. We are not prepared to accede to so novel a contention, for which no authority is produced. In our opinion, what was effected by the purchase was the transfer of the land

* Second Appeal No. 445 of 1896 from a decree of T. C. Piggott, Esq., Additional District Judge of Aligarh, dated the 13th March 1896, confirming a decree of Pandit Soti Raghubans Lal, Munsif of Khurja, dated the 20th November 1895.

itself subject to the mortgage. It seems to us a totally different thing from and bears in our mind no analogy whatever to the purchase of a mortgagee's interest in a mortgage after the mortgage has become due and payable. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[There were two main alterations by the Legislature in 1900 in the law relating to actionable claims contained in the Transfer of Property Act, 1882,—(1) from the definition of actionable claims were excluded mortgages etc. (2) sec. 135 was repealed.]

[20 All. 469]

The 16th June, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Yusuf Ali Khan and others.....Plaintiffs

versus

Hira and others.....Defendants.

Landholder and tenant—Act No. XII of 1881 (N.-W. P. Rent Act), section 93 (b)—Suit to eject a tenant—Act inconsistent with the purpose for which the land was let—Sub-lease to a theatrical company.

An agricultural tenant, at a time when there were no crops growing on his holding, let part of it temporarily to a theatrical company for the purpose of their holding performances thereon. *Held*, that this was not an act sufficient to cause a forfeiture of the tenancy within the meaning of section 93, clause (b) of Act No. XII of 1881.

THE facts of this case sufficiently appear from the judgment of the Court.

Kunwar Parmanand, for the Appellants.

The Respondents were not represented.

Banerji, J.—This was a suit brought under clause (b) of section 93 of the Rent Act (No. XII of 1881) to eject an occupancy [470] tenant from his holding on the ground that he had committed an act detrimental to the land in his occupation and inconsistent with the purposes for which it was let. The act complained of was that in the month of October, when, according to the learned Judge of the Lower Appellate Court, there were no crops on the land, and none could have been grown, the defendants had let the land to a theatrical company for erecting a temporary pavilion for the purpose of their theatre. Both the Courts below have dismissed the suit, and I think rightly. The act was not detrimental to the land or inconsistent with the purpose for which it was let, within the meaning of clause (b). The tenant, having at a time when the land could not be sown with crops let it to a theatrical company for the purpose of a theatre for a short period only, did not do an act detrimental to the land, and although, technically speaking, they did an act inconsistent with the purpose for which it was let, namely, cultivation, it does not seem to me that the Legislature contemplated that a tenancy would be liable to forfeiture if the tenant did an act of this kind for a temporary purpose only, at a time when the land in the tenant's holding could not be cultivated. It is evident from the provisions of section 149, as the learned Judge has pointed out, that the

* Second Appeal No. 478 of 1897 from a decree of C. Rustamji, Esq., District Judge of Moradabad, dated the 25th March 1897, confirming a decree of A. W. McNair, Esq., Assistant Collector of Moradabad, dated the 13th November 1897.

Legislature intended to give a tenant a *locus penitentiae* and an opportunity to repair the damage done by him. In this case at the time when the Court of First Instance made its decree the land had been restored to its former condition and crops had been grown on it. The Courts below have, in my judgment, rightly held that the defendant's act did not entail the forfeiture of their occupancy holding. I dismiss the appeal, but without costs, as the respondents are not represented.

Appeal dismissed.

[471] *The 22nd June, 1898.*

PRESENT :

MR. JUSTICE BLAIR.

Dalip Rai.....Defendant

versus

Deoki Rai.....Plaintiff.*

Dalip Rai.....Defendant

versus

Sukhdeo Rai.....Plaintiff.*

Dalip Rai.....Defendant

versus

Jokhu Rai and another.....Plaintiffs.*

Act No. XII of 1881 (N.-W. P. Rent Act), section 95 (n)—Landholder and tenant—Effect on tenant's rights of his neglecting to apply under section 95.

A tenant of certain *muafi* land was dispossessed by his zamindars, as he alleged, wrongfully. The dispossessed tenant did not avail himself of the remedy provided by section 95, clause (n) of Act No. XII of 1881; but some time after the expiry of the period of limitation for an application under that section, he dispossessed the zamindars, who had meanwhile taken the land in suit into their own cultivation. The zamindars, thereupon sued in the Civil Court for the ejectment of the former tenant as a trespasser. *Held*, that the defendant could not set up in answer to this suit his status as tenant which he had lost by not availing himself within limitation of the means provided by section 95, clause (n) of Act No. XII of 1881, to contest his own ejectment.

THESE were three connected appeals arising out of the following facts:—The plaintiffs, with others, were purchasers of a village, in which was comprised certain resumed *muafi* land, which had formerly been an assignment, or *jagir*, for the support of *chaukidars*. Before the assignment of the village to the plaintiffs and their co-starers this land appears to have been settled with the defendant. The purchasers subsequently partitioned the

* Second Appeals Nos. 430, 431 and 432 of 1897, from decrees of Maulvi Muhammad Ismail Khan, Additional Subordinate Judge of Ghazipur, dated the 26th April 1897, reversing decrees of Munshi Achal Behari, Munsif of Ghazipur, dated the 20th February 1897.

village, and the plots of land in suit, forming a portion of the above-mentioned resumed muafi, fell to the shares of the respective plaintiffs.

The plaintiffs came into Court, denying that the defendant had ever been a tenant of the land in question, and alleging that they had each and all been forcibly ejected by the defendant, and they sued for recovery of possession of their respective plots by ejection of the defendant.

The defendant pleaded *inter alia* that he was a tenant and that the suits were not cognizable by a Civil Court. The Court [472] of First Instance (Munsif of Ghazipur) gave effect to this plea and dismissed the plaintiffs' suits.

The plaintiffs appealed. The Lower Appellate Court (Additional Subordinate Judge of Ghazipur) found that the defendant had been a tenant up to some time in 1892, when he had been wrongfully dispossessed by the plaintiffs; but that, inasmuch as he had not availed himself of the remedy provided by law in clause (n) of section 95 of Act No. XII of 1881 within the period limited by section 96 of that Act, he had lost his title as well as his remedy. The Court accordingly decreed the plaintiffs' claim.

The defendant thereupon appealed to the High Court.

Munsbi *Haribans Sahai*, for the Appellant.

Mr. *Abdul Majid*, for the Respondents.

Blair, J.—It is needless to recapitulate the admitted facts of this case. The plaintiff acquired title from a person who had resumed the land theretofore assigned for the support of chaukidars. Originally this plaintiff and the plaintiffs in the two connected cases held equal shares in the plot in question. They and the other co-sharers subsequently partitioned the land, and each became possessed in severalty of his own plot. The plaintiffs sue for possession each of his own plot on the allegation that the defendants are mere trespassers. The defendant alleges in his defence that he was, at the time of the dispossession alleged against him by the plaintiffs, the tenant of the plot in suit. Numerous collateral and subsidiary issues were raised, with which it seems unnecessary to deal in deciding these second appeals. The suits of the plaintiffs were dismissed in the Court of First Instance on the finding that the defendant was a tenant. The plaintiffs appealed, and in the Lower Appellate Court it was found that the defendant had been a tenant up to some time in 1892, when he was wrongfully dispossessed by the present plaintiffs: but that inasmuch as he had not availed himself of the remedy provided by law in clause (n) of section 95 of Act No. XII of 1881 within the period limited by section 96 of that Act, [473] he had lost his title as well as his remedy. It seems to me that that judgment is sound. Section 95 of Act No. XII of 1881 provides that the Revenue Courts only shall have jurisdiction to deal with the subjects and matters of the nature for which applications are prescribed as the proper remedy in that section. The section does not provide merely that no plaintiff may bring a suit on a subject or matter in relation to which one of such applications might be made, but that the Civil Court shall not "take cognizance of any dispute or matter" upon which an application of such a nature might have been made. The defendant here is setting up an existing tenancy in himself, which, if it did exist, would entitle him to recover possession and to continue in possession, up to and at the time when he himself forcibly dispossessed the plaintiffs. In other words, it is contended that he might lie by and neglect to take the steps provided by law within the time limited by law to recover the possession from which he had been wrongfully ousted and might by his own laches oust the jurisdiction

of the Revenue Court and set up the jurisdiction of the Civil Court in relation to a matter which, if the subject of contention, could have been brought only in the Revenue Court within a period of six months. That would be the result of allowing him to set up in a Civil Court his title as a tenant in answer to a charge of trespass after the expiration of that period. It seems to me that, apart from the wording of section 95 of the Rent Act, it was intended that the landlord should not be liable for an indefinite time to the dispossession, perhaps, of some tenants whom he had been induced to let in as tenants, and who perhaps might have incurred heavy expenses, in the belief that the excluded tenant had by declining to avail himself of the remedy provided by law manifested his intention of abandoning his tenancy. That disposes of the one question in this appeal. There is a secondary one, namely, that of *res judicata* into which I decline to allow the appellant to enter. It was expressly stated by the Judge in the Lower Appellate Court that that point and another or others were not pressed on him. It seems to me that it [474] is not open to a litigant to practically abandon a portion of his contention in one Court and then at his convenience to resuscitate it in another. The effect is that these appeals will be dismissed with costs.

Appeals dismissed.

[20 All. 474]

REVISIONAL CIVIL.

The 27th June, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Chatarbuj Das.....Defendant

versus

Ganesh Ram.....Plaintiff.

Civil Procedure Code, section 516—Award—Decree passed on award filed in Court without notice of its filing being sent to the parties—Revision.

Held, that it was a good ground for revision of a decree based upon an award filed in Court that no notice of the filing of the award was given by the Court to the parties as required by section 516 of the Code of Civil Procedure, even though the applicant in revision might have received information *aliunde* that the award had been filed. *Rangasami v. Muthusami*, I. L. R., 11 Mad., 144, followed.

THE plaintiff and defendant in this case having agreed to refer the matters in dispute between them to arbitration, the plaintiff applied to the Court to have the agreement of reference filed in Court. A summons was issued to the defendant, but he did not put in a defence. The case was proceeded with *ex parte*, and the agreement of reference was filed in Court, and ultimately, on the 17th February 1898, the award based on the said agreement was filed within the time limited by the Court. The defendant on the 3rd of March 1898,

Civil Revision No. 24 of 1898.

filed a *vakalat-namah* authorizing his pleader to object to the award, and on the 18th March objections were filed. The material objection of the defendant was that no notice of the filing of the award had been given to him by the Court as required by section 516 of the Code of Civil Procedure. The Court (Subordinate Judge of Mainpuri) held that under the circumstances of the case such notice was not necessary, as the defendant in fact knew that the award [475] had been filed. The Court further held that the defendant's objections were barred by limitation under article 158 of the second schedule to the Limitation Act, and accordingly disallowed the objections and ordered that a decree should be prepared in accordance with the award. Against this order the defendant applied in revision to the High Court.

Mr. W. Wallach and Babu Badri Das, for the Appellant.

Pandit Sundar Lal and Pandit Baldeo Ram, for the Respondent.

Kershaw, C. J., and Burkitt, J.—This is an application calling on this Court to exercise its revisional powers in respect of a decree passed on the 28th of March 1898 by the Subordinate Judge of Mainpuri on an award submitted by arbitrators appointed by the parties. The first ground taken in the petition of revision, and the only ground argued before us, is that the learned Subordinate Judge acted with material irregularity, in the exercise of his jurisdiction, in that he passed the decree on the award without first having sent to the parties the notice required by section 516 of the Code of Civil Procedure. It is admitted that notice was not sent; but it was contended, and it is probably true, that the applicant did know that the award had been filed. That matter, however, we regard as immaterial: it was the duty of the Court to send notice. The applicant, in our opinion, might have remained inactive in the case, and was not bound to take any steps in it until he received notice from the Court. This case is on all fours with the case of *Rangasami v. Muttusami*, I. L. R., 11 Mad., 144. In that case it was observed that the Court of the Munsif which passed the decree was bound to give the petitioners notice of the filing of the award, which it failed to do, and that the omission to do so was a material irregularity. The High Court further went on to hold that the Munsif should not have proceeded to pass a decree in conformity with the award without first hearing the petitioner's objections. In these observations we fully concur, and adopting the form of [476] the decree used by the Madras Court, we allow this application. We set aside the decree of the Subordinate Judge. We direct him to restore the suit to the file, and after considering the objections which we understand have been filed by the applicant, to pass such orders as appear to be just. The applicant will have his costs of this application.

NOTES.

[See also (1899) 19 A.W.N., 30, (1901) (1897-1901) U.B.R., Vol. II. 24.]

[30 All. 476]

APPELLATE CIVIL.

The 27th June, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Ranjit.....Plaintiff
versus

Radha Rani and another.....Defendants.*

*Act No. XV of 1856 (Re-marriage of Hindu widows), section 2—Hindu Law—
Hindu widow—Rights of widow in deceased husband's property—Widows
whose re-marriage is valid independently of the Statute.*

Held, that a Hindu widow belonging to the Kurmi caste, in which the re-marriage of widows was permitted, by custom of the caste, independently of Act No. XV of 1856, was not, by reason of her re-marriage, deprived of her right to remain in possession of her deceased husband's estate during her life-time, and that a suit brought during her life-time by the reversioners to the estate of her husband to obtain immediate possession of such estate could not succeed. *Har Saran Das v. Nandi*, I. L. R., 11 All., 330, and *Dharam Das v. Nand Lal Singh*. Weekly Notes, 1889, p. 78, followed.

IN this case the plaintiff claimed certain immovable property which had been owned in his life-time by one Ganga Prasad, a somewhat remote collateral. Ganga Prasad had died in 1893, leaving him surviving his step-mother Radha Rani, who was actually in possession of the property, and a widow, Sugna. Sugna had married again after the death of Ganga Prasad. The parties were Kurmis, amongst whom the re-marriage of widows is permitted. The plaintiff, however, alleged that the defendant Sugna had by her re-marriage lost all right to her deceased husband's property, and that, inasmuch as Radha Rani, being the step-mother of the last owner, could not be his heir, he (the plaintiff) was entitled to the property.

[477] The Court of First Instance dismissed the plaintiff's suit, holding that Sugna was the real heir to the property claimed. The plaintiff appealed, and his appeal was likewise dismissed on a similar finding. The plaintiff thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri and Babu Ratan Chand, for the Appellant.
Pandit Sundar Lal, for the Respondents.

Blair and Aikman, JJ.—This is the suit of a plaintiff, who alleges that, failing the right of a Hindu widow of the Kurmi caste who has re-married to the property of her first husband, he is the heir. He impleads the person in actual possession of the property, who is the mother-in-law of the widow, the widow herself and her second husband. The question raised is one as to which there is a clear and absolute difference of opinion between the decisions of this Court and those of the Courts at Bombay and Calcutta, though there is indeed one case which has arisen in the Bombay High Court which has been decided to the same effect as the rulings laid down by this Court. The Allahabad decisions are in the cases of *Har Saran*

* Second Appeal No. 546 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 20th April 1896, confirming a decree of Mr. Azizul Rahman, Subordinate Judge of Jhansi, dated the 4th March 1896.

Das v. Nandi, I. L. R., 11 All., 330, and *Dharam Das v. Nand Lal Singh*, Weekly Notes, 1889, p. 78. Several unreported cases have all been decided in this Court in the same way. We see no reason to doubt the soundness of those decisions, which form, as far as we know, a consistent *cursus curiæ* in this Court. Another point was raised by the appellant to the effect that in the provisions of the *wajib-ul-arz* a custom was alleged to exist to the effect that a widow among the Kurmi caste who re-marries loses thereby the right to her husband's property. It is found as a fact upon evidence by the Judge of the Lower Appellate Court that no such custom is proved. The appeal fails and is dismissed with costs.

Appeal dismissed.

NOTES.

[The Allahabad view was maintained in (1909) 29 All., 122; (1908) 31 All., 161; (1910) 32 All., 489; (1913) 35 All., 466, though other Courts dissented therefrom:—(1908) 8 C. L. J., 642. See also *Ganapati Iyer's Hindu Law*, Vol. I (1 Edn., 1915).]

[478] *The 28th June, 1896.*

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Jiwat Dube.....Decree-holder

versus

Kali Charan Ram and others.....Judgment-debtors.

Execution of decree—Application for execution giving wrong date of decree—Amendment allowed after limitation—Amendment relating back to former applications.

J obtained a decree on two mortgage bonds on the 25th November 1885. That decree was set aside, but another decree was passed in his favour on the 21st of September 1886. The decree-holder made several applications to execute the decree, but in each described the decree as of the 25th November 1885. On the third application the judgment-debtor objected that the application was time-barred. The application was allowed to be amended, but the amendment took place after the expiry of limitation. *Held*, that the amendment would relate back to the preceding applications, and execution of the decree was not time-barred. *Ajudhia Ram v. Muhammad Munir*, Weekly Notes, 1893, p. 112, followed.

IN this case Shambhu Prasad Dube and others obtained a decree against Ishar Dât and others on the 25th of November 1885. This was an *ex parte* decree, and was set aside on application by the judgment debtors under section 108 of the Code of Civil Procedure. The decree-holders, however, obtained another decree in the same suit on the 21st of September 1886. Three applications for execution were filed, namely, on the 21st of January 1889, on the 14th of November 1891, and on the 14th of November 1894; but in each application the decree sought to be executed was described as the decree of the 25th of November 1885. Upon the third application—but apparently not before—the judgment-debtors took objection that the decree sought to be executed, namely, the decree of the 25th of November 1885 was time-barred. The representative of the original decree-holders applied for leave to amend his application, and the amendment prayed for was made on the 23rd of March 1895. The application for execution was allowed, subject to the applicant's filing a certificate of

* Second Appeal No. 577 of 1896, from a decree of Pandit Bansi Dhar, Subordinate Judge of Gorakhpur, dated the 29th April 1896, reversing a decree of Babu Dajarnath, Munsif of Gorakhpur, dated the 7th May 1895.

succession within one month. From this order the judgment-debtors appealed, and the Lower Appellate Court [479] (Subordinate Judge of Gorakhpur) allowed the appeal and dismissed the application for execution. The decree-holder thereupon appealed to the High Court.

Munshi *Jwala Prasad*, for the Appellant.

Mr. *H. C. Niblett*, for the Respondents.

Blair and Aikman, JJ.— This is the appeal of a decree-holder. The sole point urged upon us is one of limitation. It has been found that the application before the Court below was an application not made within three years of a previous legal application. The facts are these. An *ex parte* decree was obtained by the present decree-holder on the 25th November 1885. That decree was subsequently set aside. Another decree, however, was made in favour of the decree-holder on the 21st September 1886. That was then his only extant decree, the only one therefore capable of execution, and, we cannot doubt, the one he wished to execute. He made his first application on the 21st January 1889, within the three years' period, but, we are informed by Mr. *Niblett*, specified in his application the date November 25th, 1885, as being the date of the decree sought to be executed. Assuming that application to be a good one in point of law, the second application made on the 14th November 1891, would have been in point of time a good application. We are told, however, that the second application repeated the mistake as to the date of the decree. The third application was made on the 14th of November 1894, just therefore within time, were there no other objection. That application also described the decree as of the 25th of November 1885. The mistake in regard to the date of the decree passes through all these applications. Upon the third application the judgment-debtor took objection, that the decree sought to be executed, to wit, the decree of the 25th of November 1885, was time-barred. The decree-holder applied for amendment by substituting the correct date of the only extant decree held by him against the judgment-debtor. The amendment was allowed after the lapse of the three years. Mr. *Jwala Prasad* invites us to say that the Lower Appellate Court was wrong in ruling that the [480] decree in relation to which the application was made was no longer capable of execution. He suggests that there never could have been any doubt as to the intention of the appellant, and it appears there could never have been any doubt in the minds of the judgment-debtors, as to the decree which was intended to be executed. He suggests, therefore, that the amendment was properly and rightly made and relates back to the date of the original informal application. In support of his contention he cites the judgment of this Court in *Ajudhia Ram v. Muhammad Munir*, Weekly Notes, 1893, p. 112. It is there ruled that an application having once been admitted the date of a subsequent amendment would not by reason of such amendment become the date of the application. We approve of that ruling, and therefore hold that the third application was within time. Until the date of present application we are not aware of any objection taken by the judgment-debtors to the previous applications upon the ground of the erroneous date being specified as the date of the decree.

We therefore allow this appeal, and set aside the order of the Lower Appellate Court upon the preliminary point, but without costs, as it has arisen through the mistake of the decree-holder. We remand the case under section 562 of the Code of Civil Procedure for the decision of the remaining issues contained in the memorandum of appeal to the Lower Appellate Court.

Appeal dismissed and cause remanded.

NOTES.

[For similar decisions, see also (1913) 18 C. L. J., 538; (1901) 23 All., 162; (1905) 2 A. L. J., 367; (1910) 14 C.W.N., 481.]

[20 All. 480]

The 29th June, 1896.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Sada Shankar and another.....Defendants

versus

Brij Mohan Das.....Plaintiff.*

*Act No. IX of 1887 (Provincial Small Cause Courts' Act) Section 23—
Civil Procedure Code, section 586—Suit of the nature cognizable by
Courts of Small Causes.*

A suit is none the less a suit cognizable by a Court of Small Causes because that Court may have exercised the discretion conferred on it by section 23 of [481] the Provincial Small Cause Courts' Act, and returned the plaint to be presented to a Court having jurisdiction to determine a question of title raised therein. *Kali Krishna Tagore v. Issat-an-nissa Khatun*, I. L. R., 24 Cal., 557, followed.

IN this case the plaintiff Brij Mohan Das sued one Gopal Das in the Court of Small Causes at Benares for the rent of part of a house. He alleged in his plaint that he had purchased the said house from one Kanhaiya Lal, who himself had taken it as heir to one Musammat Dhani Bai, that he had let a portion of the said house to the defendant on the 7th June 1889, but that the defendant had not paid him any portion of the stipulated rent. The plaintiff accordingly claimed rent and interest for three years previous to the date of suit, amounting in all to Rs. 117-4. The defendant pleaded that the house belonged, not to the plaintiff, but to Sada Shankar and Rabi Shankar, to whom the rent claimed had been paid, and that the plaintiff had no concern whatever with the house in question. Rabi Shankar and Sada Shankar were accordingly made defendants to the suit. Subsequently the plaint was returned to the plaintiff to be presented in the proper Court. The plaint was accordingly presented in the Court of the Munsif, who heard the suit and decreed the plaintiff's claim. The defendant Sada Shankar appealed to the Subordinate Judge, who dismissed the appeal. Sada Shankar and Rabi Shankar thereupon appealed to the High Court.

Munshi Gokul Prasad, for the Appellants.

Maulvi Ghulam Mujtaba, for the Respondent.

Blair and Aikman, JJ :—Mr. *Ghulam Mujtaba's* preliminary objection to the hearing of this appeal must prevail. A cause is none the less a cause cognizable by a Court of Small Causes, because that Court exercised the discretion conferred on it by section 23 of the Provincial Small Cause Courts' Act No. IX of 1887, and returned the plaint to be presented to a Court having jurisdiction to determine the title. We concur with the judgment

* Second Appeal No. 576 of 1896, from a decree of Babu Nil Madhub Rai, Subordinate Judge of Benares, dated the 2nd May 1896, confirming a decree of Maulvi Mubarak Husain, Munsif of Benares, dated the 19th September, 1895.

of the Calcutta Court in *Kali Krishna Tagore v. Izzat-an-nissa Khatun*, I. L. R., 24 Cal., 557. The appeal is dismissed with costs.

Appeal dismissed.

[482] FULL BENCH.

The 30th June, 1898.

PRESENT :

MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, AND MR. JUSTICE AIKMAN.

Behari Lal and others.....Defendants

versus

Muhammad Muttaki.....Plaintiff.*

Act No. XV of 1877 (Indian Limitation Act), sch. ii, Arts. 134, 144—Trust—Mortgage—Limitation—Suit by trustee to set aside mortgages of trust property made by his predecessor in office.

A *sajjada nashin* in possession of certain *waqf* property during the years 1864 to 1869 executed various mortgages of portions of the *waqf* property, professing to do so in his capacity of *sajjada nashin*. The mortgagor died in February 1891, and on the 6th of April 1891, was succeeded by his son as *sajjada nashin*. On the 25th of November 1893, the son brought a suit to recover possession of the mortgaged property, of which the mortgagees were in possession, on the ground that the mortgages were in violation of the trust and therefore invalid.

Held by the Court that the suit was barred by limitation.

Per BLAIR, J.—Whether or not art. 134 of the second schedule to the Indian Limitation Act, 1877, applies to the case is immaterial, if art. 134 does not apply the suit would be barred by art. 144 of the same schedule, limitation commencing to run against the trustee from the dates of the mortgagees obtaining possession under their respective mortgages. *Nilmony Singh v. Jagabandhu Roy*, I. L. R., 23 Cal., 536 ; *Yesu Ramji Kalnath v. Balakrishna Lakshman*, I. L. R., 15 Bom., 583 ; *Bejoy Chunder Banerjee v. Kally Prosopno Mookerjee*, I. L. R., 4 Cal., 327, and *Madhava v. Narayana*, I. L. R., 9 Mad., 244, referred to.

Per BANERJI, J.—The suit is barred by art. 134 of the second schedule to the Indian Limitation Act, 1877, which is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. *Gobind Nath Roy Bahadoor v. Ranee Luchmee Koomaree*, 11 W. R., C. R., 36, *Yesu Ramji Kalnath v. Balakrishna Lakshman*, I. L. R., 15 Bom., 583, *Maluji v. Fakir Chandi*, I. L. R., 22 Bom., 225, and *Nilmony Singh v. Jagabandhu Roy*, I. L. R., 23 Cal., 536, referred to.

Per AIKMAN, J.—The term “purchased” as used in art. 134 of the second schedule cannot be taken as including “mortgaged” but art. 144 would apply and be a bar to the suit.

* Second Appeal No. 927 of 1895, from a decree of Maulvi Muhammad Anwar Hussain Khan, Subordinate Judge of Farrukhabad, dated the 6th August 1895, reversing a decree, Munshi Bakhtawar Lal, Munsif of Farrukhabad, dated the 26th September 1894.

THE facts of the case sufficiently appear from the judgments.

Munshi *Haribans Sahai*, for the Appellants.

Mr. *Amiruddin*, for the Respondent.

[483] Blair, J.:—The suit out of which this second appeal arises was brought by the plaintiff respondent as *sajjada nashin* of a certain shrine, to recover possession of certain land, the property of the shrine, by dispossession of the defendants and invalidation of the mortgages made to them by the plaintiff's predecessor in office, one Bande Ali. The plaintiff also prayed for mesne profits and costs. The plaintiff in his plaint alleged the cause of action to have arisen on February 26th, 1891, the date of the death of his father, the previous *sajjada nashin*, and upon the 6th of April 1891, the date of the plaintiff's accession to that office. The only substantial point in the statement of defence which is now at issue is the plea that the suit is barred by limitation. The Court of First Instance dismissed the suit applying art. 134 of the second schedule of the Limitation Act. The Lower Appellate Court decided that art. 134 did not apply, that the defendants' possession as mortgagees was not adverse so long as their mortgagor was alive, and that consequently the suit of the plaintiff was not barred by adverse possession. It is found that the property is *waqf* and inalienable. It is not disputed that the mortgagees took possession of several plots at the dates of the mortgages in which they were respectively hypothecated. The mortgages were seven in number and were made on the following dates:—

1. The 18th of August 1864.
2. The 14th of August 1865.
3. The 29th of October 1866.
4. The 7th of October 1867.
5. The 17th of November 1867.
6. The 14th of August 1869.
7. The 19th of September 1869.

The contentions of the parties were most ably put before us by Mr. *Haribans Sahai* for the appellants and by Mr. *Amir-ud-din* for the respondent. For the appellants it was contended that the case fell within the provisions either of art. 134 or of art. 144 of the Indian Limitation Act, and that under either of them the suit was time-barred. The words of those articles are respectively [484] as follows:—Article 134. "A suit to recover possession of immovable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration; period, 12 years; time from which period begins to run, the date of the purchase." Article 144. "A suit for possession of immovable property or any interest therein not hereby otherwise specially provided for; period, 12 years; time from which period begins to run, when the possession of the defendant becomes adverse to the plaintiff." Now it appears to me clear that the mortgages impeached fall within the comprehensive exception provided in section 10 of Act No. XV of 1877. The mortgagees are certainly "assigns for valuable consideration," and as such are entitled to the protection of such article of limitation as may be applicable to their case. It was part of Mr. *Haribans Sahai's* contention that the word "purchased" in art. 134, even if not co-extensive in its subject-matter with the alienations included in the assignments excepted by section 10 of the Limitation Act, was used in that section in the technical sense of the word "purchase" which in English Law would include both a mortgage and a lease. In support of that

proposition he cited the case of *Nilmoy Singh v. Jagabandhu Roy*, I. L. R., 23 Cal., 536. The passage on which he relied is to be found on page 544. The opinion therein expressed is no doubt favourable to the contention of Mr. *Haribans Sahai*, but does not amount to a ruling. The case of *Yesu Ramji Kalnath v. Balkrishna Lakshman*, I. L. R., 15 Bom., 583, clearly lays down that the word "purchased" in art. 134 is used in the technical English sense and includes "mortgaged." Sir CHARLES SARJENT, the Chief Justice, in delivering the judgment of the Court, refers to the case of *Radanath Doss v. Gisborne & Co.*, to be found in, 14 Moo. I. A., 1, at page 15, in which the Privy Council, discussing section 5 of Act XIV of 1859, say "purchaser means purchaser according to the proper meaning of the word," and puts upon that interpretation a construction limited by the peculiar circumstances of the case [485] before their Lordships. It is, however, in the view I take of the limitation applicable to the present suit, unnecessary for me to consider what the Privy Council intended to convey by the expressions above cited. If art. 134 applies, *cadit questio*, the period of limitation has long run out. If, however, art. 134 does not apply, we have then, in order to apply art. 144 as a bar to the plaintiff's suit, to find the time from which adverse possession commences. For that purpose it becomes necessary to consider the meaning of the word "assigns" in section 10 of the Limitation Act. It is a word of the widest significance in respect to the nature of the transfers to which it relates. It does not in its accepted meaning import any restriction upon the *quantum* of interest transferred. The assignment of a lease or a mortgage would apparently lie within its purview, just as much as an out and out sale of immovable property. In order to narrow its meaning it would be necessary to show that interests of a more limited kind would be outside the scope and policy of the enactment. No reason for such a restriction is apparent, and indeed it seems to me that the provisions of the Act would be practically nullified by attempting to draw any such distinction. To include in the section out and out sales and exclude leases or mortgages for enormous periods would reduce the operation of the section to a sheer futility. But if transfers for a period, however long, are held to be covered by the section, it seems impossible to draw a quantitative line, and to place transfers for some more limited period outside of it.

Whatever interpretation is put upon the word "purchase" in section 134, this much is plain, that the effecting of such "purchase" creates *ipso facto* an actionable wrong, and confers upon every *cestui que* trust whose interests are affected an immediate right of action, which, in the case of "purchases" for value would subsist unimpaired for twelve years. It seems difficult to frame any plausible contention that under the provisions of that article no right of action would accrue during the incumbency of the alienating trustee, but would come into being only on the termination [486] of his trusteeship and would subsist for twelve years from such termination. That would place the alienee of an unauthorized trustee in a position differing materially for the worse from that of a squatter, who, without a shred of right or title, chose to take possession of a neighbour's land. The latter would acquire an unimpeachable title in twelve years, while the other would continue liable to extrusion for the period of the trustee's tenure of office plus the term of twelve years. The omission in section 10 of Act No. XV of 1877, and also in art. 134 of the second schedule to the same Act of the words "in good faith," which found place in the corresponding provisions of Act No. IX of 1871, indicates clearly the intention of the Legislature to do away with any distinction among those who without right

or title assume ownership of the property of others. *Mutatis mutandis* the same observations apply to art. 144. In that case also the construction contended for by the respondent's counsel would extend for an indefinite time the period of limitation. It appears to me that the suit contemplated by section 10 of the Limitation Act is a suit by a cestui que trust to set aside an illegal alienation by his trustee, and by art. 134 the time from which limitation would begin to run is fixed as the date of the purchase. Under that article it is manifestly immaterial whether the trustee continued in his office or not. At the moment of sale the cause of action arose. It would hardly be consistent that under the comprehensive article applicable to all cases not specially provided for, *i. e.*, art. 144, the period at which adverse possession would commence should be deferred till the trustee had ceased to hold office. Apart from authority it seems impossible as a matter of principle to hold that the possession derived from a trustee who had no right to authorize such possession, would be otherwise than adverse to the cestui que trust from the moment of its commencement. As far as the cestui que trust is concerned it would be wholly immaterial whether the intruder's possession was unauthorized by any human being whomsoever, or authorized only by a person who [487] had no right, to give such authority. The case of *Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee*, I. L. R., 4 Cal., 327, is in point, and in my opinion was rightly decided. To the same effect is the case of *Madhava v. Narayana*, I. L. R., 9 Mad., 244. The right of the present plaintiff to sue is a right not personal to himself, except in so far as he has an interest in common with other beneficiaries, but vests in him as the representative of the cestui que trustent, and it is in that capacity only that he now sues. The possession which he seeks to determine is a possession adverse to his cestui que trustent. I would hold therefore that limitation begins to run from the dates of the respective mortgages with possession, the latest of which was executed in 1869, and that the suit is therefore barred by the twelve years' rule.

Banerji, J.—The only question which we have to determine in this appeal is whether, as contended by the defendants appellants, the claim is barred by limitation.

The suit is by a *sajjada nashin*, or the superior of a shrine, to recover possession of property found to belong to the shrine which the plaintiff's predecessor in office mortgaged to the predecessor in title of the defendants, who are now in possession as usufructuary mortgagees. The mortgages were made between the years 1864 and 1869. The mortgagor, the last *sajjada nashin*, died on the 26th of February 1891. The plaintiff was appointed on the 6th of April of that year. The suit was instituted on the 25th of November 1893. It is contended on behalf of the plaintiff that limitation began to run from the date of his appointment to the office of *sajjada nashin*, or, at the earliest, from the date of the death of his predecessor, and not from the dates of the mortgages. On the other hand, it is urged that the dates of the mortgages should be held to be the dates from which the operation of limitation commenced.

Mr. *Amiruddin*, the learned counsel for the respondent, has relied in support of his contention on the ruling of their [488] Lordships of the Privy Council in *Jewun Dass Sahoo v. Shah Kuber-ood-deen*, 2 Moo. I. A., 390, which was followed in *Piran v. Abdool Karim*, I. L. R., 19 Cal., 203, at p. 218. The Lords of the Privy Council held that it was the duty of the Government under the law then in force to protect endowments, that the plaintiff in that case was the procurator of Government, and that his right to sue accrued on his being appointed *mutawalli* or manager.

I am of opinion that since the passing of Act No. XX of 1863, the manager of a religious endowment cannot be held to be a procurator of Government, and a suit by him for the protection of endowed property cannot be regarded as a suit on behalf of Government. Act No. XX of 1863, as its preamble recites, relieved the Government "from the duties imposed on them by Regulation XIX of 1810, so far as those duties embrace.....the appropriation of endowments made for the maintenance of religious establishments.....or involve any connection with the management of such religious establishments." A suit by the manager of an endowment brought after the passing of that Act would, in my opinion, be governed by the ordinary rule of limitation applicable to all plaintiffs other than the Government, and the ruling of their Lordships of the Privy Council referred to above cannot affect such a suit. This view is supported by the decision of the Calcutta High Court in *Shaikh Laul Mahomed v. Lalla Brij Kishore*, 17 W. R., C. R., 430.

We have next to consider what rule of limitation will apply to the present case. The learned vakil for the appellants urges that the suit is governed by art. 134 of the second schedule of the Indian Limitation Act; that, if that article is not applicable, art. 144 would apply, and that the defendants' possession must be held to be adverse from the dates of the mortgages made in their favour.

It must be taken upon the findings of the Lower Appellate Court that Bande Ali, the mortgagor, was the trustee of the [489] property of the shrine, and that he was in possession as manager and trustee. By section 10 of Act No. XV of 1877 no suit against a trustee for trust property can be barred by lapse of time, but the section excludes from its operation suits against assigns from the trustee for valuable consideration. There is no question that a mortgagee is an assign, and it is not disputed that in this case the mortgagee took the mortgages from Bande Ali for valuable consideration. Section 10 therefore cannot be of any avail to the plaintiffs, and we must seek in the schedule the article which will govern the case. If article 134 is applicable, the claim is undoubtedly beyond time, the suit having been brought long after the lapse of twelve years from the dates of the mortgages under which the defendants are in possession. The suit referred to in the article is a suit "to recover possession of immovable property conveyed or bequeathed in trust or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration. Now the question is—Is a mortgagee from a trustee for valuable consideration a purchaser for valuable consideration? There can be no doubt that if we were to answer the question with reference to what an English lawyer would understand by a purchaser for valuable consideration, we must answer it in the affirmative, a mortgagee being a purchaser *pro tanto* (see Watson's Compendium of Equity, Volume II, page 1184). Was the expression used by the Indian Legislature also in the same sense in article 134? The intention of the Legislature may be gathered from the history of the legislation on the subject. Section 2 of Act No. XIV of 1859 provided that a suit against a trustee or his representative for possession of trust property would not be barred by any length of time. Section 5 of the Act excluded from the operation of that section a *bond fide* purchaser for value from a trustee. It was held by the Calcutta High Court, with reference to that section, in *Gobind Nath Roy Bahadoor v. Ranee Luchmee Koomaree*, 11 W. R., 36, that a mortgagee is a purchaser within the meaning of the section. In Act No. IX of 1871, which took the place of [490] Act No. XIV of 1859, it was enacted in section 10, which was substituted for section 2 of the former Act, that the rule that no limitation should operate against a trustee or his representative would not apply to a purchaser in good

faith for value from a trustee. In Act No. XV of 1877 this protection was granted to all "assigns for valuable consideration" and the words "in good faith" were omitted. Section 5 of Act No. XIV of 1859, in so far as it related to purchasers from trustees, was in substance re-enacted in article 134 of schedule ii of Act No. IX of 1871, and article 134 of the present Act is also to the same effect, with this exception that it does not require that the purchaser should be a purchaser in good faith. It seems to me that when in Act No. IX of 1871 the Legislature protected from the provisions of section 10 purchasers from trustees, it provided a limitation for suits against such purchasers in article 134. When the same protection was extended to all assigns for value in Act No. XV of 1877 and the Legislature did not provide any specific article to govern suits against such assigns other than article 134, it must be presumed that it intended that article to apply to suits against all assigns for value and used the words "purchased for valuable consideration" in that article in the sense in which those words are ordinarily understood by lawyers, so as to include mortgages and leases. If article 134 does not apply to such cases, the only other article applicable would be article 144. But there appears to be no reason why the Legislature should have provided one rule of limitation in the case of a suit against a person to whom trust property is sold for value and another in the case of a mortgagee or other assign for value from a trustee. The principle applicable to both these classes of assigns and the policy upon which they were excluded from the operations of section 10 are apparently the same. I am accordingly of opinion that article 134 is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. This view is supported by the ruling of the Bombay High Court (SARJENT, C. J., and CANDY, J.) [491] in *Yesu Ramji Kalnath v. Balkrishna Lakshman*, I. L. R., 15 Bom., 583, which was followed by FARRAN, C.J., and FULTON, J., in *Maluji v. Fakir Chand*, I. L. R., 22 Bom., 225, and by the opinion expressed by the Calcutta High Court in *Nilmony Singh v. Jagabandhu Roy*, I. L. R., 23 Cal., 536, and we have not been referred to any case which ruled to the contrary. For the above reasons I hold that article 134 applies in this case, and that the claim is barred by limitation.

As I am of opinion that article 134 specially provides for a case like the present, article 144, which governs suits for possession of immovable property not specially provided for, is not applicable. Had that article, however, been in my opinion applicable, I should have had considerable hesitation in holding that in this case the possession of the mortgagees defendants became adverse to the beneficiaries from the date of the mortgage. Had the mortgage been made by the trustee in repudiation of the trust, and had he ignored the right of the beneficiaries and mortgaged the property as his own, the possession of the mortgagees might be regarded as adverse to the beneficiaries from the date of the mortgage, but where, as in this case, the mortgage was made by the trustee in his capacity as such and for alleged purposes of the trust, I doubt very much that the possession of the mortgagee could be held to be adverse to the beneficiary until after the death or removal of the trustee. Holding, however, the view that I do in this case it is not necessary to decide this question.

I would allow the appeal and dismiss the suit with costs.

Aikman, J.—I concur with my learned colleagues in thinking that this appeal must be allowed. Shortly stated, the following are the facts of the case:—There is in the Farrukhabad district a Muhammadan shrine called the Durgah of Hazrat Makhdum, for the support of which a grant of land was made in the time of the Muhammadan Emperors. Upwards of thirty years

ago Bande Ali, the then curator of the shrine, mortgaged with possession a portion of this endowed property to the predecessor [492] in title of the defendants appellants. On the 26th February 1891 Bande Ali died, and, on the 6th of April following, his son, Muhammad Muttaki, the plaintiff respondent, was appointed curator in his father's stead.

On the 25th of November 1893 the plaintiff brought the suit out of which this appeal arises, not to redeem the mortgaged property, but to recover possession of it on the ground that the mortgages granted by Bande Ali were in violation of the trust and therefore invalid.

The Court of First Instance dismissed the suit as barred by limitation. The Lower Appellate Court held that the suit was within time, and gave the plaintiff a decree. The defendants come here in second appeal.

The sole question we have to decide is whether the plaintiff's suit for possession is or is not beyond time.

Section 10 of the Limitation Act provides that no suit for the purpose of following trust property in the hands of a trustee or a trustee's legal representatives or assigns (not being assigns for valuable consideration) shall be barred by any length of time. It is clear from this that an assign from a trustee for valuable consideration acquires a good title by prescription. A mortgagee is an assign for valuable consideration. The defendants are therefore entitled to plead limitation, and the only point for consideration is which article of the second schedule of the Limitation Act applies.

In a somewhat similar case it was held by the Calcutta High Court that either article 134 or article 144 applied. If the words "purchased from" in article 134 can be held to be equivalent to "mortgaged by," that article would exactly cover the present case. It has been held both by the Bombay and Calcutta High Courts that the word "purchased" here is used in its technical English sense, and is wide enough to cover the case of a mortgage. But we find this word used elsewhere in the same schedule, e.g., article 138, and the context shows that there it cannot be used in the wide signification which has been attributed to it in article 134.

[493] I prefer to look upon the case as falling under article 144, and to hold that the mortgagees have acquired by prescription as against the beneficiaries a right *pro tanto* adverse so as to entitle them to retain possession of the property until they are redeemed. The ruling relied on by the learned counsel for the respondent, *Piran v. Abdool Karim*, I.L.R., 19 Cal., 203, is in his favour, but it appears to me that the learned Judge who decided that case has overlooked the fact that the *ratio decidendi* of the Privy Council decision in *Jewan Dass Sahoo v. Shah Kubeer-ood-deen*, 2 Moo. I. A., 390, has disappeared with the enactment of Act No. XX of 1863.

For the above reasons I concur in the decree proposed.

BY THE COURT.—The order of the Court is that the appeal is decreed with costs. The decree of the Lower Appellate Court is set aside with costs, and that of the Court of First Instance restored.

Appeal decreed.

NOTES.

[For the expression, 'purchase,' the Limitation Act, 1908, Art. 134, substitutes the word 'transfer.' See also (1900) 24 Mad., 471; (1907) 29 All., 471; (1905) 8 O.C., 233. As regards the scope of that article, see (1910) 37 Cal., 885 P.C.; (1911) 9 I.C., 133; (1896) 23 Cal., 536; (1905) 2 C.L.J., 546; (1907) 6 C. L. J., 62 (female shebait); (1912) 16 C.L.J., 349; (1902) 27 Bom., 500; 363; (1911) 36 Bom., 135; (1911) 38 Cal., 526; (1908) P.R., 127 P.B.; (contra) (1908) P. R., 30—in which the decisions were similar.]

[20 All. 494]
APPELLATE CIVIL.

The 30th June, 1898.

PRESENT :
MR. JUSTICE BANERJI.

Mul Chand and others.....Decree-holders
versus
Ram Ratan and another.....Judgment-debtors.*

Civil Procedure Code, section 544—Decree proceeding upon ground common to several defendants—Decree upset in appeal but restored on appeal by one only of the defendants—Execution for costs by other defendants—Appeal—Decree to be executed where there has been an appeal.

A suit brought against several defendants was dismissed with costs. The plaintiffs appealed, and the case was remanded to the Court of First Instance under section 562 of the Code of Civil Procedure. One of the defendants appealed against the order of remand to the High Court, which set aside the order of remand and restored the decree of the first Court.

Held, that, the decree of the first Court being restored in its entirety, the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them by it, notwithstanding that they were not [494] parties to the decree of the High Court. *Muhammad Sulaiman Khan v. Muhammad Yar Khan*, I. L. R., 11 All., 267, distinguished. *Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gobind Prasad, for the Appellants.

Babu Satish Chandra Banerji, for the Respondents.

Banerji, J.—This appeal arises out of an application for execution and raises a question not free from difficulty. The facts are these. The respondents brought a suit in the Court of the Subordinate Judge of Agra against several defendants, among whom were the present appellants. The suit was dismissed by the Court, and the present appellants were awarded their costs. The plaintiffs to the suit, now respondents, preferred an appeal to the District Judge. The appeal was allowed, the decree of the Court of First Instance was set aside, and the case was remanded to that Court under section 562 of the Code of Civil Procedure. The present appellants did not appeal from the order of remand, but another defendant, Puran Chand, preferred an appeal to this Court, with the result that his appeal was allowed, the order of the District Judge was set aside, and the decree of the Court of First Instance was restored with costs. The present appellants thereupon applied for execution for the recovery of the costs awarded to them by the Court of First Instance. To this application the respondents, original plaintiffs, took objection. The Court of First Instance disallowed the objection and granted execution. The Lower Appellate Court has set aside that order and has dismissed the application for execution. The present appellants question the propriety of this order of the Lower Appellate Court.

It is contended on behalf of the appellants that as the decree of this Court restored that of the Court of First Instance, and as the Courts below had

* Second Appeal No. 551 of 1896, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 22nd April 1897, reversing an order of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 28rd January 1897.

proceeded upon a ground common to all the defendants, the decree of this Court inured to the benefit of all [495] the defendants, including the present appellants, under section 544 of the Code of Civil Procedure, and entitled them to recover the costs which the Court of First Instance had awarded to them. On the other hand, it is urged on behalf of the respondents that the decree in the cause which was capable of execution was the decree of the High Court, and as that decree did not in terms award the costs of the first Court to the present appellants the latter were not entitled to take out execution for those costs. This is the view which the learned Judge of the Lower Appellate Court has adopted, and in support of it he has relied upon the ruling of this Court in *Muhammad Sulaiman Khan v. Muhammad Yar Khan*, I. L. R., 11 All., 267. All that was held in that case, so far as it has any bearing upon the present question, is that the decree of an appellate Court supersedes the decree of the first Court even where the decree merely affirms the original decree. One of the reasons for this conclusion was stated in the judgment of EDGE, C. J., to be that it was clear from section 579 of the Code of Civil Procedure that "in any case the decree executed, not for the costs of the appeal but for the costs of the suit, is the decree of the appellate Court, and of that Court only." In that case the Court was dealing with a decree of an appellate Court in an appeal to which all the parties to the suit were parties. In this respect it was unlike the decree now under consideration. As I understand section 579 of the Code of Civil Procedure, when it provides that the decree of the appellate Court should state by what parties and in what proportion the costs incurred in the appeal and the costs in the suit are to be paid, it refers to the parties who are parties to the appeal and not to parties who were not arrayed either as appellants or as respondents in the appeal, but who, under section 544 of the Code of Civil Procedure, might take the benefit of the decree. This ruling therefore does not afford any help in the decision of the question now before us. It is true that the decree which a party should execute is, as held by the Full Bench in *Shohrat Singh v. Bridgman*, I. L. R., 4 All., 376, the final decree obtained by him [496] in appeal. But in this case, as the appellants were not parties to the appeal to this Court and no decree was formally made by this Court in their favour, they were not bound to take out execution of the decree of this Court. In fact, not being parties to that decree they were not competent to apply for its execution, and even if they did apply for its execution, they could not recover anything under it, as it did not award them in terms the costs of the first Court. The learned Judge of the Lower Appellate Court is of opinion that the appellants should apply for an amendment of the decree of the High Court and get their costs embodied in it. As they were no parties to that decree, and as they are not the representatives of any of the parties to that decree, they are not entitled under section 206 of the Code of Civil Procedure to apply for its amendment. This is not the case of a decree formally granted to the appellants by an appellate Court. In my opinion it is in the case of such a decree only that the decree of the appellate Court is the decree to be executed. In this case the Lower Appellate Court having proceeded upon a ground common to all the defendants, the High Court was competent, under section 544 of the Code of Civil Procedure read with section 587, to reverse the decree of the Lower Appellate Court in favour of all the defendants upon the appeal of any one of them. That section does not direct that in such a case the appellate Court should pass a decree in favour of the persons who are not before it in appeal, but the effect of that section is to make a decree passed in favour of one only of the defendants or plaintiffs under the circumstances mentioned in it operate in favour of all the plaintiffs or defendants, as the case may be. When,

therefore, a decree is made under that section upon the appeal of one only of the defendants, and that decree restores the decree of the Court of First Instance it inures to the benefit of all the defendants, although some of them were not parties to the appeal. Upon a decree of this description being passed the defendants other than those who preferred the appeal become entitled to take the benefit of the decree to this extent only that they acquire the right to enforce [497] the decree of the Court of First Instance which has been restored by the decree of the appellate Court. In this view the present appellants were competent to apply for execution of the decree of the Court of First Instance which was restored by the decree of this Court. The decree of this Court had, in my opinion, the effect of wiping away the order of remand of the Lower Appellate Court and relegating the parties back to the position in which they were before the order of remand was made. The Lower Appellate Court therefore erred in disallowing the application of the appellants for execution. I allow the appeal, and, setting aside the decree and order of the Lower Appellate Court with costs, restore that of the Court of First Instance. The appellants will get the costs of this appeal.

Appeal decreed.

NOTES.

[This was followed in (1899) 21 All., 346.]

[20 All. 497]

REVISIONAL CIVIL.

The 27th June, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

The N.-W. P. Club through G. B. Goyder, Honorary

Secretary.....Defendant

versus

Sadullah.....Plaintiff.*

Club—Contract—Liability of the Secretary of a Club in respect of a contract entered into for the benefit of the members of the Club.

Held, that the secretary of a Club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the Club by his predecessor in office; nor could the members of a Club collectively be sued through their secretary as their representative.

IN this case one Sadullah, who, on instructions from a previous secretary, had done certain work for the North-Western Provinces Club, sued the then secretary of the club for payment for labour and materials. The Court of Small Causes gave the plaintiff a decree. The defendant thereupon applied to the High Court in revision, not contesting the amount of the decree, which had been satisfied, but on the ground that the suit would not lie against the secretary in respect of a contract for the benefit of the members of the club at large, the club being an unregistered and unincorporated society.

Mr. W. Wallach, for the Applicant.

Kershaw, C.J., and Burkitt, J.—In this case an action was brought by Sadullah, the present respondent, against the [498] N.-W. P. Club, through Mr. G. B. Goyder, the secretary of the said club, for work done by the plaintiff to the order of some one who at that time was occupying the position of the secretary of the said club. The plaintiff has been paid a sum which has satisfied his demand, but the defendant has made this application in revision on the ground that there was no liability on him as disclosed by the plaint, and indeed it would be highly undesirable that the secretary of a social club or one individual member of it should have an action brought against him of this kind, making him personally liable for the goods which were not delivered to him personally, but were delivered to, and became the property of, the social body of which he was the secretary. We take it the law with regard to this matter is accurately laid down in the case cited in 3 Times Law Reports, at page 248, which lays down that an individual member of a club or a member of the committee of management who has not in any way pledged his personal credit, is not liable for goods ordered for, and supplied to the club, i.e., as meaning an abstract entity unknown to the law.

It has been found as a fact by the learned Judge below in this present case that at the time the order was given Mr. Goyder was not secretary of the club, and as a fact this very order was given not by him but by a prior secretary of the club.

Therefore it stands to reason that Mr. Goyder did not pledge his personal credit, and he took no part at all in the transaction. Now the action may be said by those who brought it to be an alternative action, first, against the N.-W. P. Club, secondly, against Mr. Goyder, secretary of the club. We have dealt with the question as to whether Mr. Goyder is or is not personally liable. The question remains as to whether the action can rightly be said to have been brought against the N.-W. P. Club, that is, what the case mentioned above calls an abstract entity unknown to the law. To hold that an action lay against it and to give judgment in such action would be to hold that an action lay against a great number of individuals who had not been cited in the action, who had no opportunity of appearing, but who [499] should have been so cited, and who should have had such opportunity given to them to appear and contest the action. On that ground the action should have been dismissed against the club.

We think that there is another ground upon which the action against the club should be dismissed, and that is, that as alleged in the plaint the contract was entered into by the club through its secretary. It is clearly shown as a fact that at the time the contract was entered into, Mr. Goyder was not secretary at all. Our order is:—We allow this application, set aside the decree of the Court below, and we dismiss the plaintiff's suit.

Application allowed.

[20 All. 500]

APPELLATE CIVIL.

The 1st July, 1898.

PRESENT :

MR. JUSTICE AIKMAN.

Abid Husen.....Defendant

versus

Bashir Ahmed.....Plaintiff. *

Pre-emption—Muhammadan law—Talab-i-ishtishhad—Reference necessary to the previous talab-i-mawasibat.

When in asserting a claim for pre-emption the making of the *talab-i-ishtishhad* is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the *talab-i-mawasibat* having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same. *Rujjub Ali Chopedar v. Chundi Churn Bhadra*, I. L. R., 17 Cal., 549; *Akbar Husain v. Abdul Jai*, I. L. R., 16 All., 388, and *Abasi Begam v. Afsal Husen*, I. L. R., 20 All., 457, followed. *Nundo Pershad Thakur v. Gopal Thakur*, I. L. R., 10 Cal., 1008, dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Thulam Muftaba, for the Appellant.

Mr. Amiruddin, for the Respondent.

Aikman, J.—This is an appeal by the defendant vendee in a suit for pre-emption which was based on the Muhammadan law. [500] The Court of First Instance found that the plaintiff pre-emptor had failed to prove that he had performed the necessary ceremony *talab-i-mawasibat* or making immediate assertion of his rights as soon as he heard of the sale. That Court further found that the plaintiff when making the *talab-i-ishtishhad*, or demand with invocation of witnesses did not say that he had made the immediate demand. On these grounds the plaintiff's suit was dismissed. The plaintiff appealed. The learned Subordinate Judge found that the plaintiff had proved that he had made an immediate demand. This demand was not made in the presence either of the seller or of the purchaser or on the premises, and therefore the demand with invocation of witnesses was necessary. The learned Subordinate Judge found that, as the same witnesses were present at the time when the immediate demand was made and at the time when the *talab-i-ishtishhad* was made, it was unnecessary for the pre-emptor to repeat the immediate demand. He therefore reversed the decision of the Munsif and gave the plaintiff a decree. I may point out that, as there were various other pleas raised by the defendant vendee, it was improper for the Lower Appellate Court to decree the plaintiff's suit merely on the ground that the defendant's plea as to non-fulfilment of the necessary requirements of Muhammadan law had failed. The defendant comes here in second appeal.

In my opinion the appeal must succeed. In the case of *Nundo Pershad Thakur v. Gopal Thakur*, I. L. R., 10 Cal., 1008, it was held by GARTH, C. J., and BEVERLEY, J., that when a person seeking pre-emption had performed the *talab-i-mawasibat* in the presence of witnesses and as soon as possible on the

* Second Appeal No. 566 of 1897, from a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated 1st June 1897, reversing a decree of Babu Nihala Chandra, Munsif of Amroha, dated the 2nd December 1896.

same day in the presence of the same witnesses demanded his right from the vendor and purchaser, it was unnecessary that he should again state when making his demand that he had declared his right as soon as he heard of the sale, that is, that it was unnecessary for him to make any reference to his immediate demand. The present case is on all fours with that case. But that case was dissented from and overruled by a Full Bench of the Calcutta Court in *Rujjub Ali Chopedar v. Chundi Churn* [801] *Bhadra*, I. L. R., 17 Cal., 543, which latter case has been followed by this Court in *Akbar Husain v. Abdul Jalil*, I. L. R., 16 All., 383, and in a recent case *Abbasi Begam v. Afzal Husen*, I. L. R., 20 All., 457. That these latter rulings are correct is, in my opinion, clear from the definition of *talab-i-ishtishhad* given on p. 489 of Baillie's Digest of Moohummudan Law (2nd edition). By *talab-i-ishtishhad*," says that learned author, is meant a person calling upon witnesses to attest his *talab-i-mawasibat* or immediate demand." It appears to me impossible to invoke witnesses to attest the fact that an immediate demand has been made without making some reference to that immediate demand.

The learned counsel for the respondent argues that the *talab-i-ishtishhad* is merely a rule of evidence according to the Muhammadan law and is no longer of any validity. Be that as it may, I am bound to follow the decisions of this Court to which I have referred.

For the above reasons I allow this appeal, and, setting aside the decree of the Lower Appellate Court with costs, restore that of the Court of First Instance. The appellant will have his costs of this appeal.

Appeal decreed.

NOTES.

[This was followed in (1904) 27 All., 160.]

[20 All. 501]

REVISIONAL CRIMINAL.

The 5th July, 1898.

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Queen-Empress

versus

Jasoda Nand.

Criminal Procedure Code, sections 133, 135 and 136—Act No. XLV of 1860 (Indian Penal Code), section 168—Power of Magistrate to order repair of a house not adjoining a public road.

Section 133 of the Code of Criminal Procedure does not empower a Magistrate to order the owner of a house standing apart from any public road in its own compound to repair such house. By "persons living or carrying on business in the neighbourhood," injury to whom the power to pass orders under section 133 is intended to prevent, are meant, not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous [802] condition, but unascertained members of public whose ordinary avocations

* Criminal Reference No. 31^f of 1898.

may take them to the neighbourhood of such building. *Queen-Empress v. Narayana*, I. L. R., 12 Mad., 475, and *Queen-Empress v. Bishambar Lal*, I. L. R., 13 All., 577, distinguished.

THIS was a reference made by the Sessions Judge of Allahabad under section 438 of the Code of Criminal Procedure and arising out of the following circumstances. One Jasoda Nand was the owner of a house in Allahabad, No. 15, Cawnpore Road. This house stood in a compound of its own at some little distance from the public road, and was inhabited by several families, and the servant's houses in the compound were also inhabited by a number of persons. An order was made by a Magistrate under section 133 of the Code of Criminal Procedure requiring Jasoda Nand to make certain repairs to the said house. The order was served on Jasoda Nand, but he did not take either of the courses open to him under section 135 of the Code. He did not perform the act directed by the Magistrate, nor did he either appear to show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try the propriety of the order. An order absolute was made under section 136 of the Code of Criminal Procedure, and, as Jasoda Nand still did not comply with the order, he was put upon his trial under section 188 of the Indian Penal Code and fined Rs. 50. The case was brought to the attention of the Sessions Judge, who, being of opinion that the conviction could not be maintained, referred the case to the High Court.

Mr. Sorabji, in support of the Reference.

The Officiating Government Advocate (Mr. A. E. Ryves), for the Crown.

Blair and Aikman, JJ.—Jasoda Nand has been convicted of an offence made punishable under section 188 of the Indian Penal Code. That section is couched in the following words:—"Whoever, knowing that by an order promulgated by a public servant lawfully empowered to promulgate such order, he is directed to abstain from a certain act or to take certain order with certain property in his possession or under his management, [503] disobeys such direction, shall, if such disobedience causes or tends to cause obstruction, annoyance or injury, or risk of obstruction, annoyance or injury to any person lawfully employed, be punished" under the latter portion of the section. Jasoda Nand is the occupant of the house No. 15, Cawnpore Road. The house, it appears, stands in its own compound some little distance from the public road and is inhabited by a number of families, and the servants' houses in the compound are also inhabited by a number of persons. An order was made under section 133 of Act No. X of 1882, upon information, by a Magistrate, called in that section a conditional order, requiring Jasoda Nand to effect certain repairs in the house No. 15, Cawnpore Road. The order was served upon Jasoda Nand, and he did not adopt either of the courses admissible under section 135 of the Act. He did not perform the act directed by the Magistrate: he did not appear in accordance with the order to show cause against the same, or apply to the Magistrate by whom it was made to appoint a jury to try the propriety of the order. An order absolute was made under section 136. Jasoda Nand was then put upon his trial for the offence specified in section 188 of the Indian Penal Code and fined Rs. 50. The case was brought to the attention of the Sessions Judge of Allahabad, who, being of opinion that the conviction could not be maintained, reported the case to this Court.

Mr. Ryves, the Government Advocate, has appeared to support the conviction, and Mr. Sorabji to dispute its propriety. Mr. Ryves in his first contention submitted to the Court that it cannot go behind the order absolute made under section 136 of Act No. X of 1882. In support of his contention he has cited to us the case of *Queen-Empress v. Narayana*, I. L. R.,

12 Mad., 475, and the case of *Queen-Empress v. Bishambar Lal*, I. L. R., 13 All., 577. In the case reported in the Madras High Court the subject of the order was an open tank or well. The well or tank was in a public street, and the safety of the public required that it should be fenced. The subject-matter of that order then fell well within the jurisdiction of the Magistrate, and within [804] the powers conferred upon him by section 133 of the Criminal Procedure Code and the succeeding sections. The ground upon which the conviction was impeached in that case was not that the order made was one of such a nature that the Magistrate was not empowered by the section of the Criminal Procedure Code to make it: the only ground of contention was that the person upon whom the order was served was not the person who was responsible for the existing state of things, or who ought to have been made the subject of such order. The Court held, that the person convicted could not go behind that order: it held so having expressly noted that the order was one well within the power of the Magistrate who made it. That finding appears to us not inconsistent with the provisions of section 136 of the Code of Criminal Procedure. The case cited in 13 Allahabad is in substance identical with the Madras case. There is no doubt that the order was an order made in respect of one of the invasions of the public right set forth in section 133. The contention was that such order was made against the wrong person. Following the ruling reported in 12 Madras, it was held that it was not competent for the person convicted to question the order made against him.

We cannot, however, acquiesce in the expressions, needlessly large for the decision of the case then before the Court which find place in the judgment. It appears to us, applying to section 188 of the Indian Penal Code that strict construction applicable to penal provisions, that it is essential in order to justify a conviction to show that the order has been promulgated by a public servant lawfully empowered to promulgate such order. Now in this case and from that point of view we have to consider whether the public servant making the order in question was lawfully empowered to promulgate that order. Chapter X of the Code of Criminal Procedure, in which appear the provisions relating to such orders, is headed "Public Nuisances," and it enumerates certain forms of invasions of public rights which would be regarded by the law of England [805] as falling under the definition of *commune nocumentum*. It provides, first, for the removal of any unlawful obstruction from any way, river or channel which may be lawfully used by the public; secondly, for the prohibition of any trade or of the keeping of any goods or merchandize by reason of their being injurious to the health or physical comfort of the community; thirdly, for the prevention of the construction of any building or the disposal of any substance as likely to occasion conflagration or explosion. The fourth clause is the one under which the order in question purports to have been made. It deals with the case in which "any building is in such condition that it is likely to fall and thereby cause injury to persons living or carrying on business in the neighbourhood or passing by," in consequence of which its removal, repair or support is necessary. The last case provided for is where any tank, well or excavation adjacent to any such way or public place should be fenced in such a manner as to prevent danger arising to the public. It appears manifest to us that, apart from the heading, which may possibly form no part of the enactment, the scope of this section is plainly limited to injuries arising or likely to arise to members of the general unascertained mass of the public. The persons who under the clause require protection are "persons living or carrying on business in the neighbourhood, or passing by." It appears to us that it would be straining the meaning of the words to hold that the clause

applies to persons living actually in the alleged dangerous building or in the servants' houses in the compound belonging to it. It seems also to us, that it would be an unnatural use of the words "passing by" to include in it persons going to or from the house or about it for their private business or pleasure, or in the exercise of their private and not of their public rights. In our opinion the words used are not sufficiently comprehensive to include the case of the person who has been convicted, or to justify or make legal the order of the Magistrate in relation to the building in Jasoda's occupation. It may well be, as the [506] Magistrate in his explanation argues, that section 44 would have justified some such order as the order made in this case; but the scope of that section is different from, and far larger than, that of section 133.

We hold then that the order made in this case by the Magistrate was not an order which the Magistrate was lawfully empowered to promulgate within the meaning of section 188. We therefore set aside this conviction and order the fine, if paid, to be refunded.

[20 All. 506]

APPELLATE CIVIL. •

The 7th July, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Har Prasad and another.....Opposite Parties

versus

Sheo Ram and another.....Applicants.*

Civil Procedure Code, section 244—Execution of decree—Mortgage—Attempt to obtain redemption of a usufructuary mortgage by means of an application in execution.

Certain mortgagees held a mortgage which, in its inception was a simple mortgage, but which was to become a usufructuary mortgage upon non-payment of the mortgage debt by a certain date. The mortgage debt was not paid within the time limited. The mortgagees sued on the covenant in their bond and obtained a decree for possession, declaring them entitled to remain in possession until the mortgage debt was satisfied from the usufruct. Some time after the mortgagees had got possession under this decree, the mortgagors applied, ostensibly under section 244 of the Code of Civil Procedure, for recovery of possession of the mortgaged property and for payment of a large sum of money, which they alleged the mortgagees had collected as profits in excess of what was due under the mortgage.

Held, that such an application would not lie. If the allegations of the mortgagors were true, their proper remedy was by suit for redemption and not by application in the execution department. *Ravji Shivram v. Kaluram*, 13 Bom., H. C. Rep., 160; *Ram Chandra Ballal v. Baba Esqonda*, 12 Bom. H. C. Rep., 163; and *Narsinha Manohar v. Bhagwantrav*, I.L.R., 14 Bom., 327, referred to.

THE facts of this case are fully stated in the judgment of the Court.

* First Appeal No. 52 of 1898, from an order of F. W. Fox, Esq., District Judge of Jhansi, dated the 24th December 1897.

[507] Babu *Durga Charan Banerji*, for the Appellants.

Babu *Satya Chandar Mukerji*, for the Respondents.

Burkitt, J., (Blair, J., concurring).—This is an appeal against an order of the District Judge of Jhansi, passed under section 244 of the Code of Civil Procedure, directing that possession of certain mortgaged property be restored by the appellants mortgagees to the applicants in execution (the mortgagors), and also directing that the appellants pay to their mortgagors a sum of Rs. 4,575, being the surplus received by the appellants as mortgagees over and above the amount due on their mortgage.

The preliminary history of this case is, that in February 1892, Sheo Ram and others, respondents to this appeal, mortgaged certain immovable property to Har Prasad and others, appellants here. The mortgage was a simple one; but there was a stipulation that if the money due on it were not paid by a certain date the mortgagees would be entitled to be put into possession of the property. The money was not paid. The mortgagees thereupon instituted a suit for possession of the property and obtained a decree in their favor in June 1893, directing them to be put in possession of the property, to hold possession until the amount due on the bond with interest had been satisfied from the usufruct. The mortgagees took out execution of that decree and obtained possession under it in August 1893. Nothing more was done in the matter of executing the decree till March 1897.

In that month the mortgagors, the judgment-debtors under the decree, made an application (which they described as being an application under section 244 of the Code of Civil Procedure) to the District Judge. In that application they recited the passing of the decree mentioned above, and the possession over the mortgaged property obtained by the mortgagees in execution thereof. They then set forth that the amount due under the decree had been much more than satisfied by the usufruct of the property while in the possession of the mortgagees, and they asked the Court to direct the property to be restored to them, and to compel the mortgagees to refund to them some Rs. 12,876 which, they [508] alleged, the mortgagees had received over and above the amount due on their decree.

In reply to this petition the present appellants naturally raised the plea that the matter of the petition was one which could not be decided in execution proceedings on an application under section 244 of the Code of Civil Procedure.

The learned District Judge framed an issue for trial on that plea, but somehow failed to come to any finding on it. Had he considered the question, he probably would have been spared the trouble of making the "examination of long and complicated accounts" mentioned in his order of July 2nd 1897. He, however, left the preliminary question undecided, and having examined the accounts, he passed an order that possession should be restored to the applicants, and that the appellants here should pay them a large sum of money.

Hence this appeal, in which it is contended that the matter dealt with by the lower Court was not a question which could be entertained under section 244 of the Code of Civil Procedure. It was argued for the appellants that the proper course for the applicants was to have instituted a regular suit for redemption of the mortgage, and that they were not entitled to obtain a redemption decree under the disguise of an application in execution under section 244 of the Code. The appellants urged that the execution of the decree obtained by them for the possession of the mortgaged property was fully completed when, on their application for execution of that decree, they were placed in possession under it in August 1893, and that thenceforth the

position occupied by them and the applicants respondents was that of mortgagees in possession and mortgagors, and not merely that of decree-holders and judgment-debtors amenable to the jurisdiction given by section 244 of the Code of Civil Procedure. The applicants indeed must, we think, be held to have admitted some of the propositions stated above, for in their application under section 244 they state in the first paragraph that the decree obtained by the applicants was a decree for possession as mortgagees, entitling them to remain in [509] possession till the amount due to them on the mortgage had been paid off by the usufruct.

For the respondents it was contended that the case comes under clause (c) of section 244, because the Court which passed the decree specified in its decree the amount due on the mortgage and gave the mortgagees a decree for possession until that amount was repaid. The argument is that an execution Court is empowered under that clause to take accounts and ascertain whether the amount decreed had or had not been paid off. In that contention we are unable to concur. We are of opinion that the limitation as to the period of enjoyment was inserted in the decree to indicate the title by which the mortgagees retained possession, and for no other purpose, and we are unhesitatingly of opinion that all proceedings relating to the execution of the decree came to an end, and that the decree was fully executed when the appellants were put in possession (as mortgagees) of the property by virtue of the decree. Nothing more remained to be done under it, the decree having been fully satisfied. We fail to see how the matter of this application to the learned Judge can be said to be a question relating to the execution, discharge or satisfaction of the decree. That decree had been fully executed and satisfied; nor can the word "discharge" be applicable to such a case as this in which the decree has been executed and satisfied. In the opinion expressed above we are supported by several decisions of the High Court of Bombay. The first of those cases to which we would allude is that of *Ravji Shivram v. Kaluram*, 12 Bom. H. C. Rep., 160, a decision of a Full Bench of that Court. That case is conversely on all fours with the present case. On a suit by a mortgagee, the mortgage money being unpaid, he obtained a decree for possession of the mortgaged property "for the amount claimed," which, the High Court observed, was "the ordinary decree to put an unpaid mortgagee in possession, which he might retain till he was paid in full." Subsequently the mortgagor instituted a suit for redemption. In reply to the claim it was contended for the [510] mortgagee that the mortgagor was seeking a wrong remedy, and that his "only proper mode of recovering possession is by an application in the possession suit for further execution of the decree" in that suit.

This case is then, it will be observed, exactly the converse of the present case. It was held by the Full Bench, overruling the mortgagee's contention that when the mortgagee was put in possession of the mortgaged premises, the decree for possession was fully executed, the suit in which that decree was made being really nothing more than a suit in the nature of an ejectment, by an unpaid mortgagee, of the mortgagor from the mortgaged premises, and the Court went on to say that a "proceeding for redemption of those premises is not a question" relating to the discharge or satisfaction of the decree, nor "a question relating to the execution of the decree, which we hold to have been fully executed when the heir of the mortgagee was put into possession under the decree."

The Full Bench accordingly held that the proper mode for the mortgagor to redeem the lands and recover possession was not by an application to the Court which passed the decree for further execution thereof by taking the account, etc.

This case (decided in 1873) was, no doubt, one under the old Codes of 1859 and 1861. We cannot, however, see any material difference (as far as the question here is concerned) between the corresponding sections of the present and of the former Code. The ruling just cited was followed and approved of in *Ram Chandra Ballal v. Baba Esgonda*, 12 Bom. H. C. Rep., 163, and in *Narsinha Munohar v. Bhagvantrav*, I. L. R., 14 Bom., 327, the latter of which cases was decided long after the present Code of Civil Procedure had come into force.

Concurring to the fullest extent in the rule laid down in those cases, we are of opinion that the application made by the respondents to the District Judge was one which could not be entertained under section 244 of the Code of Civil Procedure, and that it should have been rejected.

[511] There is another aspect of this case which should be referred to. It might be most disastrous (as noted in the case of *Ravji Shivram v. Kaluram* cited above) to persons in the position of the respondents, if it were to be held that their proper course to obtain redemption of the mortgaged property in cases like the present was by presenting an application for further execution of the decree for possession, which had been passed against them. In that case their application would come under the rules governing proceedings in execution of a decree. One of those rules is that contained in Art. 179* of the second schedule to the Limitation Act of 1877, which limits the time for applying for execution of a decree to three years from certain dates, one of which is the date on which the last application has been made to the proper Court for execution, or to take some step in aid of execution on the decree. Now, in the present case no application of any kind was made in the matter of the execution of this decree from the time when the applicants made the application for execution on which they were put into possession in August 1873, up to March 1897, a period of much more than three years. Therefore, if the application was properly presented as an application for further execution, it was clearly time-barred when presented and could not be entertained.

We would add that the respondents did not ask to be allowed to have their application converted into a plaint in a redemption of mortgage suit on payment of the Court fees payable on a plaint in such a suit.

*[Art. 179 :—

| Description of Application. | Period of limitation. | Time from which period begins to run. |
|---|--|---|
| For the execution of a decree or order of any Civil Court not provided for by No. 180 or by the Code of Civil Procedure, section 230. | Three years; or, where a certified copy of the decree or order has been registered, six years. | 4. (where the application next hereinafter mentioned has been made) the date of applying in accordance with law to the proper Court for execution, or to take some step in aid of execution, of the decree or order, or |

For the above reasons we allow this appeal, set aside the order of the lower Court, and direct that the respondents' application be dismissed with costs in both Courts.

Appeal decreed.

[512] *The 7th July, 1898.*

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Chattar Mal.....Decree-holder

versus

Thakuri and another.....Judgment-debtors.*

Act No. IV of 1882 (Transfer of Property Act) section 90—Mortgage—Personal covenant to pay—Application to sell non-hypothecated property—"Balance legally recoverable"—Cause of action—Limitation.

A mortgage bond securing a debt payable on demand provided that for the payment of the amount of mortgage debt the immoveable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." *Held*, that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage debt, but that the cause of action for both remedies was one and the same and accrued when the covenant to pay was broken. Hence, the suit for sale of the mortgaged property having been brought more than ten years after the date of the mortgage, the balance due upon the mortgage was not legally recoverable otherwise than out of the property sold and an application for a decree under section 90 of the Transfer of Property Act was not maintainable : *Musahab Zaman Khan v. Inayat-ul-lah*, I. L. R., 14 All., 513 ; *In re McHenry: McDermott v. Boyd*, (1894) L.R., 3 Ch., 290, and *Miller v. Runga Nath Moulick*, I.L.R., 12 Cal., 989, referred to.

IN this case the appellant held a mortgage over certain property of the respondents under a bond dated the 24th of October 1880. The amount secured by the bond was Rs. 300 payable with interest on demand. The bond provided that for payment of the amount the immoveable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." On the 22nd of June 1891, the mortgagee brought a suit for sale upon his bond. He obtained a decree under section 88 of the Transfer of Property Act on the 6th of August 1891. Under that decree the mortgaged property was brought to sale on the 23rd of [513] June 1893. The proceeds of the sale being insufficient to satisfy the

* Second Appeal No. 508 of 1896 from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 14th May 1896, confirming an order of Babu Bipin Bihari Mukerji, Subordinate Judge of Aligarh, dated the 27th November 1895.

mortgage debt, which by that time had reached the sum of Rs. 3,239, the mortgagee decree-holder applied on the 2nd of February 1895 for a decree under section 90 of the Transfer of Property Act.

The Court of First Instance (Subordinate Judge of Aligarh) held that the decree-holder's application for a decree under section 90 was time-barred, and dismissed it. The decree-holder appealed, and his appeal was dismissed upon the same ground by the Lower Appellate Court (District Judge of Aligarh). The decree-holder thereupon appealed to the High Court.

Babu Durga Charan Banerji, for the Appellant.

Pandit Madan Mohan Malaviya, for the Respondents.

Kershaw, C. J., and Banerji, J.—This is an appeal from the decree and order of the Court below refusing to grant to the appellant a decree under section 90 of the Transfer of Property Act. The appellant held a mortgage over certain property belonging to the respondents under a bond dated the 24th of October 1880. The amount secured by the bond was Rs. 300 payable with interest on demand. The bond provided that for the payment of the amount the immoveable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." On the 22nd of June 1891, the mortgagee brought a suit for sale upon that bond. He obtained a decree under section 88 of the Transfer of Property Act on the 6th of August 1891. Under section 89 of that Act he obtained an order for the sale of the mortgaged property, and on the 23rd of June 1893, the said property was sold. The proceeds of the sale not being sufficient for the discharge of the mortgage debt, which had swelled to the large sum of Rs. 3,239, the present application was made on the 2nd of February 1895, for a decree under section 90. That section empowers a Court to grant to a [514] mortgagee a decree for the recovery of the balance due to him after the sale of the mortgaged property from the mortgagor and his other property, provided that the balance is legally recoverable otherwise than out of the mortgaged property. The Courts below have held that on the date on which the plaintiff brought his suit upon his mortgage, his claim for a personal decree against the mortgagor was time-barred, and therefore the balance of the amount of the mortgage was not legally recoverable on the date of the application for a decree under section 90. The correctness of this decision has been challenged in this appeal. It is urged that under the terms of the bond in this case the mortgagee was not entitled to realize the balance personally from his debtors until after the hypothecated property had been sold, and as his application for a decree under section 90 was made within three years from the date of the sale of the mortgaged property, it ought to have been granted.

The question we have to determine is whether, on the date of the application for a decree under section 90, the balance of the amount due on the mortgage was legally recoverable from the debtors otherwise than out of the mortgaged property. If, under the terms of the bond, the mortgaged property was the only security for the debt and the mortgagors did not incur any personal liability, the balance is not recoverable otherwise than out of the mortgaged property. But if there is nothing in the mortgage bond to the contrary, the presumption will be that the mortgagor has undertaken a personal liability to pay the mortgage debt. In the latter case if a claim for a personal decree against the mortgagor would have been time-barred on the date of the mortgagee's suit the balance would not be legally recoverable otherwise than

out of the mortgaged property, within the meaning of section 90. This was held in *Musaheb Zaman Khan v. Inayat-ul-lah*, I. L. R., 14 All., 513. The decision of this appeal, therefore, turns upon the question whether, if the appellant mortgagee had on the date of the institution of his suit asked for a personal remedy [515] against the mortgagors, his claim for that remedy would have been barred by limitation.

In this case the mortgagors in distinct terms undertook a personal liability to pay the mortgage debt. The bond gives the mortgagee two remedies for a breach of the conditions thereof, namely, first, a right to proceed against the immoveable property hypothecated in the bond; and, secondly, in the event of the proceeds of the sale of that property proving insufficient, a right to proceed against the debtors personally. The debt, however, is one and the same, and the personal liability of the debtors co-exists with the liability of the property. It is upon the occurrence of a breach in the conditions of the bond that the cause of action of the mortgagee for the remedies given to him under the bond arose. It was a single cause of action, and upon the accrual of it the mortgagee became entitled to seek all his remedies. The covenant in the bond that the mortgagors would be personally liable for the balance which might remain due after the sale of the mortgaged property did not give the mortgagee a right to bring a separate suit for a decree personally against the mortgagors after the sale of the property. The truth is, as observed by HERSCHELL, L. C., in *in re McHenry: McDermott v. Boyd*, (1894) L. R., 3 Ch., 290, "the right of the creditor in law would have been precisely the same as if those words had not been inserted." His Lordship added:—"I cannot say that that right of realization gave a separate and independent cause of action, so that the statutory period did not begin to run until that date." The ruling in that case is, in our opinion, conclusive of the question. A similar view was held by the Calcutta High Court in *Miller v. Runga Nath Moulick*, I. L. R., 12 Cal., 389. In this case the appellant's cause of action arose when his debtors made default in payment of the debt. He was bound to come into Court within the period of limitation prescribed for his suit computed from the date of the accrual of his cause of action. The limitation for the claim for sale being sixty years, his suit for sale was within time, but the period of limitation for a suit upon the [516] personal covenant being six years only, a claim upon that covenant would have been time-barred on the date on which the suit was brought, more than six years having elapsed on that date from the date of the accrual of the cause of action. That being so, the Courts below have, in our opinion, rightly held that the amount which the appellant seeks to recover by a decree under section 90 is not legally recoverable from the mortgagors within the meaning of that section, and this appeal must fail. We dismiss it with costs.

Appeal dismissed.

NOTES.

[See also (1906) 33 Cal., 867 ; (1903) 6 O. C., 30 ; (1907) 4 L.B.R., 28 ; (1901) 15 C. P. L. R., 29.]

[20 All. 516]

The 8th July, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Pulandar Singh.....Plaintiff

versus •

Jwala Singh and others.....Defendants.*

Civil Procedure Code, section 13, expl. II—Res judicata—Matter which might have been a ground of defence in a former suit.

A defendant in a suit for the recovery of possession of immoveable property pleaded only a right to the proprietary possession of the property in suit in himself. This defence failed, and a decree was given in favour of the plaintiff. Subsequently the plaintiff sold a portion of the property so decreed to them, and the *quondam* defendant brought a suit for pre-emption. Held, that the suit must fail inasmuch as the plaintiff's claim was one which he might have made when defendant in the former suit as an alternative to his defence of title. *Srimut Rajah Mootoo Vijaya &c. v. Katama Natchair*, 11 Moo. I. A., 50; *Kameswar Pershad v. Raj Kumari Ruttan Koer*, I. L. R., 20 Cal., 79, and *Baldeo Sahai v. Bateshar Singh*, I. L. R., 1 All., 75, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, for the Appellant.

Maulvi Ghulam Mustaba, for the Respondents.

Kershaw, C. J., and Banerji, J.—The suit out of which this appeal has arisen was one for pre-emption brought by the present appellant in respect of a sale made by one Musammat Subta on the 11th of May 1894. The suit has been dismissed as barred by the [517] rule of *res judicata*. It is contended before us that this ruling of the Courts below is erroneous. We are unable to accede to this contention.

The facts out of which the plea of *res judicata* arose were these :—The share now sold is a part of a 5-biswa share which belonged to the father of Musammat Subta. After the death of both her parents she sold the share now in question to the vendees respondents. The whole property, however, consisting of 5-biswas, was in the possession of the present appellant. The vendees and Musammat Subta therefore brought a suit for possession against the present appellant. That suit was resisted on the sole ground that the present appellant was the owner of the property. The Court decided against him and made a decree in favour of the then plaintiffs. The Courts below have held that the present plaintiff ought to have put forward his right of pre-emption in respect of the property now in suit as an answer to the claim of the vendees in the former suit, and that as he did not do so the present claim is barred by the rule of *res judicata*, having regard to explanation II of s. 13 of Act No. XIV of 1882.

It has been urged before us that the present plaintiff might no doubt have defeated the claim of the then plaintiffs by setting up his right of pre-emption, but he was not bound to do so, and therefore this is not a case to which explanation II of section 13 applies. In our opinion this contention is untenable. The present plaintiff being in possession of the property, it was his duty to resist the claim of those who sought to oust him upon all possible

* Second Appeal No. 522 of 1896, from a decree of W. F. W. Wells, Esq., District Judge of Shahjahanpur, dated the 16th April 1896, confirming a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 7th December 1895.

grounds. In *Srimut Rajah Mootloo Vijaya Raganadha Bodha Gooroo Swamy Periya Odaya Taver v. Katama Natchiar, Zemindar of Shivagunga*, 11 Moo. I. A., 50, it was observed by the Privy Council (at p. 73), that "when a plaintiff claims an estate, and the defendant, being in possession, resists that claim, he is bound to resist it upon all the grounds that it is possible for him, according to his knowledge, then to bring forward. The present appellant might have insisted on the validity of the alleged will, but instead of doing so [518] when his suit came on to be heard and decided in the Court of final appeal, he in effect disclaimed all title under the instrument as a will, and insisted that it must be regarded by the Court as not being testamentary. There would be an end to all security in the administration of justice if the course now taken by the appellant of setting up the will were allowed." These observations apply with full force to the present case. It is true that if the present plaintiff had raised in the former suit the defence that he had a right of pre-emption, that defence would have been only in the alternative, but such a defence is one which a party who resists a claim ought to bring forward for the purpose of defeating the claim. In the case of *Kameswar Pershad v. Raj Kumari Ruttan Koer*, I. L. R., 20 Cal., 79, their Lordships of the Privy Council explained what the word "ought" in explanation II of section 13 means. In that case their Lordships said:—"Where matters are so dissimilar that their union might lead to confusion, the construction of the word 'ought' might become important." It is urged that the defence on the ground of pre-emption, if raised, would have been so dissimilar to the other defence, namely, on the ground of proprietary title, that confusion would have arisen, and consequently according to their Lordships of the Privy Council the defence on the ground of pre-emption ought not to have been raised in the former suit. In our opinion, however, the two defences would only have been alternative ways of seeking to defeat the claim of the plaintiff. This view is supported by the ruling of this Court in *Imam Khan v. Ayub Khan*, I. L. R., 19 All., 517. We are therefore of opinion that as the present plaintiff did not in the former suit set up his right of pre-emption in answer to the claim advanced in that suit he is precluded by the provisions of section 13 of the Code of Civil Procedure from maintaining the present suit. The ruling of this Court in *Baldeo Sahai v. Bateshar Singh*, I. L. R., 1 All., 75, is directly in point. For the above reasons we hold that the Courts below were right. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This was overruled in (1903) 26 All., 61; and not followed in (1904) 1 A. L. J., 426; (1904) 27 All., 78; see also (1907) P.R., 55.]

[519] *The 9th July, 1898.*

PRESENT :

MR. JUSTICE AIKMAN.

Jai Kishen and others.....Plaintiffs

versus

Ram Lal.....Defendant.*

Act No. XV of 1877 (Indian Limitation Act), sch. ii, Art. 32—Suit for removal of trees from tenant's holding—Limitation—Jurisdiction—Civil and Revenue Courts Act No. XII of 1881 (N.-W. P. Rent Act), section 93.

Held, that a suit by zamindars for the removal of trees planted by a tenant on his cultivatory holding was governed by the limitation prescribed in art. 32† of sch. ii of the Indian Limitation Act, 1877. *Gangadhar v. Zahurriya*, I. L. R., 8 All., 446, and *Musharaf Ali v. Iftkhar Husain*, I. L. R., 10 All., 634, referred to.

Held also, that such a suit was not cognizable by a Civil Court. *Deodat Tiwari v. Gopi Misr*, Weekly Notes, 1882, p. 102.

THE plaintiffs came into Court alleging that the defendant being their tenant of certain fields, which were leased to him for agricultural purposes, had, without obtaining their permission, planted trees on the said fields, instead of using them for the purpose for which they were let, and the plaintiffs prayed for the removal of the trees.

In the first Court the defendants raised several issues, but the case was decided upon one only, namely, whether the predecessor in title of the plaintiffs had given permission to the defendant to plant the trees in question. Finding this issue against the defendant the Court (Munsif of Agra) gave a decree in favour of the plaintiffs.

On appeal by the defendant the Lower Appellate Court (Small Cause Court Judge of Agra acting as Subordinate Judge) decreed the appeal and dismissed the plaintiffs' suit on the finding that it was barred by limitation under Article 32 of the second schedule to the Indian Limitation Act 1877; the trees in dispute having, according to the evidence of Jai Kishen, one of the plaintiffs, been planted more than two years before suit.

The plaintiffs thereupon appealed to the High Court.

[520] Babu Jogindro Nath Chaudhri, for the Appellants.

The Respondent was not represented.

Aikman, J.—The plaintiffs, who are appellants here, brought a suit for the removal of certain trees which had been planted by the defendant on the land which he held from the plaintiffs for cultivation. The suit was brought

* Second Appeal No. 593 of 1897, from a decree of Syed Akbar Husain, Subordinate Judge of Agra, dated the 28th April 1897, reversing a decree of Babu Hari Mohan Banerji, Munsif of Agra, dated the 1st January 1897.

† [Art. 32:—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|---|-----------------------|---|
| Against one who, having a right to use property for specific purposes, perverts it to other purposes. | Two years | When the perversion first becomes known to the person injured thereby.] |

upwards of two years after the trees were planted. The Lower Appellate Court has dismissed the suit as barred by limitation, applying art. 32 of the second schedule to the Indian Limitation Act, 1877. In appeal it is contended that the suit is governed by art. 144 of the second schedule to the Limitation Act. That article has clearly no application to this suit, which is not a suit for possession. In the case of *Gangadhar v. Zahurriya*, I.L.R., 8 All., 446, art. 32 was held to be applicable to a suit like the present. That was a ruling of TYRRELL and MAHMOOD, JJ., and that ruling was concurred in by STRAIGHT, J., in *Musharaf Ali v. Iftkhar Husain*, I.L.R., 10 All., 634. The appeal therefore cannot be sustained. I may add that, in my opinion, the cognizance of the suit by the Civil Court was barred by the provisions of section 93 of Act No. XII of 1881, and in this opinion I am fortified by the decision in *Deodatt Tiwari v. Gopi Misr*, Weekly Notes, 1882, p. 102. I dismiss this appeal, but without costs, as the respondent is not represented.

Appeal dismissed.

NOTES.

[See also (1911) 12 I. C. 108 (All.); (1897) 24 Cal., 160; (1899) 26 Cal., 564 which are to the same effect.]

[20 All. 520]

The 15th July, 1895.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Kaliani.....Defendant

versus

Dassu Pande and others.....Plaintiffs.*

Jurisdiction—Civil and Revenue Courts—Suit in ejectment against a trespasser—Res judicata—Entries in revenue records.

Although a Civil Court cannot give a decree declaring or deciding the status of an agricultural tenant, yet where a plaintiff, having no remedy in the Revenue Courts, sues, on the allegation that he is a tenant entitled to possession, to eject a trespasser, it is competent to a Civil Court to grant a decree for possession on the ground that the plaintiff is a tenant, the class of his tenancy being left to the Revenue Courts to determine.

[521] *Held* also, that an entry in a revenue record which is based solely on the fact of possession cannot operate as *res judicata* on a question of title subsequently raised in a Civil suit. *Ajudhia Rai v. Parmeshar Rai*, I. L. R., 18 All., 340, and *Dukhna Kunwar v. Unkar Pande*, I. L. R. 19 All., 452, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the Appellant.

Mr. *J. Simeon*, for the Respondents.

Kershaw, C. J., and Banerji, J.—This is an appeal from an order of remand under section 562 of the Code of Civil Procedure. This is one of those cases in which the question of the conflict of the jurisdiction of Civil and Revenue Courts arises. The plaintiffs, who are respondents here, brought their suit for a declaration that they were occupancy tenants of the land in suit and for recovery of possession of that land. They alleged that the defendant had no right to it and that she was a trespasser. It appears that the name of the

* First Appeal from Order No. 46 of 1898, from an order of H. D. Griffin, Esq., District Judge of Aumgarh, dated the 4th April 1898.

defendant was entered in the revenue papers as the tenant of this land. The plaintiffs made an application for amendment of that entry on the ground that they were entitled to the holding. That application was dismissed by the Revenue Court, and thereupon the present suit was brought. The Court of First Instance dismissed the suit on the ground that it was one cognizable by a Court of Revenue, and it relied for that opinion on the ruling of the Full Bench in *Ajudhia Rai v. Parmeshar Rai*, I. L. R., 18 All., 340. The plaintiffs appealed to the District Judge. He held that in so far as the plaintiffs sought to obtain a declaration that they were the occupancy tenants of the land in suit, the suit was not cognizable by a Civil Court and that the claim had been rightly dismissed; but as regards the claim for possession, he held, relying on the ruling of this Court in *Dukhna Kunwar v. Unkar Pande*, I. L. R., 19 All., 452, that it was cognizable by the Civil Court. He accordingly made an order under section 562 of the Code of Civil Procedure remanding the case to the Court of First Instance for trial on the merits.

[522] In our judgment this case is almost on all fours with the ruling on which the learned Judge of the Court below has relied and we fail to see in what respect this case may be distinguished from the one in which that ruling was passed. As observed in that case, the plaintiffs could not obtain any relief by resorting to the Court of Revenue. By asking that Court to determine the class of their tenancy under section 10 of Act No. XII of 1881 and obtaining a decision under clause (a) of section 95 of that Act, they could not recover possession of the holding. As they did not allege that the zamindar had dispossessed them, and as the defendant did not claim to have been put into possession by the zamindar, they could not make an application under clause (n) of that section. They are thus clearly without remedy, unless that remedy could be given them by a Civil Court. In the ruling to which we have referred it was held that, although the Civil Court could not grant a decree declaring or deciding the status of an agricultural tenant, the only Court in which a person claiming to be such a tenant could sue to recover possession from an alleged trespasser was the Civil Court. With that opinion we fully agree. This case was not one in which it was necessary that the question of the status of the plaintiffs tenancy *quâ* status had to be determined; if the plaintiffs were tenants of any description and if the defendant was a trespasser, the plaintiffs were entitled to succeed. In this respect this case does not fall within the purview of the Full Bench ruling in *Ajudhia Rai v. Parmeshar Rai*, I. L. R., 18 All., 340, and we think that the conclusion at which the learned Judge of the Court below has arrived is a right conclusion.

It was further contended before us on behalf of the appellant that, by reason of the order of the Revenue Court refusing to amend the entry in the revenue papers, the matter had become *res judicata*. We are unable to accede to this contention. The order of the Revenue Court was made under section 102 of Act No. XIX of 1873. That section provides that in disputed cases the Collector of the District or Assistant Collector shall make [523] such inquiry as may be necessary to ascertain the truth and cause the record to be amended accordingly. This section in our judgment does not confer upon the Collector of the District or Assistant Collector any greater powers than what a settlement officer would have under section 64 of that Act. By section 63 the settlement officer is to specify in the record of rights all particulars relating to tenants of every description. By section 64 all entries in the record made under section 63 shall be founded on the basis of actual possession, and all disputes regarding such entries shall be investigated and decided on that basis. The inquiry referred to in section 102 is, in our opinion,

the inquiry which in the case of disputes a settlement officer is competent to make under section 64 on the basis of actual possession. That section further provides that persons not in possession, but claiming a right to be so, shall be referred to the proper Court. The proper Court mentioned in the section evidently must be, as observed in *Dukhna Kunwar v. Unkar Pande*, I. L. R., 19 All., 452, a Court other than the Court of the settlement officer, and where the Revenue Court would not have jurisdiction to afford relief it must be the Civil Court. An adjudication on the basis of possession, which an adjudication under section 102 must necessarily be, cannot, in our opinion, operate as *res judicata* on a question of title. In our judgment this appeal is untenable. We dismiss it with costs.

Appeal dismissed.

NOTES.

[This was followed in (1901) 23 All., 360 : (1901) 23 All., 481.]

[20 All. 523]

FULL BENCH.

The 20th July, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, MR. JUSTICE BLAIR,
MR. JUSTICE BANERJI, MR. JUSTICE BURKITT AND
MR. JUSTICE AIKMAN.

Maqbul Fatima... Judgment-debtor

versus

Lalta Prasad and another.....Decree-holders.*

Execution of decree—Construction of decree—Act. No. IV of 1882 (Transfer of Property Act), section 88—Civil Procedure Code, sections 219, 206—Costs—Decree apparently awarding costs twice.

A decree drawn up under section 88 of the Transfer of Property Act, 1882, was properly framed in accordance with the requirements of that section, but, [524] in addition to the prescribed contents of such a decree, contained a clause to the following effect:—"It is further ordered, that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court."

Held, that this latter clause was merely a formal compliance with the provisions of the Code of Civil Procedure and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. *Chiranji v. Moti Ram*, Weekly Notes, 1898, p. 3, on this point over-ruled.

IN this case the respondents decree-holders had obtained a decree under section 88 of the Transfer of Property Act, 1882, on the 27th August 1894, which decree was confirmed by the High Court on appeal on the 22nd of April 1897. The decree thus confirmed was, as to the main portion of it, drawn up in strict accordance with the terms of section 88 of the Transfer of Property Act; but, in addition to the matters provided for by that section, contained a further order to the effect that "defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8-0, the amount of costs incurred by them in this Court." The decree-holders caused the mortgaged property to be sold by auction, and,

* First Appeal No. 251 of 1897, from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 7th August 1897.

the proceeds of the sale being insufficient for the realization of the whole of the decretal amount, they subsequently applied for a decree under section 90 of the Transfer of Property Act, 1882, that application was dismissed. The decree-holders subsequently applied for execution of their decree as to costs by realization of the costs awarded to them from the person of the judgment-debtor. The Court of First Instance (Subordinate Judge of Bareilly) disallowed the judgment-debtor's objections and made an order granting execution for the costs of both Courts against the judgment-debtor personally. Against this order the judgment-debtor appealed to the High Court.

Maulvi *Ghulam Muftaba*, for the Appellant. The decree-holders' claim to recover their costs from the judgment-debtor personally is concluded by the order of the Subordinate Judge on their application for a decree under section 90 of Transfer of Property Act. The decree-holders in that application [525] asked for a personal decree as to costs and it was refused them : they cannot therefore now get a personal decree for costs.

Further the award of Rs. 876-8-0 as costs by the decree of the High Court, which is now the only decree in the suit, was made "as awarded in the decree of the Lower Appellate Court," that is to say the costs were made a portion of the mortgage money as required by section 88 of the Transfer of Property Act.

The decree, moreover, as drawn up is ambiguous, and, that being so, it must be construed, if possible, as a decree in accordance with law. As the judgment directs a decree to be drawn up in accordance with the terms of section 88 of the Transfer of Property Act the decree must be construed as a good decree under that section and as awarding costs in the matter prescribed thereby, namely, payable out of the mortgaged property and not by the judgment-debtor personally.

Mr. *D. N. Banerji* (with whom Mr. *W. K. Porter*), for the Respondents. The sole question is whether the Court executing the decree can go behind it. The language of this decree is plain, and whether rightly or wrongly the decree has awarded costs separately. There is nothing in the law to show that the Court cannot award costs separately, *i.e.*, without including them in the mortgage money, and in any case the Court has done so. The judgment-debtor never appealed from the decree of the first Court on the point of costs, and the High Court has now no power to prevent execution of that decree according to its terms which are not ambiguous.

The judgment of the majority of the Court (KERSHAW, C. J., BLAIR, BANERJI and AIKMAN, JJ.), was delivered by BANERJI, J.:-

This appeal arises out of an application for the execution of a decree presented in the Court of the Subordinate Judge of Bareilly by the respondents decree-holders. They brought a suit for sale on a mortgage, and a decree was made in their favour under section 88 of the Transfer of Property Act on the 27th of August 1894. An appeal was preferred from that decree to this Court, which was dismissed on the 22nd of [526] April 1897. The decree-holders caused the mortgaged property to be sold by auction, and the proceeds of the sale being insufficient for the realization of the whole of the decretal amount, they subsequently applied for a decree under section 90 of the abovementioned Act. That application was dismissed. Their present application, which has given rise to this appeal, was one for the realization of the costs awarded to them by the decree of the Court of First Instance and of the appellate Court from the person of the judgment-debtor. As regards the costs of the appellate Court, there is no controversy in this appeal. As for the costs of the Court of First Instance, it is contended on behalf of the judgment-debtor appellant that,

under the terms of the decree passed in favour of the respondents they are not entitled to realize the costs of that Court otherwise than out of the mortgaged property. The Court below has over-ruled that objection, and it has been repeated in the appeal before us. No doubt a Court executing a decree is bound to give effect to the decree as it finds it. We have therefore to see whether in this case the decree awards to the decree-holders the costs of the suit against the defendant personally. The decree, as we have said above, is one under section 88 of the Transfer of Property Act. Under the terms of that section, read with section 86, the decree should order, that an account be taken of what would be due to the mortgagee for principal and interest on the mortgage and for his costs of suit, if any, awarded to him, on the date to be fixed in the decree, and in the event of failure of payment of such amount of principal, interest and costs, that the mortgaged property should be sold. A decree drawn strictly in accordance with the provisions of section 88 cannot direct the costs of the suit to be recovered otherwise than out of the mortgaged property. The first portion of the decree in this case was in strict compliance with the requirements of section 88 of the Transfer of Property Act. It declared that on the 27th of February 1895, Rs. 11,866-8 was to be payable to the plaintiffs, viz., Rs. 10,990 on account of principal and interest, and Rs. 876-8 on account of costs. The decree, however, [527] contains a further direction in the following terms:—"It is further ordered that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8, the amount of costs incurred by them in this Court." It is contended that the second direction in the decree to which we have referred is independent of the order contained in the first portion of the decree as to the inclusion of costs in the amount on failure to pay which the mortgaged property could be sold, and it is urged that under this last clause the mortgagees plaintiffs are entitled to recover the costs over again from the defendants personally. We are unable to accede to this contention. We do not think that we should be justified in construing this decree in a manner which would make it an inequitable decree, which the decree in this case must be if, as is contended, it directs the same amount of costs to be paid twice over. In our opinion there is no ambiguity in the decree, and the second provision in it as to payment of costs is only a repetition of what is already contained in the first portion of the decree about the realization of costs out of the mortgaged property. Section 219 of the Code of Civil Procedure provides that the judgment shall direct by whom the costs of each party are to be paid, and by section 206 it is directed that the decree shall state the amount of costs incurred in the suit, and by what parties and in what proportions such costs are to be paid. In our opinion the clause in the decree relied on by the decree-holders is only a formal compliance with the provisions of the Code of Civil Procedure. It was never intended to be a direction for the recovery of costs personally from the debtor. In this view we are unable to agree with the observations contained in the judgment of this Court in *Chiranjī v. Moti Ram*, Weekly Notes, 1898, p. 33. Even if there were any ambiguity in the decree, it would be the duty of the Court to construe the decree by the light of the judgment. The judgment in this case does not in the slightest degree indicate that the Court intended to award costs against the defendant personally. The claim in the plaint was only for a decree for the [528] sale of the mortgaged property, and the judgment directed that a decree should be prepared according to section 88 of the Transfer of Property Act. In our opinion the judgment, so far from indicating, negatives an intention to make the defendant personally liable for the amount of the costs. We may observe that the decree of the appellate Court does not in any way affect the question before us, as it provides that

the costs of the Court of First Instance should be paid in the manner awarded in the decretal order of the said Court. We are in full accord with the opinion expressed by our brother BURKITT in his judgment in First Appeal No. 54 of 1894, decided on the 10th of August 1894, which dealt with a decree couched in similar terms. For the above reasons we are of opinion that the decree-holders are not entitled to realize the costs awarded by the decree of the Court of First Instance from the judgment-debtor personally, and we hold that this appeal must prevail.

Burkitt, J.—This case was referred to a Full Bench at my request, because, being one of the Judges responsible for the judgment in the case of *Churanji v. Moti Ram*, Weekly Notes, 1898, p. 33, I felt dissatisfied as to the correctness of the rule therein laid down. I now desire to say that I fully concur in the judgment which has just been delivered. On consideration I am of opinion that in that case we were wrong in holding that the Lower Appellate Court took a portion of the main decree of the Court of First Instance out of its proper position, and in a way constituted it a subsidiary decree for costs capable of execution against the persons of the mortgagors. I think we were wrong on that point, and that all that was intended to be done was to fill up as a matter of routine certain columns in the printed form of decree, and not in any way to modify the meaning or effect of the actual decree.

BY THE COURT.—The order of the Court is, that this appeal be allowed, and that the order of the Court below be varied to this extent that the application of the decree-holders for the [529] recovery of the costs of the Court of First Instance is dismissed. The appellant will get her costs of this appeal.

Appeal decreed.

NOTES.

[This was followed in (1905) 35 Cal., 431; (1908) 13 C. W. N., 742; (1908) 11 O.C., 877. See also (1907) 30 Mad., 464.]

[20 All. 529]

REVISIONAL CRIMINAL.

The 22nd July, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE AIKMAN.

Queen-Empress

versus

Brij Narain Man.*

Criminal Procedure Code, section 339—Pardon—Tender of pardon by Magistrate inquiring into a Criminal case—Pardon withdrawn after some of the witnesses for the prosecution had been examined—Effect of withdrawal of pardon at that stage.

A Magistrate inquiring into a charge of dacoity tendered a pardon to one of the accused persons. The pardon was accepted, and the person to whom it was tendered was examined as a witness for the prosecution. Subsequently, and after certain other witness for the prosecution had been examined the Magistrate, being of opinion that the person to whom pardon had been tendered had not made a full disclosure of the facts of the case, withdrew

* Criminal Revision No. 345 of 1898.

the pardon, put the person to whom it had been tendered back in the dock, and ultimately committed him along with the other accused to the Court of Session. *Held*, that the commitment of the person whose pardon had been withdrawn must be quashed, inasmuch as he had had no opportunity of cross-examining the witnesses for the prosecution who were examined before his pardon was withdrawn; but that it was not necessary that, if a fresh commitment could be made in time, his trial before the Court of Sessions should be postponed until the trial of his co-accused had been completed. *Queen-Empress v. Sudra*, I. L. R., 14 All., 396, and *Queen-Empress v. Muluk*, I. L. R., 14 All., 502, referred to.

THE facts of this case sufficiently appear from the order of the Court.

Mr. S. S. Singh and Pandit Madan Mohan Malaviya, for the Applicant.
The Officiating Government Advocate (Mr. A. E. Ryves) for the Crown.

Kershaw, C. J. and Aikman, J.—This is an application asking this Court to quash a commitment. The applicant Brij Narain Man was implicated in a dacoity: a pardon was tendered [530] to him by the Magistrate under the provisions of section 337* of the Code of Criminal Procedure, and by him accepted. He was in the course of the inquiry examined as a witness. The Magistrate came to the conclusion that Brij Narain Man was wilfully concealing material circumstances relating to the case, in particular, that he designedly in his statement omitted mention of his father and of his brother, who, according to the evidence, were also implicated in the crime. The Magistrate accordingly withdrew the offer of pardon, and, treating Brij Narain Man as an accused person, in the result committed him along with the other accused persons to the Court of Sessions for trial under section 395 of the Indian Penal Code. The learned counsel who has appeared in support of the application puts forward two grounds as grounds which would justify us in quashing the commitment of his client. One of these is, that the withdrawal of the tender of pardon by the committing Magistrate is improper. This was explained to us as meaning that there was nothing to show that the statement made by Brij Narain Man when examined as a witness was other than a true and full disclosure of the circumstances within his knowledge relating to the offence and the persons concerned in the committal of the offence. The question whether or not the applicant made a full and true disclosure of all he knew regarding the dacoity is clearly a question of fact. Now, according to section 215 of the Code of Criminal Procedure, a commitment once made by a competent Magistrate can be quashed by this Court only, and only on a point of law. This ground therefore would not justify us in interfering with the commitment. The other ground urged is, that it was illegal for the Magistrate to take the applicant from the witness-box and commit him for trial along with the other accused. Reliance is placed on

*[Sec. 337 :—In the case of any offence triable exclusively by the Court of Session or High Court, the District Magistrate, a Presidency Magistrate, any

Tender of pardon to Magistrate of the first class inquiring into the offence, or, with accomplice. the sanction of the District Magistrate, any other Magistrate, may, with the view of obtaining the evidence of any person

supposed to have been directly or indirectly concerned in, or privy to, the offence under inquiry, tender a pardon to such person on condition of his making a full and true disclosure of the whole of the circumstances within his knowledge relative to such offence, and to every other person concerned, whether as principal or abettor, in the commission thereof.

Every person accepting a tender under this section shall be examined as a witness in the case.

Such person, if not on bail, shall be detained in custody until the termination of the trial by the Court of Session or High Court, as the case may be.

Every Magistrate, other than a Presidency Magistrate, who tenders a pardon under this section, shall record his reasons for so doing; and when any Magistrate has made such tender and examined the person to whom it has been made, he shall not try the case himself, although the offence which the accused appears to have committed may be triable by such Magistrate.]

the decision of this Court in *Queen-Empress v. Sudra*, I. L. R., 14 All., 336, and the case of *Queen-Empress v. Mulua*, I. L. R., 14 All., 502. The latter case was a case in which during the course of a trial a Sessions Judge, being of [531] opinion that an accused person to whom a tender of pardon had been made, and who had accepted that pardon and had given evidence at the trial, was giving false evidence, forthwith put him as an accused person into the dock and proceeded at once with his trial. The former case was one on all fours with this, i.e., it was one in which the approver's pardon was withdrawn by the committing Magistrate and he was committed to the Sessions. We are of opinion that upon the second ground the commitment must be quashed, and for this reason. An order committing a person to take his trial at the Court of Sessions is an order which is passed to his prejudice, and the evidence upon which such an order is made must be the evidence of witnesses whom the accused person has had an opportunity of cross-examining. If he has not had that opportunity, it cannot but be said that he has been prejudiced. Now the order withdrawing the pardon of the applicant and directing that he should be treated as an accused person was made after some, at least, of the evidence in the inquiry preliminary to commitment had been taken, and as regards this evidence it is admitted that the applicant had no opportunity of cross-examining. For this reason we quash the commitment of Brij Narain Man Tewari to the Court of Sessions on the charge under section 395 of the Indian Penal Code, leaving the Magistrate to take such further proceeding against the applicant as he may deem necessary and as may be warranted by law. The learned counsel for the applicant has asked us to lay down that in the event of his client being after a fresh inquiry committed to the Court of Sessions and this commitment being made before the trial of the other accused has come on, he shall not be tried along with them. It is no doubt true that in the case, *Queen-Empress v. Sudra*, I. L. R., 14 All., 336, the learned Judge who decided the case remarked as follows:—"It is, in my opinion, the intention of law that a person to whom a tender of pardon has been made in connection with the offence should not be tried for an alleged breach of the conditions upon which the pardon [532] was tendered until the original case has been fully heard and determined." We fully agree with the law as laid down in *Queen-Empress v. Mulua*, I. L. R., 14 All., 502, namely, that the trial of an approver whose pardon is withdrawn at the trial should not be merely a continuation of the trial at which he gave false evidence, but a trial, so far as he is concerned, *de novo*. We are unable to follow the learned Judge who decided the case, *Queen-Empress v. Sudra*, in the opinion expressed in the passage quoted above. We are unable to find anything in the Code of Criminal Procedure which would render it necessary that an approver whose pardon has been withdrawn by the Magistrate and who has been committed by the Magistrate in time to stand his trial along with the other accused in the case should be tried separately from them. We assume that the commitment referred to is not open to objection on the ground of any illegality such as exists in this case. The joint trial under such circumstances could not, in our opinion, prejudice the approver in any way; nor could it prejudice the accused who are jointly tried with him. We allow this application and quash the commitment of Brij Narain Man Tewari.

NOTES.

[This was followed in 29 All., 24; 5 A. L. J. 691; 24 Mad., 321. In the Cr. P. C. 1898, in sec. 389, the word 'forfeited' was substituted for 'withdrawn.']

[20 All. 533]

APPELLATE CIVIL.

The 22nd July, 1898.

PRESENT :

MR. JUSTICE BURKITT.

Radha Kishen and another.....Plaintiffs

versus

Fateh Ali Ram.....Defendant*

Act No. IV of 1882 (Transfer of Property Act) section 59—Act No. I of 1872 (Indian Evidence Act) section 68—Attesting witness—Scribe of a deed.

Held that a deed may be legally proved by the evidence of the scribe thereof who has signed his name, but not explicitly as an attesting witness, on the margin, and has been present when the deed was executed. *Muhammad Ali v. Jafar Khan*, Weekly Notes, 1897, p. 146, followed.

[533] THE plaintiffs in this case sued to recover a debt secured by a bond dated the 26th of February 1889. The defendants put the plaintiff to proof of his bond and the plaintiff called numerous witnesses, but none of the marginal witnesses to the bond, and it was not shown that the evidence of the marginal witnesses was not procurable. Amongst those called by the plaintiff was the scribe of the bond. The Court of First Instance (Munsif of Ghazipur) held with reference to sections 63 and 69 of the Transfer of Property Act, 1882, that the bond sued on had not been legally proved, but gave the plaintiff a money decree against one of the defendants who admitted the claim.

The plaintiffs appealed, but the Lower Appellate Court (Subordinate Judge of Ghazipur) dismissed the appeal concurring with the finding of the Munsif that the bond sued on had not been proved.

The plaintiffs thereupon appealed to the High Court.

Mr. *Abdul Rasool*, for the Appellants.

Munshi *Kalindi Prasad*, for the Respondents.

Burkitt, J.—It seems to me that this case is exactly on all fours with the case of *Mu'ammad Ali v. Jafar Khan*, Weekly Notes., 1897, p. 146. It is true that none of the witnesses was called, but the plaintiff did call the scribe of the deed, who, though not an attesting witness, had affixed his name on the deed and who swore that the deed had been in his presence executed by the parties to it. The Lower Appellate Court finds that the evidence of the scribe is not sufficient to prove the bond. By that phrase it is clear that the learned Subordinate Judge means that, as the scribe was not an attesting witness, his evidence is not legally sufficient to prove the bond. The Subordinate Judge does not say that he disbelieves the scribe. If he had said so there would have been an end of the matter. I take it that the finding of the two lower Courts is that the plaintiff was bound to call one attesting witness at least, that he failed to do so, and that the evidence of the witness, that is to say, of the scribe, whom he did call, was not in law sufficient to prove the bond. On

* Second Appeal No. 858 of 1897, from a decree of Maulvi Muhammad Ismail Khan Subordinate Judge of Ghazipur, dated the 9th April 1897, confirming a decree of Munshi Achal Behari, Munsif of Ghazipur, dated the 6th January 1897.3

[534] the authority of the case cited above I am of opinion that that decision is wrong, and that if the Munsif and the Subordinate Judge believed the evidence of the scribe to be true, they were quite at liberty on that evidence alone to find that the bond had been executed. This case has been decided on the preliminary point that the evidence of the scribe was legally insufficient to prove the bond. I set aside the decree of the lower Court and remand the case to the Court of First Instance with instructions that, if the evidence of the scribe be in its opinion credible, that Court is at liberty on that evidence to find the bond proved. Costs of this appeal will follow the result.

Appeal decreed and cause remanded.

NOTES.

[In (1901) 5 C. W. N. 454 this was followed; see also (1912) 34 All., 615. In (1909) 83 Bom., 44 the writer's name appeared above those of the executing parties as part of the body of the document and as such it was not treated as attestation.]

[20 All. 534]

REVISIONAL CRIMINAL.

The 23rd July, 1898.

PRESENT:

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE AIKMAN.

Queen-Empress
versus
Behari Lal.*

*Act No. I of 1892 (Local) (N.-W. P. and Oudh Lodging House Act),
section 5, sub-section 2—Lodging house—House of "pragwal"
used for accommodation of pilgrims.*

Held, that a "pragwal" who, according to custom, affords accommodation to his clients when they come to Allahabad for religious purposes, is bound under the North-Western Provinces and Oudh Lodging House Act, 1892, to take out a license in respect of such houses as he may use for the accommodation of his clients.

IN this case one Behari Lal, a *pragwal* living in Kydganj, a *mohalla* of the city of Allahabad, was charged before a Magistrate of the third class of the Allahabad district with keeping without a license three lodging houses in respect of which licenses were necessary. It was found that, besides the house in which he himself lived, which was also used at times for similar purposes, Behari Lal kept two other houses which were used by him to accommodate the pilgrims who came from time to time to Allahabad and there availed themselves of Behari Lal's professional services. The case for the prosecution was that these houses were habitually used for the accommodation

* Criminal Revision No. 401 of 1898.

[535] of pilgrims, and that, although no direct consideration was received for their use from the pilgrims, some indirect consideration was received in the shape of presents, which on their departure the pilgrims customarily made to their priest. For the defence it was contended that the houses were not habitually used as lodging houses, but only on certain occasions when the occurrence of religious festivals brought pilgrims to Allahabad, and it was also argued that the presents given by the pilgrims were the same whether they received any accommodation or not, and that the reciprocal functions of priest and client were hereditary and the client was not at liberty to change his priest, so that no part of the presents made by the clients could be regarded as consideration for the accommodation afforded to them by the priest.

The third class Magistrate convicted Behari Lal under section 5 (2) of the N.-W. P. and Oudh Lodging House Act and fined him Rs. 50. He appealed to the District Magistrate, and the appeal was transferred by order of the High Court to the Sessions Judge. On this appeal the Sessions Judge found both that the houses in question were used more or less at all times throughout the year for the accommodation of pilgrims, and also that some indirect consideration was received by Behari Lal in return for the accommodation so afforded. The Judge accordingly dismissed the appeal.

Behari Lal thereupon applied to the High Court for revision of the order of the Magistrate and of the Sessions Judge.

Mr. *W. Wallach*, for the Applicant.

The Officiating Government Advocate (Mr. *A. E. Ryves*), for the Crown.

Kershaw, C. J., and Aikman, J.—This is an application for revision of an appellate order of the Sessions Judge of Allahabad confirming a conviction of the applicant under section 5, sub-section 2, of Act No. I of 1892 of the Local Legislature (The North-Western Provinces and Oudh Lodging House Act), and a sentence of fine imposed thereunder. The applicant relied on the contention that the houses in respect of which he had been [536] convicted did not, for two reasons, come within the definition of lodging house in section 1, sub-section 3, of the Act above-mentioned. In the first place, it was argued that the houses were not ordinarily used for the purpose of affording temporary accommodation to persons, and, secondly, that, if they were so used, the applicant did not receive any compensation, direct or indirect for such use. The first contention of the applicant is negatived by the finding of fact of the Judge, who says:—"I think there is no doubt that pilgrims are lodged in these houses of the appellant at all times and seasons of the year, and that the houses are used ordinarily as lodging houses." The Court accepts that finding of fact. We find that there was evidence amply sufficient to support it, and we are therefore not justified in interfering where the question is one of fact, and where the fact has been found in a sense hostile to the applicant by the tribunal from which he has appealed. The second point under this sub-section 3 made by the applicant's counsel is that the applicant's houses do not come within the definition in that sub-section, inasmuch as the applicant did not receive any consideration, direct or indirect, for their user. The Magistrate has found that the persons who at various times of the year received temporary accommodation at the houses of the applicant did indirectly pay the applicant for such accommodation. Presents were received by him on the departure of the persons accommodated at his houses. We are of opinion that a portion of the value of those presents is to be ascribed to the accommodation which was given and received. The applicant derived his income from such presents. It was necessary that accommodation of some sort should be provided in order to enable him to keep his clients and so to receive in future

such presents as they might give him. Under these circumstances we think that he was indirectly paid for the accommodation which he gave to those clients, and therefore that his houses come within the definition in the subsection mentioned, and that he was rightly convicted. We therefore dismiss this application.

[537] APPELLATE CIVIL.

The 28th July, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Rup Singh.....Judgment-debtor

versus

Pirbhu Narain Singh.....Decree-holder.*

Hindu law—Mitakshara—Impartible raj—Impartible raj not necessarily inalienable.

If amongst Hindus governed by the law of the Mitakshara, a raj happens to be impartible and governed by the rule of primogeniture, it does not therefore follow that it is inalienable. The condition of inalienability depends upon special custom, or, in some cases, upon the special tenure of the raj and must be clearly proved. *Rani Sartaj Kuari v. Rani Deoraj Kuari*, L. R., 15 I. A., 51, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Parbati Charan Chatterji*, for the Appellant.

Babu *Jogindro Nath Chaudhri* and Pandit *Sundar Lal*, for the Respondent.

Kershaw, C. J., and Knox, J.—The parties to these proceedings are Maharaja Pirbhu Narain Singh Sahib Bahadur, Kashi Nares, who is decree-holder, and Raja Rup Singh, known and styled as the Raja of Bhare, who is judgment-debtor. On the 29th of November 1891, Raja Rup Singh transferred by way of mortgage his rights and interests in certain property to the Maharaja of Benares. Upon that mortgage-deed the Maharaja of Benares instituted a suit and obtained a decree for sale. An order absolute for sale was also given subsequently. In process of time the decree-holder applied for attachment of the property with a view to its being brought to sale. No objection was raised by the judgment-debtor, and on the 19th of November 1894, an order issued for sale, and proceedings were transferred to the Collector of Mainpuri in accordance with section 320 of the Code of Civil Procedure. Upon the case reaching the Collector, steps appear to have been taken to bring the property under the management of the Court of Wards, and under its management the property [538] appears to have remained up to the 8th of May 1897, when the Court of Wards withdrew from management. On the 27th of March 1897, the decree-holder again applied for execution of his decree. Notice was issued to the judgment-debtor under section 248 of the Code of Civil Procedure, and the 19th of April 1897 fixed for hearing any objection that might be raised. The

* First Appeal No. 13 of 1898, from an order of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 14th December 1897.

judgment-debtor raised no objection and the case went again to the Collector on the 27th of July 1897. Eventually the 20th of December 1897, was fixed for sale. On the 8th of December for the first time the judgment-debtor appears to have roused himself, or to have been roused into taking action. He on that date, after final orders for holding the sale of the property had issued, came forward, and for the first time asked the Court to consider whether the property which it was about to sell could or could not be sold in execution of the decree. The Subordinate Judge of Mainpuri considered that the objections taken were entitled to no weight and disallowed them. From that order the present appeal is brought, and it is again urged upon us that the property ordered to be sold is property which cannot be sold because, first, it forms part of an impartible raj, which by Hindu law and custom is inalienable; secondly, because the son and heir of the Raja of Bhare should, under the terms of section 85 of the Transfer of Property Act of 1882, have been made party to the proceedings.

It is admitted that the property forms part of an impartible raj. The learned vakil for the appellant strove to maintain that an impartible raj was also inalienable. He appears to have either overlooked or to have misunderstood the decision given by their Lordships of the Privy Council in *Rani Sartaj Kuari v. Rani Deoraj Kuari*, L. R., 15 I. A., 51. In that case it is laid down that in a raj the eldest son, where the Mitakshara law prevails and there is a custom of primogeniture, does not become a co-sharer with his father in the estate. If the estate be inalienable, the inalienability of it depends upon custom which must be proved, or it may be that in some cases it depends upon the nature of the tenure. Indeed, in [639] this case it does not lie in the mouth of the appellant to maintain at this stage this contention, seeing that when he offered the property for mortgage, he put forward that it was capable of alienation, that he made no resistance to the decree which was passed against it, and that he never, until the 8th of December 1897, attempted to put forward the objection at all; even then he put it forward as being a question based upon the general principles of Hindu law.

The principle laid down by their Lordships of the Privy Council in the case above-mentioned cuts away the ground on which the second contention is based. The Court below was quite right in dismissing both the objections taken as frivolous. They were, in our opinion, frivolous and intended to delay execution. At any rate there is ample ground for suspecting that there was such intent. We cannot believe for a moment that if they were valid objections, the appellant would not have urged them long ago, and taken care to have them fortified by evidence of custom or as to the nature of the tenure. We dismiss the appeal with costs.

Appeal dismissed.

• NOTES.

[In (1899) 22 Mad., 383 the Privy Council affirmed the alienability (and devisability) of impartible estates in the absence of special custom.]

[20 All. 539]

The 28th July, 1898.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Sheoraj Singh.....Plaintiff

versus

Amin-ud-din Khan.....Defendant.*

Execution of decree—Application for execution by beneficial holder of decree—Application dismissed—Suit for declaration of applicant's right to execute the decree—Civil Procedure Code, section 232.

Held, that where an application under section 232 of the Code of Civil Procedure by a person alleging himself to be beneficially entitled under a decree to execute such decree has been rejected, it is still competent to the applicant (no appeal lying from the order under section 232 rejecting his application) to bring a separate suit for a declaration that he is the person entitled to execute the decree. *Ram Bakhsh v. Panna Lal*, I. L. R., 7 All., 457, and *Halodhar Shaha v. Harogobind Das Koiburto*, I. L. R., 12 Cal., 105, referred to.

THE facts of this case are fully stated in the judgment of the Court.

[540] Babu Durga Charan Banerji, for the Appellant.

Mr. D. N. Banerji, for the Respondent.

Banerji and Aikman, JJ :—This appeal has arisen in a suit brought by the present appellant for a declaration that he is beneficially interested in a certain decree, and that he is entitled to take out execution of that decree. The facts are these:—Haji Mansur Khan father of the defendant-respondent and one Kadirdad Khan owned an indigo factory and other property. After Kadirdad Khan's death his legal representative sold his half share of the property under a sale-deed, dated the 23rd of August 1887, executed in favour of Asharfi Lal, who was a servant of the appellant's father, Raja Shankar Singh. It is said that Raja Shankar Singh was beneficially interested in the sale-deed, and that Asharfi Lal was a benamidar for him. This allegation has not been traversed in this suit and has been found to be true. It appears that the mother of the defendant-respondent brought a suit for pre-emption in respect of one of the villages included in the sale-deed referred to above, and in that suit impleaded Asharfi Lal and Raja Shankar Singh as defendants. Raja Shankar Singh disclaimed all interest in the property. The suit, however, was dismissed on other grounds. Subsequently a suit was brought in the name of Asharfi Lal against the respondent to recover damages for certain obstructions caused by him to the indigo factory comprised in the sale-deed. A decree was passed in his favour for Rs. 2,250 by the Subordinate Judge of Aligarh, which was affirmed by this Court on the 28th of June 1883. Raja Shankar Singh died in 1891. On the 11th of June 1894, Asharfi Lal executed a document in favour of the appellant, in which he declared that he was merely benamidar for Raja Shankar Singh. To this document we shall have to refer later on. On the 13th of August 1894, Sheoraj Singh applied for execution of the decree referred to above under section 232 of the Code of Civil Procedure. That application was dismissed on the 18th of September 1894, and thereupon the present suit was instituted. The allegation of the plaintiff was, as we have said above, that he was beneficially [541] interested in the sale-deed and in the decree, and that he was entitled

* Second Appeal No. 123 of 1896, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 30th November 1895, reversing a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 20th June 1895.

to apply for execution of the decree. The Court of First Instance decreed his claim, but the Lower Appellate Court dismissed it. Hence this appeal.

The Lower Appellate Court has held, first, that the plaintiff is estopped from setting up a title to the sale-deed and the decree; secondly, that he is not the assignee of the decree, and that on this point the order refusing his application under section 232 of the Code of Civil Procedure is conclusive; and thirdly, that it would be against public policy, after Raja Shankar Singh's repudiation of the sale-deed, to grant the declaration sought for in this suit.

We are unable to agree with the learned Judge in regard to any of the grounds relied on by him. The plea of estoppel was never raised by the defendant in his written statement, and the learned Judge has spelt out for him a case which he never set up. In his written statement the defendant distinctly stated that the plaintiff's father Raja Shankar Singh was the real owner of the property conveyed by the sale-deed of the 23rd of August 1887. He did not assert that by reason of the disclaimer made by Shankar Singh in the suit for pre-emption he was deceived or was induced to alter his position in any way. The learned Judge says, that in consequence of the statement made by Shankar Singh in the suit for pre-emption the defendant did not advance, in a suit for partition instituted by Asharfi Lal, the defence which he might have raised, and on this ground he holds that the plaintiff is now estopped from claiming an interest in the decree in question. This, however, was not an allegation made by the defendant. As we have said above, he nowhere stated in the pleadings that he was led by any representations of the plaintiff or his father into believing the existence of a state of things which did not in reality exist. As a matter of fact, the defendant has admitted that he was aware that Raja Shankar Singh was the actual purchaser under the sale-deed of the 23rd of August 1887. Any representation made by the Raja therefore could [542] not have induced the defendant to alter his position to his own prejudice.

The next ground of the learned Judge's judgment is in our opinion equally untenable. As the plaintiff was not recognised by the Court as a person who, under section 232 of the Code of Civil Procedure, was entitled to execute the decree and his application under that section was refused, he could not appeal from the order of refusal. The propriety of that order was therefore liable to be contested in a suit, and section 244 of the Code of Civil Procedure does not bar such a suit. This was held by this Court in *Ram Bakhsh v. Panna Lal*, I. L. R., 7 All., 457, and by the Calcutta High Court in *Halodhar Shaha v. Harogobind Das Koiburto*, I. L. R., 12 Cal., 105. The order relied upon by the learned Judge does not preclude the plaintiff from maintaining the present suit.

As regards the third ground of the learned Judge's judgment, we are unable to agree with it. A benami transaction is not illegal, and according to the rulings of the Lords of the Privy Council effect should be given to such transactions. The mere fact that the father of the present plaintiff made an untrue statement in a Court of justice in a previous litigation should not preclude the plaintiff from proving the real nature of the transaction on which he relies.

It has been contended before us that the plaintiff should be deemed to be a decree-holder within the meaning of the Code of Civil Procedure, and that as such decree-holder he is entitled to apply for execution of the decree in question. In our opinion a decree-holder within the meaning of section 2 of the Code of Civil Procedure must be the person whose name is on the record of the suit and in whose favour the decree is passed, and the only other person who is included in the definition of decree-holder is the person

to whom the decree is transferred. The beneficial owner of a decree cannot, in our judgment, be regarded as a decree-holder within the meaning of the Code. We are, however, of opinion that the plaintiff may be treated as the transferee of the [543] decree obtained by Asharfi Lal. The deed executed by Asharfi Lal on the 11th of June 1894, has the effect of transferring to the plaintiff all decrees obtained by him for damages or costs in relation to the property acquired under the sale-deed of the 23rd of August 1887. As the decree now in question is a decree of such a character it was in our opinion transferred to the plaintiff by the instrument of the 11th of June 1894, and the plaintiff as such transferee was entitled to apply for execution of the decree under section 232 of the Code of Civil Procedure. As such transferee he has still the right to apply for execution of that decree, provided, of course, that execution is not otherwise barred by law.

The learned counsel for the respondent contended that we should not make a declaratory decree in this case, inasmuch as such a decree would be infructuous, as any application for execution which the plaintiff may now make would be barred by the operation of limitation. It is true that a Court in the exercise of the discretion which it possesses in the matter of passing a declaratory decree should refuse to exercise that discretion where the declaratory decree would be fruitless, but we are informed that in this case certain applications for execution were made which might have the effect of saving the operation of limitation. It would be premature for us to express any opinion as to whether or not execution of the decree is time-barred, and we are not satisfied that this is so clear a case that we should be justified in holding that any decree which we may make in favour of the plaintiff will be of no value to him. For the above reasons we allow this appeal with costs, and, setting aside the decree of the Lower Appellate Court with costs, restore that of the Court of First Instance.

Appeal decreed.

NOTES.

[See also (1906) 28 All., 613 ; (1899) 3 O. C., 32.]

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BY
M. SUBRAMANIAM, B.A., B.L.,
AND
M. V. KRISHNASWAMY, B.A., B.L.,
VAKILS, HIGH COURT, MADRAS.

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CONTAINING CASES DETERMINED BY THE HIGH
COURT AT ALLAHABAD, AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

ALLAHABAD—Vol. XXI-1899.

APPELLATE CIVIL.

The 3rd August, 1896.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Hardat.....Decree-holder

versus

Izzat-un-nissa.....Judgment-debtor.'

*Civil Procedure Code, section 583—Restoration of benefit obtained under a
decree which has been subsequently reversed in appeal—Interest—
Mesne profits.*

Held, that a person who is entitled under section 583 of the Code of Civil Procedure to the restoration of a benefit of which he has been deprived by reason of a decree which has been subsequently reversed in appeal is entitled, if the thing to be restored is money, to interest for the time during which he has been deprived of the use of it, or, if the thing to be restored is land, to mesne profits for the time during which he has been kept out of possession. *Phul Chand v. Shankar Sarup*, I. L. R., 20 All., 430, approved.

IN this case Musammat Izzat-un-nissa Begam sued one Dwarka Das for the purpose of having a lease which had been granted to him set aside. She obtained a decree in the Court of the Subordinate Judge on the 8th of March 1895. That decree cancelled the lease and directed Dwarka Das to give up possession of the land and to pay to Izzat-un-nissa the sum of Rs. 1,134-11-6 on account of mesne profits, and also other sums asked for. On appeal to the High Court that decree was set aside and Izzat-un-nissa's suit was dismissed with costs. Meanwhile, however, Izzat-un-nissa had executed the decree of the Subordinate Judge and had obtained possession, and she had realized also the amount of her mesne profits and her costs. Dwarka Das assigned the decree

* First Appeal No. 186 of 1898, from an order of Babu Madho Das, Subordinate Judge of Bareilly, dated the 19th March 1898.

[2] of the High Court in his favour to Hardat, and Hardat applied under section 583 of the Code of Civil Procedure, asking in the first place for restitution of the amount which Izzat-un-nissa had realized in execution of her decree as mesne profits and costs, with interest thereon, and, secondly, for mesne profits from the date when his assignor was ejected in execution of Izzat-un-nissa's decree up to the date of the expiration of the lease.

The Court of First Instance (Subordinate Judge of Bareilly) allowed the claim for the mesne profits and costs realized by Izzat-un-nissa, but disallowed the claim for interest and for future mesne profits.

The applicant thereupon appealed to the High Court.

Mr. *D. N. Banerji*, for the Appellant.

The Respondent was not represented.

Kershaw, C. J., and Burkitt, J.—This is an appeal against an order made by the Subordinate Judge of Bareilly on an application made to him under section 583 of the Code of Civil Procedure.

The only facts which need be cited are that the respondent, Musammat Izzat-un-nissa Begam, sued the appellant's assignor for the purpose of having a lease which had been granted to the latter set aside. She obtained a decree on the 8th March 1895. That decree cancelled the lease and directed appellant's assignor to give up possession of the land and pay to Musammat Izzat-un-nissa Begam the sum of Rs. 1,134-11-6 on account of mesne profits, and also other sums asked for. On appeal to the High Court the decree in that case was set aside, and Musammat Izzat-un-nissa Begam's suit was dismissed with costs.

But meanwhile Musammat Izzat-un-nissa Begam had executed her decree obtained in the lower Court : she had obtained possession, and she had realised the amount of her mesne profits and her costs. The present applicant asks for the restitution of these amounts with interest. The Subordinate Judge has ordered the mesne profits and costs to be refunded, but has refused interest. That is the first matter raised in appeal.

[3] It is contended that the order of the Subordinate Judge refusing interest is wrong, and we have been referred to the recent case of *Phul Chand v. Shankar Sarup*, I. L. R., 20 All., 430. In that case, on the strength of the decision of their Lordships of the Privy Council, it was held that in a case like the present, interest should be allowed. In our opinion that decision, to which one of us was a party, is correct and should be followed. We therefore set aside that part of the judgment of the Subordinate Judge which refused interest, and we direct him in execution to allow interest at 6 per cent. on all amounts which the appellant is entitled to recover from the opposite party.

The other matter asked for is, that appellant should be allowed mesne profits from the date when he was ejected under the execution of Musammat Izzat-un-nissa Begam's decree up to the date of the expiration of his lease, that is, up to the 6th of July 1897. It is a matter of regret to us that no counsel has appeared to argue this case before us, but we think that the principle underlying the ruling of their Lordships mentioned above is that we must put the appellant in the same position that he would have occupied if the plaintiff's decree had never been passed. Had that decree never been executed this appellant would have held possession of the leased property up to the date on which the lease expired, and would as lessee have been entitled to the rents and profits and the other advantages of possession as lessee. We think that we ought now to put him in that position, and we therefore direct that the Subordinate Judge on this application under section 583, allow

to the appellant the mesne profits which he would have received between the date when he was ejected in execution of the decree and the 6th of July 1897, the date on which the lease expired. Interest will be allowed on the mesne profits at 6 per cent.

We also give appellant the costs of this appeal.

Decree modified.

NOTES.

[In the C. P. C., 1908, sec. 144 which takes the place of sec. 583 of the C. P. C., 1882, is worded so as to include cases like this. The Court is empowered to make orders for the refund of costs and for the payment of interest, damages, compensation and mesne profits which are properly consequential on the variation or reversal of the decree.]

[4] *The 3rd August, 1898.*

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Jafar Husen.....Defendant

versus

Ranjit Singh.....Plaintiff.*

Mortgage—Construction of document—Mortgage of a mixed character partly simple and partly usufructuary—Decree for sale—Act No. IV of 1882 (Transfer of Property Act), section 58.

In construing a mortgage deed, the terms of which are of a doubtful character, the intention of the parties, as deducible from their conduct at the time of execution and other contemporaneous documents executed between them, is to be looked to.

Mortgage-deeds of a mixed character and other than those expressly defined in section 58 of the Transfer of Property Act, 1882, must be construed as far as possible in accordance with the covenants contained in them. Where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of a simple mortgage the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed. *Shunker Lal v. Poorrun Mull*, N.-W. P., H. C. Rep., 1867, p. 160; *Phul Kuar v. Murlidhar*, I.L.R., 2 All., 527; *Jugal Kishore v. Ram Ram Sahai*, Weekly Notes, 1886, p. 212; *Umrao Begam v. Valiullah*, Weekly Notes, 1888, p. 171; *Ramayya v. Guruva*, I. L. R., 14 Mad., 232, and *Sivakami Ammal v. Gopala Savundram Ayyan*, I. L. R., 17 Mad., 131, referred to.

THE facts of this case sufficiently appear from the judgment of KNOX J.

o. Mr. Karamat Husen and Pandit Moti Lal, for the Appellant.

Messrs. D. N. Banerji and B. E. O'Connor and Babu Satish Chandar Banerji, for the Respondent.

Knox, J.—Syed Jafar Husen executed a deed on the 12th of January 1888, whereby he transferred his interests in certain immovable property for the term of seven years to one Chaudhri Ranjit Singh for the purpose of securing the payment of one lakh of rupees advanced by Chaudhri Ranjit Singh to him.

The main dispute in this appeal turns upon the precise nature of the transaction between the parties.

The first plea in appeal is to the effect that the learned Subordinate Judge has misinterpreted the mortgage-deed in suit. The appellant contends that the transaction is a pure usufructuary mortgage.

* First Appeal No. 227 of 1896, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 8th June 1896.

[6] On the same day on which Syed Jafar Husen executed the mortgage-deed, three other documents were executed between the same parties. All the four deeds were registered on one and the same day, namely, the 21st January 1888. It will be necessary to examine carefully the wording of the mortgage-deed, and if its terms are not sufficiently clear and admit of more than one interpretation, it will be necessary further to ascertain in what manner the terms of the deed were understood and acted upon by the parties subsequent to their entering upon the contract, for, as was pointed out in *Shunker Lall v. Poorrun Mull*, N.-W. P. H. C. Rep., 1867, p. 150, the real intention of the parties to a deed may fairly be gathered from their conduct and from the effect given to the deed before the commencement of the dispute out of which the suit has arisen. It is hardly necessary to remind ourselves that where the terms of an instrument are doubtful, what we have to look at is the substance and not the mere form. The mortgage-deed will be found sufficiently well translated for the purposes of this appeal at page 1 of the respondent's printed book. After reciting that the shares in certain villages had been mortgaged by Syed Jafar Husen to Chaudhri Ranjit Singh, and that the mortgage money had been left with the mortgagee for the payment of debts due to certain creditors of the mortgagor, it states:—(1) that the mortgagor has put the mortgagee in possession of all the aforesaid villages; (2) that he authorises the mortgagee to appropriate the profits of the mortgaged shares in the villages in lieu of interest of the mortgage money during the term of the mortgage; (3) that he is entitled to redeem the mortgage after the expiration of seven years; (4) that the mortgagee is entitled to demand repayment of the mortgage money after the expiration of the term; (5) that if any difficulties or obstructions are placed in the way of the mortgagee, or any disputes or prior liens are found to exist, the mortgagee is at liberty to recover the mortgage money, together with costs, damages and interest, from the mortgagor and other properties of the mortgagor in the said [6] villages "according to the condition of a separate deed of agreement executed to-day;" (6) that until the full payment of the mortgage money, the mortgaged property shall in every way remain liable for damages, interest and deficiency of profits. This deed was executed after the Transfer of Property Act, 1882, came into force. The definition of a usufructuary mortgage according to that Act is to be found at clause (d) of section 58. Putting the terms above recited alongside of the definition, it is evident that the deed contains more than is provided for in clause (d). The portions of it where the mortgagor binds himself personally to pay the mortgage money in the event of disputes, &c., find no place in, and are directly contrary to the nature and essence of a transaction which is a pure usufructuary mortgage. So also is the clause which provides that the mortgaged property shall remain liable for damages, interest and deficiency of profits. It is also evident from the reference made to "the separate deed of agreement executed to-day" that the parties intended this latter document to be read with and interpreted by a document to be found at page 8 of the respondent's printed book. This document is termed a security bond. It recites that Syed Jafar Husen has given in mortgage to Chaudhri Ranjit Singh certain shares in certain villages—the shares and the villages in both deeds correspond exactly; that Syed Jafar Husen has taken a lease of the said shares in the said villages upon certain terms to be found in a *qabuliyat* executed the same day; that the lease runs from January 1888 up to January 1896, or until redemption of the mortgage; in other words, that as regards time it is coterminous with the mortgage. The deed then proceeds to state that for the satisfaction of the mortgagee in regard to payment of the lease

money the mortgagor pledges and hypothecates in this security bond his equity of redemption over the mortgaged property and shares to which he was entitled in the mortgaged villages. It is this last portion of this deed which is cited in the mortgage deed and which under certain circumstances is to govern the parties to the mortgage-deed. If the two documents are read together, it is [7] evident that they deviate still further from the definition of a usufructuary mortgage as set out in clause (d) of section 58 of the Transfer of Property Act, 1882. It will be observed that the two other deeds, namely, the lease and *qabuliyat* have practically been called in aid of the mortgage transaction. One of those two documents will be found at page 5 of the respondent's printed book. The terms of this document also refer to the mortgage-deed, and they show that the intention of the parties was to enter into a transaction covered by the four deeds. In our opinion the four deeds must be read together before it can be fairly understood what the intentions of the contracting parties were. Indeed the learned counsel on both sides are at one upon the point that the deeds were intended to be and must be read together. The learned counsel for the appellant argued from them all that the intention of the parties was not to charge the property mentioned in the mortgage-deed with the principal amount or any portion of it. He drew our attention to the fact that there is no mention made in any of the deeds as to how the principal sum advanced was to be recovered after the expiry of the seven years, and also that the property charged, should any difficulty or dispute, &c., arise within the seven years, was property other than that covered by the mortgage deed. He referred particularly to the words in the end of the mortgage deed, wherein the mortgaged property is made liable for everything except the principal money. It was for these reasons that he contended that the deed was a pure usufructuary deed, and nothing more. The transaction between the parties stood, as he said, upon precisely the same footing as what is known in England as a Welsh mortgage, and he travelled into what is laid down in Ashburner's Treatise on Mortgages (see specially p. 168). He also referred us to the following cases :—*Teulon v. Curtis*, Young's Reports, p. 610; *Rankin v. Potter*, House of Lords' Reports for 1873, p. 128, and *Cooper v. Cooper*, House of Lords' Reports for 1875, p. 55. It is needless, however, to refer to English cases and English treatises, for we have the question in dispute [8] before us, in our opinion, sufficiently covered by the Transfer of Property Act, 1882, and by the general principles which have been uniformly followed by this Court for a long series of years. In 1879 a Full Bench of this Court, in *Phul Kuar v. Murlidhar*, I. L. R., 2 All., 527, in considering a deed which provided *inter alia* that if the mortgagor failed to pay the mortgage amount within the period of two years the mortgagee would be at liberty to recover the mortgage amount in any way he pleased, held, in spite of provisions in the same deed which recited that the mortgagee had been put in possession of the property mortgaged, and that the mortgagors intended to pay the mortgage money in a period of two years and get the property redeemed, that the transaction was in reality a simple mortgage-deed. In 1885, in the case of *Jugal Kishore v. Ram Sahai*, Weekly Notes, 1886, p. 212, STRAIGHT, Officiating C.J., and MAHMOOD, J., agreed in holding that an instrument, the terms of which were far more in accord with the terms of the deed before us, was a combination of a simple mortgage and a usufructuary mortgage; that the shops were mortgaged as security for the debt; and that the plaintiff was entitled to maintain a suit to bring the property to sale. In 1888 in *Umrao Begam v. Valiullah*, Weekly Notes, 1888, p. 171, BRODHURST and MAHMOOD, JJ., had a deed which they considered covered both the case of a usufructuary mortgage and of a hypothecation charge. From these and other cases which were cited to

us, it is abundantly evident that this Court has always looked to the intention of the parties in construing a mortgage-deed, the terms of which were of a doubtful character ; also that it has constantly recognized the fact that the covenants in mortgage-deeds of a mixed character and other than those expressly defined in section 58 of the Transfer of Property Act, 1882, may be given effect to in accord, as far as possible, with the covenants contained in them, and that where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of simple mortgage, the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the [9] deed. Looking at the mortgage-deed and the security bond and reading them together, we are satisfied that they were intended to form one and the same transaction, that the intention of the parties was that the person and property, both that expressly contained in the mortgage deed and the further property set out in the security bond, were to be within the power and control of the mortgagee to bring to sale, if there was any default on the part of the mortgagor in the payment of the lease money.

Another question arose, namely, how far the mortgagee could in the present suit claim to include arrears of lease money for the years 1893 to 1896, for which he had instituted suits and obtained decrees prior to the institution of the present suit. Upon this point the learned advocate for the appellant admitted that the case *Altaf Ali Khan v. Lalta Prasad*, I. L. R., 19 All., 496, was against him, and we think it is. No other questions were argued before us. The result is that the appeal is dismissed with costs. We extend the time for payment of the mortgage money to the 31st of January 1899. The costs of the plaintiff will be included in the amount, upon non-payment of which the mortgaged property will be sold.

Banerji, J.—I, too, have arrived at the same conclusion as my learned colleague. If the mortgage in this case is a purely usufructuary mortgage as defined in clause (d) of section 58 of the Transfer of Property Act, 1882, the plaintiff is not entitled, having regard to the provisions of section 67, clause (a) of that Act, to institute a suit for sale, and the present suit must be dismissed. The principal question which we have to determine in this appeal, therefore, is whether, as contended by the appellant, the mortgage made in favour of the plaintiff is a purely usufructuary mortgage, or, as urged on behalf of the plaintiff and held by the Court below, it is a mortgage which partakes of the nature both of a simple mortgage and of a usufructuary mortgage, and is a combination of both those kinds of mortgage.

[10] I am of opinion that the mortgage in this case is of the latter description. The mortgage deed is not artistically drawn. We must, therefore, look to all its provisions as a whole, to the other instruments which were executed at the same time and admittedly form parts of the same transaction, and to the surrounding circumstances, in order to gather the intention of the contracting parties. The document begins with the recital that the property mentioned in it was mortgaged and pledged. The vernacular words are "*rehn*" and "*girau*," both of which mean mortgage or pledge. It was argued that the words should be understood in the sense in which they are used in Muhammadan law, namely, to denote a usufructuary mortgage. I am unable to agree with this contention. The words were evidently used in the mortgage-deed in the sense in which they are used in common parlance in the Hindustani language. As ordinarily understood in that language they are generic terms denoting a mortgage, whatever the nature of that mortgage may be. They apply as much to a simple mortgage as to a usufructuary mortgage. The use of those words does not, in my opinion, help the appellant. On the contrary,

the fact that the deed begins by saying that the executant had "mortgaged and pledged all the aforesaid shares" for a lakh of rupees "for a term of seven years," coupled with the other recitals in the deed, raises the inference that the intention was to provide for the realization of the amount of the loan from the property itself and not from its usufruct only. The mortgage deed next provides for the payment of the mortgage money after seven years, and it contains a covenant to the effect that the mortgagee "will have the power to take back the mortgage money after the expiry of the term of seven years." This is a personal covenant to pay the mortgage money after the expiry of seven years—a covenant inconsistent with a usufructuary mortgage pure and simple. In a pure usufructuary mortgage as defined in clause (d), section 58 of Act No. IV of 1882, the mortgagee takes possession of the mortgaged property and is authorised to retain such possession until payment [11] of the mortgage money, and to receive the rents and profits, and appropriate them in lieu of interest only, or of the principal only, or partly of principal and partly of interest. The mortgagee, so long as he remains in possession, has no right under the mortgage to claim the mortgage money, and the mortgagor undertakes no personal liability. But where the mortgage deed authorises the mortgagee to recover the mortgage money after a specified period or on demand, the transaction ceases to be a pure usufructuary mortgage of the kind contemplated by the Transfer of Property Act. It was held by the Madras High Court in *Ramayya v. Guruva*, I. L. R., 14 Mad., 232, that a mortgage which otherwise answers the definition of a usufructuary mortgage as contained in clause (d), section 58 of Act No. IV of 1882, is not a usufructuary mortgage within the meaning of that Act if there is a covenant in it to pay the mortgage debt, and in the case of such a mortgage the mortgagee has a right to sue for sale. A Full Bench of that Court affirmed the same view in *Sivakami Ammal v. Gopala Savundram Ayyan*, I. L. R., 17 Mad., 131. With these rulings I fully agree. This case is almost on all fours with the decision of this Court in *Jugal Kishore v. Ram Sahai*, Weekly Notes, 1886, p. 212, in which a mortgage of the same description as the one in suit was held to be a combination of a simple and usufructuary mortgage. It is contended in this case that the mortgage deed does not in terms provide for the recovery of the mortgage money by sale of the mortgaged property; but, as I have said above, the deed not being artistically drawn, we must gather the intention of the parties from all the provisions taken as a whole, and from all the surrounding circumstances. In my opinion there is much force in the argument of the learned counsel for the respondent, that, all the four deeds executed on the same date being parts of the same transaction, the intention must be presumed to be the same in all of them, although the language employed in each deed to convey that intention may not [12] be the same. There can be no doubt that under the other deeds executed on the same date as the mortgage deed the mortgaged property and the other property mentioned in those deeds were rendered liable for interest. It is also clear from the last clause of the mortgage deed that "until the full payment of the mortgage money" the mortgaged property was to remain liable for "damages, interest and deficiency of profits." It is unreasonable to infer that the intention was that, although the mortgagee would have the right upon the expiration of seven years to recover the mortgage money in cash, and although he would be competent to realise "damages, interest and deficiency of profits" by sale of the mortgaged property, he would not be competent to touch that property, except to hold it for the realisation of interest only out of the usufruct, and that he would not have the right to cause that property to be sold for the realisation of the principal. •

For these reasons I agree with my learned colleague in thinking that the Court below has rightly conceived the nature of the mortgage in this case, and that this appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[The rule of construction that the intention of the parties should be allowed to prevail was applied to mortgage deeds in (1908) 30 All., 162; (1908) 26 Bom., 662; (1908) 10 Bom. L.R., 615; (1909) 6 N.L.R., 20; the deed in (1905) 28 All., 157 was distinguished from this. See also 37 All., 365 P.C., as regards the liberal (as against the literal) construction of deeds by Indians.]

[21 All. 12]

The 3rd August, 1898.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Sahib Ali and others.....Plaintiffs

versus

Subhan Ali and others.....Defendants.*

Regulation No. XXXI of 1803, section 6—Revenue-free grant—Settlement in favour of daughter purporting to render other lands than the lands settled liable in the hands of the settlor and his heirs for the revenue of the settled lands.

One Bakhshish Ali in 1843 settled certain lands on his daughter Rahmat-un-nissa and covenanted that he and his heirs would pay the land revenue due on the estate so assigned along with the land revenue for their own estate. The deed of settlement then went on to provide that if at any time the heirs of the settlor, or whoever might be in possession of the rest of his estate, should demand from Rahmat-un-nissa, or the person in possession of the lands assigned [13] to her, the revenue assessed on those lands, then Rahmat-un-nissa and her heirs would be entitled to claim and take possession of the legal share in the settlor's estate to which she would be entitled under the Muhammadan law of inheritance.

Held, that as regards a person who had acquired a portion of the settled property partly by private sale and partly by sale at auction the settlement contravened the provisions of s. 6 of Regulation No. XXXI of 1863, and the heirs of the settlor could not be compelled to pay the land revenue due on the portion of the settled lands acquired by the said purchaser, nor had the purchaser any right under the deed of settlement to a proportionate part of the inheritance which would have come to Rahmat-un-nissa from her father.

THE facts of this case are fully stated in the judgment of the Court.

Pandit *Moti Lal* for the Appellants.

Munshi *Ram Prasad* for the Respondents.

Banerji and Aikman, JJ.—This is a plaintiffs' second appeal. The following are the facts of the case :—One Bakhshish Ali was the owner of a taluqa called Taluqa Fatuha. On the 5th of December 1843 he executed a document called a *tamliknama*, in favour of his daughter Musammat Rahmat-un-nissa, by which he assigned to her lands in two villages, namely, chak Sikandar and Mugarsan. In this document he covenanted that he and his heirs would pay the land revenue due on the estate assigned to his daughter along with the land revenue for their own estate. The document went on to provide that if at any time his heirs, or whoever might be in possession of the rest of his

* Second Appeal No. 119 of 1896, from a decree of Babu Sanwal Singh, Subordinate Judge of Allahabad, dated the 22nd November 1895, reversing a decree of H. David, Esq., Munsif of Allahabad, dated the 27th May 1895.

estate, should demand from Rahmat-un-nissa, or the person in possession of the lands assigned to her, the revenue assessed on those lands, then Rahmat-un-nissa and her heirs would be entitled to claim and take possession of the legal share in his estate to which she would be entitled under the Muhammadan law of inheritance.

The suit out of which this appeal arises was brought by one Mussammat Izzat-un-nissa, who had acquired a portion of the land bestowed by Bakhshish Ali on Mussammat Rahmat-un-nissa, in the village Mugarsan. Part of this land the plaintiff had acquired by private sale on the 20th of September 1872, and another portion she had purchased at auction on the 22nd of February 1875. [14] The persons representing the other heirs of Bakhshish Ali having successfully asserted against the plaintiff Musammat Izzat-un-nissa a right to recover from her land revenue payable on the portion of Musammat Rahmat-un-nissa's property which she (plaintiff) had acquired, the plaintiff brought this suit, claiming, first, a declaration that the defendants were bound by the *tamlíknama* and liable to pay the land revenue assessed on the property in the possession of the plaintiff, and that if the amount of the revenue should be recovered by Government from the plaintiff, that the defendants were liable by reason of the *tamlíknama* to repay the amount to the plaintiff; secondly, in the event of the above declaration being refused, the plaintiff claimed a decree for the amount of revenue which the defendants had recovered from her; and, thirdly, failing the above reliefs, the plaintiff claimed to be entitled to recover possession out of the share of Bakhshish Ali's estate which would have fallen to Rahmat-un-nissa by the Muhammadan law of inheritance of a portion bearing the same relation to the whole of Rahmat-un-nissa's share as the land which the plaintiff had acquired bore to the whole of the land bestowed on Musammat Rahmat-un-nissa. The Court of First Instance decreed the second of the alternative reliefs set forth in the plaint. On appeal the learned Subordinate Judge dismissed the suit of the plaintiff on two grounds: first, that under the *tamlíknama* only the heirs of Rahmat-un-nissa were entitled to hold revenue-free, and that the plaintiff, not being an heir, but an assign, was not entitled to enforce the condition of the *tamlíknama*; the second was that the grant by Bakhshish Ali to his daughter Musammat Rahmat-un-nissa was a grant in contravention of the provisions of section 10 of Regulation XIX of 1793, and that consequently the condition that she should hold it free from the payment of revenue was one which could not be enforced.

The plaintiff died during the pendency of the suit and is now represented here by her heirs. On their behalf three contentions are put forward. The first is, that the grant by Bakhshish Ali is not a grant of the nature prohibited by section 10 of Regulation XIX of 1793. We may observe that the Regulation applicable [15] to the question before us is really Regulation XXXI of 1803, which in section 6 re-enacts the provisions of section 10 of Regulation XIX of 1793. In support of this plea much ingenious argument was addressed to us. We are of opinion, however, that it cannot prevail. There is no doubt the grant was of a nature which was declared in the Regulations referred to to be null and void. It was argued that as no power save Government can free land from its responsibility to pay Government revenue, and that, whatever the owner of the land may purport to do, Government can always in the last resort enforce its demand by having recourse to the land itself, the grant in question was not one of the kind at which the Regulations were aimed. The preamble to the regulations shows no doubt that the main object of the Government was the security of the land revenue which was considered to be imperilled by such grants. But that this was not the only

object the Government had in view is clear from a reference to other legislation which took place about the same time. Regulation XLIV of 1793, for instance, was intended to prevent the grant by zamindars of leases and farms for long terms or in perpetuity at a reduced rent. The preamble states that such engagements, if held valid, would leave it in the power of weak, improvident or ill-disposed proprietors to render their property of little or no value to their heirs. Similarly, section 81 of Act No. XIX of 1873 provides that grants of land which the grantor has expressly agreed not to resume shall be valid as against him, but not as against his representatives after his death. This shows that the intention of the Legislature was not merely to secure the public revenue, but to protect the heirs of zamindars from the effects of their improvidence. We hold that the grant in this case comes within the purview of section 6 of Regulation XXXI of 1803, and consequently, being contrary to law, cannot afford a basis for either of the first two reliefs asked for in the plaint.

The next contention put forward by the learned advocate for the appellants was based on the provisions of section 28 of Act [16] No. X of 1859. That section provides that applications to dispossess grantees of land exempt from revenue must be instituted within the period of twelve years from the time when the title of the person claiming the right to assess the land, or dispossess the grantee, or of some person claiming under him, has accrued; and that if such period has already elapsed or will elapse within two years from the date of the passing of that Act, the suit might be brought at any time within two years from such date. It was argued that the right of the defendants to resume the land and have it assessed expired on the 29th of April 1859, on which date the period of two years after the passing of Act No. X of 1859 expired, and that consequently the plaintiffs had acquired an indefeasible title to hold the land revenue free. This plea might have been advanced by the plaintiffs in answer to the suit which was brought against them by the defendants in the Revenue Court to recover the revenue which they had paid for the land held by the plaintiff, but we do not think that this section, though it might perhaps have been pleaded in bar of a suit by the defendant for resumption or assessment, can be of any assistance to the plaintiff in this case.

The third and last contention on behalf of the appellants was that the defendants having failed to perform the conditions attached to the grant made in favour of Rahmat-un-nissa by Bakhshish Ali, by realizing from the plaintiffs the revenue for the land which was the subject of his grant, the plaintiffs were entitled to possession of a proportionate share of Rahmat-un-nissa's inheritance out of Bakhshish Ali's estate. In the view which we have taken of the validity of the grant, we are unable to accede to this contention. As in our opinion the condition which Bakhshish Ali imposed upon his heirs was a condition in violation of law, a breach of such a condition could not, in our judgment, confer on Rahmat-un-nissa, or on any person deriving title from her, the right to claim the share which Rahmat-un-nissa would have inherited out of Bakhshish Ali's estate under the Muhammadan law.

For the above reasons the appeal must, in our opinion, fail. We dismiss it with costs.

Appeal dismissed.

[17] *The 3rd August, 1898.*

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

The Collector of Moradabad.....Defendant

versus

Harbans Singh and another.....Plaintiffs.*

Civil Procedure Code, section 14—Suit on a foreign judgment—Power of Court to inquire into the merits—Muhammadan Law—Dower.

Where a suit was brought in a Court in British India upon the basis of a decree of the Council of Regency of the State of Rampur, it was *held* that the Court was empowered by section 14 † of the Code of Civil Procedure, as amended by section 5 of Act No. VII of 1888, to consider the merits of the case in which the decree of the Council of Regency had been passed.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. Conlan and Mr. A. E. Ryves, for the Appellant.

Mr. W. M. Colvin and Maulvi Ghulam Muftaba, for the Respondents.

Knox and Banerji, JJ.—This was a suit instituted in the Court of the Subordinate Judge of Moradabad on the basis of the judgment of a foreign Court, namely, the Council of Regency of the native State of Rampur. The suit in which that judgment was passed was brought by Musammât Humai Tajdar Begam against her husband Nawab Mohib Ali Khan, also called Nabba Sahib, to recover her dower, the amount of which was admittedly one crore of rupees and 25,000 Murshidabad gold mohurs. Both the lady and her husband belonged to the family of the Nawab of Rampur, the former being the daughter of a sister of the last reigning Nawab. Differences having arisen between Nawab Mohib Ali Khan and the ruler of Rampur, the former removed to Moradabad in the early part of 1887. His wife, however, continued to live in Rampur, and in the year 1888 brought against her husband the claim for her dower referred to above. Nawab Mohib Ali Khan having died in October 1889, during the pendency of the suit, it was continued against Sahibzada Sajjad Ali Khan, his minor son by another wife, whose estate in the district of Moradabad is under the management of the Court of Wards. On the 26th of January 1891 the [18] Council of Regency, the highest Court of Appeal in Rampur, made a decree in favour of the lady. In execution of that decree a sum of nearly 22,000 rupees was realized in Rampur territory, and the amount now due is Rs. 1,07,53,088-7-0. The assets of Nawab Mohib Ali Khan in Rampur having been exhausted, the suit out of which this appeal has arisen

* First Appeal No. 198 of 1896, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 29th June 1896.

When foreign judgment no bar to suit in British India. [Sec. 14.—No foreign judgment shall operate as bar to a suit in British India—

- (a) if it has not been given on the merits of the case :
- (b) if it appears on the face of the proceedings to be founded on an incorrect view of international law or of any law in force in British India :
- (c) if it is in the opinion of the Court before which it is produced contrary to natural justice :
- (d) if it has been obtained by fraud :
- (e) if it sustains a claim founded on a breach of any law in force in British India.]

was brought to recover the aforesaid amount from the property of the deceased in the district of Moradabad. It was instituted on the basis of the decree of the Rampur Court, dated the 26th January 1891, by Humai Tajdar Begam and the respondent Kunwar Harbans Singh, who has taken from her an assignment of a half of her rights under the said decree. Upon a plea of misjoinder of plaintiffs and causes of action being raised, the lady withdrew from the claim, which was continued by the other plaintiff alone, and she was made a formal defendant. The lower Court considered the case on the merits, and made a decree in favour of the respondent Kunwar Harbans Singh. From this decree the present appeal has been preferred. Mr. Colvin on behalf of the respondents urged before us *in limine* that as the suit is founded upon a foreign judgment and the object of it is to enforce that judgment, that judgment should be accepted as final between the parties, provided that it is not opposed to natural justice and was not obtained by fraud; that the Court below acted improperly in going into the merits of the case, and that we also in deciding the appeal should not consider the merits of the case. He cited to us several English and Indian rulings on the subject, which are well summarised in Chapter VIII of part II of Mr. Caspersz's work on the Law of Estoppel. It is not necessary for us to consider those rulings, as we are of opinion that the amendment of section 14 of Act No. XIV of 1882 by section 5 of Act No. VII of 1888 has introduced an important departure in this respect.

The authorities to which our attention has been drawn seem to show that it is now established in England that when a suit is based on the judgment of a foreign Court which that Court had jurisdiction to pass and which was not obtained by fraud, such judgment must be presumed to be right, and the Court in which the suit on [19] that judgment is brought should not enter into a consideration of the merits of the case. The Indian Legislature has, in our opinion, laid down a different rule in the paragraph added to section 14 of the Code of Civil Procedure by section 5 of Act No. VII of 1888. That paragraph declares that when a suit is instituted in a British Indian Court on the basis of a foreign judgment, that Court is not precluded from inquiring into the merits of the case if the judgment is that of certain Asiatic and African Courts specified in the section. In the case of judgments of such Courts the Courts in British India have been given the discretion to regard or not to regard those judgments as conclusive. The exercise of that discretion must depend on the circumstances of each case. But there can be no doubt that by the enactment of section 5 of Act No. VII of 1888 the finality of the judgment of certain foreign Courts in Asia and Africa has been taken away by the Legislature when a suit is brought on the basis of such a judgment. The Court below was not, therefore, precluded from inquiring into the merits of the case. Whenever a discretion is vested in a Court, that discretion should, it is true, be exercised judiciously and not in an unwarrantable manner. But we are unable to hold that in this case the learned Subordinate Judge acted improperly in considering the case on its merits. It may be that, having regard to the constitution of that foreign Court in this instance, no further inquiry was needed than what could be made upon the material afforded by the judgment of that Court—*Fazal Shah Khan v. Zafar Khan*, I. L. R., 15 Mad., 82. As the learned Subordinate Judge has, however, inquired into the merits of the case, as he was competent to do, we think that we also should hear the appeal on its merits.

(The judgment of the Court, after a discussion of the case on its merits, thus concluded :—)

We are aware that the effect of the decree in this case will be to deprive the appellant—the only son of Nawab Mohib Ali Khan—of the whole of the

large property left by the Nawab, and that the said property, or the proceeds of the sale of it, will go to the [20] plaintiff, who evidently embarked on a speculation in taking an assignment of the decree of the Rampur Court. This has made us examine the decree with all the greater anxiety, and we cannot but regret that the Courts in these Provinces have not been vested by the Legislature with the discretion which has been conferred on the Courts in Oudh by section 5 of Act No. XVIII of 1876, to award to a Muhammadan lady only so much of the stipulated amount of dower as the Court may consider "reasonable with reference to the means of the husband and the status of the wife." We have therefore no alternative but to make a decree for the amount of the dower contracted for, however extravagant that amount may be.

We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This decision was followed in (1899) 24 Bom., 86. See now, sec. 13 C. P. C., 1908, in which the distinction between the Asiatic and the African Courts and other foreign Courts found in the previous Code, was omitted.]

[21 All. 20]

The 5th August, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Gur Prasad and others.....Plaintiffs

versus

Ram Lal and others.....Defendants.*

Execution of decree—Civil Procedure Code, section 244—Representative of a party to the suit—Purchaser of property under attachment in execution of a decree.

Held, that the purchaser of property which is at the time of the purchase under attachment in execution of a decree is a representative of the judgment-debtor vendor within the meaning of section 244 of the Code of Civil Procedure. *Lalji Mal v. Nand Kishore*, I. L. R., 19 All., 332, followed. *Madho Das v. Ramji Patak*, I. L. R., 16 All., 286, explained.

THE plaintiffs in this case came into court alleging that they had purchased from the defendants Mehrban Singh and others a 10-biswa share in a certain village, and out of the sale consideration, viz., Rs. 8,000, had paid Rs. 5,999 in payment of a mortgage on the share held by the defendants Ram Lal and others, and that the mortgagees had previously, in execution of money decrees held by them against the vendors, caused the property purchased [21] by the plaintiffs to be attached, of which attachment the plaintiffs had been fraudulently kept in ignorance, and now sought to bring it to sale.

The plaintiffs prayed that the property purchased by them might be released from attachment, or, in the alternative, that the property should be sold subject to the sale consideration and mortgage money paid by the plaintiffs.

The Court of First Instance (Subordinate Judge of Farrukhabad) decreed the plaintiffs' claim in part by declaring that the property should be sold subject to the mortgage money, Rs. 5,999, paid by the plaintiffs.

* Second Appeal No. 551 of 1896, from a decree of G. A. Tweedy, Esq., District Judge of Farrukhabad, dated the 6th July 1896, confirming a decree of Maulvi Muhammad Anwar Husain, Subordinate Judge of Farrukhabad, dated the 13th December 1895.

The plaintiffs appealed, and the Lower Appellate Court (District Judge of Farrukhabad) dismissed the appeal.

The plaintiffs thereupon appealed to the High Court.

Pandit *Sundar Lal* and Munshi *Gulzari Lal*, for the Appellants.

Pandit *Moti Lal*, for the Respondents.

Blair and Burkitt, JJ.—Upon the finding of fact that at the time of purchase there was an attachment, the only question is as to the application of the law to that finding. The question to be decided is ;—Are the plaintiffs as purchasers representatives of the judgment-debtor so as to fall within the category of persons specified in section 244 of the Code of Civil Procedure? Two cases have been cited to us which are in apparent contradiction. The first is the case of *Madho Das v. Ramji Patak*, I. L. R., 16 All., 286, and the other is *Lalji Mal v. Nand Kishore*, I. L. R., 19 All., 332. The first was decided by the late Chief Justice and our brother BANERJI, the second by the late Chief Justice and one of us. In the former case it was found as one of the facts that there was a subsisting attachment at the time of purchase, though no mention of such attachment is made in the rest of the judgment. We have consulted one of the Judges who decided that case, and he having perused it, informs us that in the course of the delivery of the judgment the fact of the existence of that attachment was not present to the mind of the Court. We [22] see no reason to depart from the ruling in the latter case, which we believe to be sound and in accordance with the drift of the decisions of this Court. The result is that we find that the plaintiffs in this case are representatives of the judgment-debtor, and as such are bound to seek their remedy by application under section 244, and not by separate suit. The result is, that we allow the preliminary objection taken to the hearing of this appeal, and it follows therefore that the decrees of both the lower Courts are set aside and the suit of the plaintiffs is dismissed *ab initio*, but, under the circumstances, without costs. We regret that it is impossible for us to take what we believe to be the equitable course of allowing the plaintiffs to turn their plaint into an application under section 244, the Court in which the suit was filed not being one in which the execution proceedings could be carried on. The appeal is dismissed.

Appeal dismissed.

NOTES.

[Similar decisions were given in (1897) 20 Mad., 378 (mortgage) ; (1909) 34 Mad., 450 (sale) ; (1901) 28 Cal., 492 (case) ; (1906) 11 C. W. N., 163 : 5 C. L. J., 80 ; (1904) 26 All., 447 (execution-sale) ; (1905) 5 A. L. J., 16 n ; (1899) 13 C. P. L. R., 1 (execution-sale) ; in (1900), 20 A. W. N., 107, there was no *actual* attachment at the time, and so it was distinguished from this.]

[21 All. 23]

The 5th August, 1898.

PRESENT :

MR. JUSTICE AIKMAN.

Muhammad Husen.....Defendant

versus

Muzaffar Husen and another.....Plaintiffs.*

*Act No. XII of 1881 (N.-W. P. Rent Act), sections 93 (h), 203—Suit for profits
—Limitation—Act No. XV of 1877 (Indian Limitation Act), section 5—Act
No. 1 of 1887 (General Clauses Act), section 7.*

Held, that a suit for profits under section 93 (h) of Act No. XII of 1881, the period of limitation for the filing of which expired in respect of a portion of the claim on a day when the Court was closed, could not be brought on the day when the Court reopened, but, so far as that portion was concerned, was barred by limitation.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof*, for the Appellant.

Maulvi *Ghulam Mujtaba*, for the Respondents.

Aikman, J.—This is an appeal by the defendant in a suit brought against him as lambardar by the plaintiffs under the [23] provisions of section 93, clause (h) of the Rent Act, to recover their share of profits for the years 1301, 1302 and 1303 Fasli, and for the profits of the kharif harvest of 1304 Fasli. In the Court of First Instance the defendant pleaded that the claim as regards the profits for the kharif of 1301 Fasli was barred by limitation. These profits fell due on the 1st February 1894. The suit was filed one day beyond the three years allowed for such a suit by section 94 of the Act. The Assistant Collector overruled the defendant's plea on the ground that the Court was closed on the last day of the period of three years, and that the suit was within time, having been instituted on the day on which the Court reopened. The Assistant Collector, however, found that no profits were due for that year, and gave the plaintiffs a decree for the profits of the remaining years claimed, calculated on actual realizations. The plaintiffs appealed to the District Judge, who modified the decree of the Assistant Collector, and gave a decree for profits for all the years in suit, finding that there had been gross negligence on the part of the lambardar, and that the rental, all but a small amount, might have been collected had due diligence been used. The defendant comes here in second appeal.

In the first ground of appeal he renews his plea that the claim for the profits of 1301 Fasli was barred by limitation. Nothing appears to have been said on the plea of limitation in the Lower Appellate Court, and it is contended on behalf of the respondents that the appellant should not be allowed to raise it now. I am of opinion, however, that it is open to me to entertain it even at this late stage, and I do so. In my opinion the claim for the profits for that year was barred. It is true that the last day of the period of the three years was a Sunday, but that does not, under the Rent Act, entitle the plaintiffs to

* Second Appeal No. 805 of 1897, from a decree of C. Rustamji, Esq., District Judge of Moradabad, dated the 7th July 1897, modifying a decree of Muhammad Nur-ul-hasan Khan, Assistant Collector of Moradabad, dated the 30th March 1897.

an additional day's grace. Section 203 of the Rent Act provides that whenever a Court is closed on the last day of any period provided in this Act for the presentation of any memorandum of appeal or for the deposit or for the payment of any money [24] in or into Court, the day on which the court reopens shall be deemed to be such last day. It is noticeable that nothing is said in this section in regard to the presentation of plaints. Consequently the provisions of that section do not apply to the present case. There is no other section in the Rent Act which would help the plaintiffs. The provisions of Act No. XV of 1877 do not affect special or local laws which specially prescribe periods of limitation; consequently the plaintiffs are not entitled to take advantage of the general provisions contained in section 5* of that Act. Nor will section 7 of the General Clauses Act of 1887 help the plaintiffs, for by section 2 the application of part I of the Act, in which that section occurs, is limited to the Act itself and to all Acts made by the Governor-General in Council after the passing of the Act. The former General Clauses Act contained no provisions similar to section 7 of the present Act. For these reasons I am of opinion that the first ground in the memorandum of appeal must be sustained, and that that portion of the decree of the Lower Appellate Court which awarded profits to the plaintiffs on account of the kharif harvest of 1301 Fasli must be set aside. In the remaining grounds of appeal it is contended that the lower Court was wrong in allowing the plaintiff's additional profits owing to rents remaining uncollected through the gross negligence of the defendant. Although the reasons given by the learned District Judge do not appear to me in all cases valid, yet there was, in my opinion, evidence upon which he could come to the conclusion at which he arrived. He found on a consideration of the evidence that the lambardar had been unable to collect a sum of Rs. 55-4-8 owing to the poverty of the tenants. With regard to the balance uncollected, his finding appears to me to be one of fact which I cannot disturb in second appeal.

For the above reasons I so far allow the appeal as to set aside that portion of the decree of the Lower Appellate Court which awarded Rs. 14-0-11 to the plaintiffs on account of the profits of 1301 Fasli. *Quoad ultra* the appeal is dismissed.

[25] The parties will pay and receive costs throughout in proportion to their failure and success.

Decree modified.

NOTES.

[This was dissented from in (1901) 22 All., 277; see (1912) 34 All., 496 F. B.; (1905) 30 Bom., 275; (1901) 4 O. C., 182.]

* [Sec. 5.—If the period of limitation prescribed for any suit, appeal or application expires on a day when the Court is closed, the suit, appeal or application may be instituted, presented or made on the day that the Court re-opens.

Any appeal or application for a review of judgment may be admitted after the period of limitation prescribed therefor, when the appellant or applicant satisfies the Court that he had sufficient cause for not presenting the appeal or making the application within such period.]

[21 All. 25]
 REVISIONAL CRIMINAL.

The 6th August, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Queen-Empress
versus
 Ram Baran Singh.*

*Criminal Procedure Code, section 395—Whipping—Sentence of imprisonment
 in lieu of whipping—Powers of Magistrate.*

Where a prisoner who has been sentenced to whipping is found to be unfit to undergo such sentence and such sentence is accordingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the Court passing the sentence is competent to inflict. *Queen-Empress v. Sheodin*, I. L. R., 11 All., 308, referred to.

THIS was a reference under section 438 of the Code of Criminal Procedure made by the Sessions Judge of Benares. The facts of the case sufficiently appear from the order of the Court.

Banerji, J.—In this case one Ram Baran Singh was convicted by a Magistrate of the first class under sections 454 and 75 of the Indian Penal Code, and sentenced to two years' rigorous imprisonment and to receive 30 stripes. He was medically certified not to be in a fit state of health to undergo the sentence of whipping. The Magistrate thereupon sentenced him to 6 months' additional rigorous imprisonment in lieu of whipping. The Magistrate was evidently acting under the powers conferred on him by section 395 of the Code of Criminal Procedure. Under that section, upon the offender being found not to be in a fit state of health to undergo the sentence of whipping, the Court may either remit the sentence of whipping, or may, in lieu of whipping, sentence him to imprisonment for a term not exceeding twelve months, which may be in addition to any term of imprisonment to which he may have been sentenced for the same offence. But this term of imprisonment, as held in *Queen-Empress v. Sheodin*, I. L. R., 11 All., 308, [26] is a substantive sentence of imprisonment. That being so, the Magistrate was not competent to sentence the accused to imprisonment in lieu of whipping for a period which was in excess of the maximum term of two years, for which, under section 32, he could order the imprisonment of the accused. This is clear from the second paragraph of section 395, which declares that under that section a Court is not authorised to inflict imprisonment for a term exceeding that which the said Court is competent to inflict. Section 33, which relates to the powers of a Magistrate to pass a sentence of imprisonment in default of fine, distinctly provides that the imprisonment awarded under that section may be in addition to a substantive sentence of imprisonment for the maximum term awardable by the Magistrate under section 32. The absence of a similar provision in section 395 and the provision of the second paragraph of that section, to which I have referred above, leave no room for doubt that the sentence of imprisonment awarded in lieu of whipping cannot be in addition to a substantive sentence of imprisonment for the maximum term which the Magistrate was competent to

* Criminal Revision No. 398 of 1898.

award. The sentence of additional imprisonment in lieu of whipping passed in this case was therefore clearly illegal and I set it aside. Ram Baran's bail will be discharged.

NOTES.

[See also (1901) P. R., 11.]

[21 All. 26]
APPELLATE CIVIL.

The 8th August, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Jadubar Singh and others.....Defendants

versus

Sheo Saran Singh.....Plaintiff.*

*Suit for malicious prosecution—Reasonable and probable cause—Evidence—
Conviction of plaintiff by a Criminal Court.*

The fact that the plaintiff in a suit for damages for malicious prosecution has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if un rebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable [27] and probable cause. *Parimi Bapirazu v. Bellamkonda Chinna Venkayya*, 3 Mad. H. C. Rep. 238, followed.

THE plaintiff in this case was prosecuted in the Criminal Court by the appellants on charges of riot and robbery. He was convicted by the Court of First Instance and fined Rs. 10. That conviction was, however, set aside in revision by the High Court, on a reference by the Sessions Judge, who was of opinion that the charge had not been substantiated. The plaintiff, accordingly, instituted the present suit claiming damages to the amount of Rs. 600. The first Court gave him a decree for Rs. 175, which sum was, on appeal, cut down to Rs. 75. The Lower Appellate Court (Additional Subordinate Judge of Ghazipur) in its judgment said :—"Independently of that judgment (the judgment of the Sessions Judge) there is a good deal of oral evidence which satisfactorily proves the innocence of the plaintiff. The parties are old enemies. The defendants had seen the plaintiff and his other companions carrying away the crops, and identified them while beating them. Under the circumstances there can be no question of reasonable and probable cause, as see the authority noted in the margin. (Weekly Notes) 1889, p. 189). Now such being my view as to the prosecution being false the plaintiff must be held entitled to get damages."

The defendants appealed to the High Court. An issue was referred to the Lower Appellate Court for a finding as to the existence or non-existence of reasonable and probable cause. On return of the finding of that Court, which was in favour of the plaintiff, the appeal again came up for hearing.

Messrs. *Amiruddin and Muhammad Ishaq Khan* for the Appellants.

* Second Appeal No. 454 of 1897, from a decree of Maulvi Muhammad Ismail Khani Additional Subordinate Judge of Ghazipur, dated the 27th March 1897, modifying a decree of Babu Chandi Prasad, Munsif of Rasra, dated the 28th January 1897.

Mr. *E. A. Howard* for the Respondent.

Banerji, J.—The plaintiff respondent was prosecuted in the Criminal Court by the appellants on charges of riot and robbery. He was convicted by the Court of First Instance and sentenced to a fine of Rs. 10. That conviction was set aside by this Court on revision, the Sessions Judge who reported the case to this Court [28] for revision having been of opinion that the charge had not been substantiated. The plaintiff thereupon instituted this suit claiming Rs. 600 as damages. The Lower Appellate Court has granted him a decree for Rs. 75. That Court refused to enter into the question of reasonable and probable cause. As it was essential that in a suit of this kind the plaintiff, in order to succeed, must prove not only that the charge was unfounded and was instituted through malice, but also that it was without reasonable and probable cause, I referred an issue to the Lower Appellate Court for a finding as to the existence or non-existence of reasonable and probable cause. That Court has returned a finding in favour of the plaintiff, to which exception has been taken by the appellants.

The question of the presence or absence of reasonable and probable cause is a mixed question, both of law and fact. In this case, as I have said above a Magistrate believed in the truth of the complaint brought by the appellants. That alone was sufficient evidence of the existence of reasonable and probable cause. In the case of *Parimi Bapirazu v. Bellamkonda Chinna Venkayya*, 3 Mad. H. C. Rep., 238, the learned Judges observed —“We do not know of any instance of a suit of this kind being successfully maintained after a conviction of the plaintiffs by the sentence of one competent tribunal.” No doubt, as observed in the said judgment, the judgment of one competent Court against the plaintiff should not in every case be considered a sufficient answer to the suit. But the fact of a Court of competent jurisdiction having believed that the complaint is a true complaint is strong evidence to show that it was not brought without reasonable and probable cause. The conviction by the first Court was no doubt subsequently set aside; but on referring to the judgment of the learned Sessions Judge, dated the 11th of November 1895, which is to be found on the record of the connected suit, No. 622, out of which Second Appeal No. 455 has been brought, it appears that he held the charge not to be established because he had doubts in his mind as to the truth of the complainant's story. He did not find that the complaint was an [29] utterly false one. On the contrary, it appears from his judgment that a riot did take place that night, for which the complainant's party was convicted by the first Court along with the party of the present plaintiff. We have thus a judgment of a Court of First Instance convicting the plaintiff and the judgment of an appellate Court which gave the plaintiff only the benefit of a doubt. Such being the case, it cannot be said that the complaint was totally without probable cause. I have not been referred to any instance in which, under similar circumstances, a decree for damages has been granted. In my judgment the suit ought to have been dismissed. I allow the appeal, and, setting aside the decree of the Courts below, dismiss the suit with costs in all the Courts. The objection under section 561 of the Code of Civil Procedure necessarily fails and is also dismissed.

Appeal decreed.

[The decision in this case was affirmed on appeal under section 10 of the Letters Patent on the 7th of January 1899.—ED.]

NOTES.

[In (1902) 26 Mad., 506 this decision was held to be no authority for the proposition that in no case could a suit lie when there was conviction in some Lower Court. See also (1901) P. R., 176; (1903) 2. L. B. R., 111; (1903) 12 C. W. N., 188 n, where the conviction was held to afford evidence, though not of a conclusive character.]

[21 All. 39]

The 8th August, 1898.

PRESENT:

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

The Delhi and London Bank Ld.Plaintiff

versus

Chaudhri Partab Bhaskar and others.....Defendants.*

Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 184—Sale for arrears of Government Revenue—Alleged benami purchase—Suit on a mortgage against the debtor and the certified purchasers alleged to be benamidars of the debtor—Civil Procedure Code, section 317.

Per KNOX, J.—The operation of section 184 of Act No. XIX of 1873 is not confined to disputes between certified auction purchasers and persons who allege that such auction purchasers purchased on their behalf as their *benamidars*, but extends to cases where the dispute is between the certified purchasers and third persons who allege that the certified purchasers are not the real purchasers. In such a case the claimants cannot succeed without proof of fraud.

Mussumat Buhuns Kowur v. Lalla Buhooree Lall, 14 Moo. I. A., 496; *Sohn Lall v. Lala Gya Pershad*, N.-W. P., H. C. Rep., 1874, p. 265; *Kanizak Sukina v. Monohur Das*, I. L. R., 12 Cal., 204; *Chundra Kaminy Debea v. Ram Ruttun Pattuck*, I. L. R., 12 Cal., 302; and *Tara Soonduree Debee v. Oojul Monee Dossee*, 14 W. R., C. R., 111, referred to.

[30] *Per BANERJI, J.*—Section 184 of Act No. XIX of 1873 contemplates a suit between the person claiming to be the real purchaser and the certified purchaser, and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor and that the certified purchaser is only the *benamidar* of the debtor. Section 184 does not preclude a creditor of the beneficial owner from suing the certified purchaser on the allegation that his purchase was *benami* for the debtor, and that the latter is the real purchaser. *Mussumat Buhuns Kowur v. Lalla Buhooree Lall*, 14 Moo. I. A., 496; *Bodh Sing Doodhooria v. Gunes Chunder Sen*, 19 W. R., C. R., 356; *Lokhee Narain Roy Chowdhry v. Katypuddo Bandopadhya*, 23 W. R., C. R., 358; S. C., L. R., 2 I. A., 154; *The Uncovenanted Service Bank v. Abdul Bari*, I. L. R., 18 All., 461; *Sohn Lall v. Gya Pershad*, N.-W. P., H. C. Rep., 1874, p. 265; *Puran Mal v. Ali Khan*, I. L. R., 1 All., 235; *Kanizak Sukina v. Monohur Das*, I. L. R., 12 Cal., 204; *Subha Bibi v. Hara Lal Das*, I. L. R., 21 Cal., 519; *Ameer-oon-nissa Beeble v. Binode Ram Sein*, 2 W. R., C. R., 29; and *Chundra Kaminy Debea v. Ram Ruttun Pattuck*, I. L. R., 12 Cal., 302, referred to. THE facts of this case are fully stated in the judgment of KNOX, J.

Messrs. *W. M. Colvin, C. Kirkpatrick and D. N. Banerji*, for the Appellants.

Babu Jogindro Nath Chaudhri, Pandit Sundar Lal, Pandit Moti Lal, Maulvi Ghulam Muftaba and Kunwar Parmanand, for the Respondents.

Knox, J.—In the suit which gave rise to this appeal the Delhi and London Bank, Ld., plaintiff (now appellant), laid a claim against one Chaudhri Partab Bhaskar *alias* Chaudhri Raj Kumar, for the recovery of Rs. 1,19,571-9-11,

* First Appeal No. 72 of 1896, from a decree of Maulvi Anwar Husain Khan, Subordinate Judge of Farrukabad, dated the 26th November 1895.

with interest, for an account of what sums might be due to them under a mortgage deed, dated the 17th December 1892, and, in default of payment of the sums found due, for sale of the properties covered by the aforesaid mortgage deed. The suit was instituted on the 27th day of June 1894.

As the suit proceeded the plaintiff asked and obtained leave from time to time to add to the array of defendants (i) several persons who had purchased some of the villages covered by the deed on which the Bank had based their claim; (ii) several other [31] persons who claimed a prior mortgage over certain of the same villages, and (iii) other persons whom they considered representatives of defendants who had died during the progress of the suit, until at last the total number of defendants arrayed on the record was twenty-five.

The plaint as originally framed was amended and added to more than once. Unfortunately these amendments and additions were so carelessly and inartistically carried out that even as it now stands the plaint abounds in errors which are creditable neither to the plaintiff nor to the Court which allowed the suit to proceed without taking care that so important a document as the plaint was free from all patent and obvious errors.

As an instance of such errors, the plaint says in paragraph 6 that "defendant No. 7," i.e., Tulshi Ram, for he is No. 7 on the array of defendants, "purchased Ani Bojh." Now it is not and never was any part of the plaintiff's case that the mahal Ani Bojh was purchased by Tulshi Ram. Indeed, in the same paragraph, only two lines lower down, the plaint goes on to say that the auction purchaser of Ani Bojh was "defendant No. 8, i.e., the auction purchaser." Even here in these nine words there is another error, for on consulting the array of the defendants it will be found that Mashuk Ali is not defendant No. 8, but defendant No. 9.

It is evident that those who were responsible for the plaint have grievously neglected the duty imposed upon them by law of preparing for the Court to consider and for the defendant to answer an accurate, plain and concise statement of the circumstances constituting the cause of action. Ill considered and hasty additions have been made, until the plaint is no longer a safe guide as to what the plaintiff's case really is.

While reading the array of parties it has to be noted that after the appeal had been filed in this Court, Chaudhri Partab Bhaskar *alias* Chaudhri Raj Kumar, the principal defendant, died, and the name of Musammat Indomati has now been inserted in place of her deceased husband as his legal representative.

[32] The claim was not resisted in the Court below by Chaudhri Raj Kumar. In appeal no one appears to defend the appeal on the part of Musammat Indomati, his widow. The real litigant parties are the London and Delhi Bank, Ltd., and the persons subsequently added to the array of defendants, who from time to time purchased or pretended to purchase portions of the property covered by the mortgage deed of the 17th of December 1892.

It will materially assist the understanding of the real points at issue if those matters are first set out, upon which the litigants are practically agreed, and to dispute which no attempt has been made in the very prolonged arguments which have been addressed to us.

The late Chaudhri Raj Kumar was the son of one Chaudhri Fateh Chand, the owner of a very large amount of landed property situate in the Farrukhabad and Mainpuri districts. He was a man of a very spendthrift nature, and we find that the Collector of Farrukhabad had, with the sanction of the Board of Revenue, advertised for sale, on the 22nd of December 1892, 46 mahals, in all

of which the Government revenue was in arrears. There is abundant evidence to show that the villages were good valuable property, well worth, if we may borrow a term in use in auction marts, the attention of purchasers. Chaudhri Raj Kumar suffered the day fixed for sale to come on without apparent effort to avert the catastrophe beyond the negotiations with the Delhi and London Bank, which ended in the mortgage deed of the 17th of December 1892. The 22nd of December arrived, and of the 46 mahals, there stood advertised for sale 32 villages, in which the Government revenue still remained in arrears.

The Assistant Collector, specially appointed by the Collector under section 172 of Act No. XIX of 1873 to hold the sale, one Misr Banarsi Das, after selling by auction 3 of the villages so advertised, namely, the mahals Shahpur, Atrauli and Salimpur, stayed his hand and did not proceed to the sale of the remaining [38] villages on his sale sheet. His reason for abstaining from sale is set out in a proceeding which will be found at page 55 of the appellant's printed book No. 1. In this proceeding he begins by setting out that he found the total balance due from Chaudhri Raj Kumar, on the 22nd of December 1892, was Rs. 20,101. To recover this balance an auction sale was held. As by the sale of only 3 villages the whole of the money had been realized, as he thought, the remaining villages had not been sold, and he reported his proceedings to the Collector for necessary orders. On this report reaching the Collector, that officer drew up a proceeding (see page 10 of appellant's printed book II), in which he pointed out that the procedure adopted by the Deputy Collector was in error, and ordered that the sale be continued on the 24th of December 1892; that all the villages and mahals which were not sold on the 22nd of December 1892, and the demand in respect whereof had not been paid, be sold on the 24th of December 1892. No further proclamation was issued, and the Deputy Collector proceeded to sell 27 villages out of 29 still remaining on his list for sale. The remaining two villages which he did not sell were left unsold because money had been paid in on account of the arrears due from those two particular mahals. Just at the same time, i.e., early on the morning of the 24th of December the plaintiffs, through their servants, paid over at Mainpuri to Babu Amar Singh, the attorney of Chaudhri Raj Kumar, the sum of Rs. 1,00,000, the consideration money for the mortgage deed upon which the suit is based, and had that same mortgage deed duly registered at the Mainpuri tahsil. This payment and registration preceded by a few hours in point of time the sale at Farrukhabad.

It is contended by the plaintiff that this sale of the 24th December 1892 was illegally held and bad in law, because (i) there was in the Government Treasury at the time of sale and to the credit of Chaudhri Raj Kumar, namely, on the 24th of December 1892, more than sufficient money to cover all arrears of Government revenue due on account of the villages under [34] sale, and (ii) because no fresh proclamation or notice of sale had been given.

A further contention is that the purchasers at the so-called sale of the 24th December 1892 were really fictitious purchasers. They were all of them friends or underlings of Chaudhri Raj Kumar, and the learned counsel promised to show that they purchased with the intention that the property purchased should still be Chaudhri Raj Kumar's and only revert to them if Chaudhri Raj Kumar failed to pay in the money which they promised on the 24th of December to pay as purchasers of the property sold.

Of the villages sold on the 24th of December, the following were villages mortgaged to the Delhi and London Bank in the deed of the 17th December 1892:—

- (1) Chandpura Chaudhri, (2) Ayubpur, (3) Jhusi Nagar, (4) Kishanpur, (5) Malikpur, (6) Hasanpur, (7) Ranra, (8) Bhawani Sarai, (9) Aima-uz-zam,

(10) Jahangirpur, (11) Asafpur Patti, (12) Tikri and (13) Ani Bojh. At pages 12 of *seqq.* are the lists of bids made at the auction sale, and from these we learn that—

1. Chandpura Chaudhri was sold to Muhammad Umar for Rs. 8.
2. Ayubpur was sold to Mashuk Ali for Rs. 1,025.
3. Jhusi Nagar was sold to Lalta Prasad for Behari Lal for Rs. 4,100.
4. Kishanpur was sold to Lalta Prasad for Behari Lal for Rs. 9,050.
5. Malikpur was sold to Lalta Prasad for Thakur Das for Rs. 4,025.
6. Hasanpur was sold to Mashuk Ali for Rs. 1,600.
7. Raura was sold to Lalta Prasad for Behari Lal for Rs. 4,000.
8. Bhawani Sarai was sold to Kunwar Bahadur for Rs. 8,000.
9. Aima-uz-zam was sold to Mashuk Ali for Rs. 4,050.
10. Jahangirpur was sold to Muhammad Umar for Rs. 100.
11. Asafpur Patti was sold to Mashuk Ali for Rs. 3,780.
- [36] 12. Tikri was sold to Ram Saran for Rs. 4,025, and
13. Ani Bojh was sold to Mashuk Ali for Rs. 2,450.

On perusing the history of the above villages after sale we find that the sale certificates of the mahals of Kishanpur, Malikpur, Raura and Jhusi Nagar were granted to Parsotam Rai Tantia Sahib; that he was informed on the 3rd of May 1893 that the sales had been confirmed by the Commissioner; and we also find that on the dates between the 8th and 10th of September 1893 he formally acknowledged having been put into possession of them.

In respondents' book No. 1 at page 32 will be found a sale deed, dated the 15th of September 1893, by which Mashuk Ali purported to convey to Nawab Safia Jehan Begam the village of Hasanpur Partabpur together with other villages. By a separate deed of the same date Mashuk Ali conveyed to Nawab Syed Ali Hasan Khan the villages of Ayubpur, Aima-uz-zam, Asafpur Patti and Ani Bojh.

In respondents' book No. 11, at page 3, will be found a deed of sale, dated 29th June 1894, under which Kunwar Bahadur conveys the village of Bhawani Sarai with the village of Sarai Gujurnal to Tulsi Ram.

Chandpura Chaudhri, which was purchased by Muhammad Umar, was sold by him to Gauri Lal, since deceased. Gauri Lal's representative on the record is the respondent Kunj Behari Lal.

What the plaintiff seeks is that the mortgage deed of the 17th of December 1892 may be declared to have preference to all these transactions. According to him the sales of the 24th of December 1892 were illegal, because they were held without any fresh proclamation issued; or if they were, in spite of this defect, sales according to law, then he contends that the real purchaser at all these sales was Chaudhri Raj Kumar, and the nominal purchasers were people who never intended to purchase in their own right, but who assisted him with loans of money on the security of the villages purchased. In either case the sales of the 24th and the subsequent transactions should be all held to in no [36] way derogate from the mortgage deed in his (plaintiff's) favour and to have no higher status than that of subordination to it.

This is the contention in appeal. Before considering it, it will be necessary once more to pass in review the case as put by the plaintiff for the defendants to answer; in other words the case that on the pleadings had to be tried by the Court below.

The plaint sets out that Chaudhri Raj Kumar has not up to the present paid anything towards the principal or interest due under the mortgage deed of the 17th of December 1892, and asks that a decree may be passed against him personally for such an amount as may be found due, and a further decree directing that on non-payment by him of the sum so found due on the account, the properties mortgaged in the deed may be sold, and the proceeds applied in liquidation of the sum due.

Two grounds are set out in the 7th paragraph of the plaint as the grounds upon which the sale of the 24th December should be set aside as being illegal and bad in law; the first being that prior to the sale and at the time thereof there was in the Government Treasury and in the hands of the Collector more than sufficient money to cover all arrears of Government revenue due on account of those villages, and the Collector was entitled to, and ought to, have realized the arrears therefrom; the second being that as the sales were originally fixed for the 22nd of December 1892, and the officer conducting the sale on that date had postponed the sale, subsequent sale without proclamation or notice on the 24th of December 1892 was invalid.

In the 8th paragraph the plaintiff says that as he did not advance any money until after the sale had been postponed, he cannot be bound by any subsequent sale of which no proclamation was issued or notice given.

In the 9th paragraph it is alleged that the said properties were purchased at the sale of the 24th of December 1892, on behalf of the principal defendant, and any subsequent [37] contract cannot affect the plaintiff's right. From this 9th paragraph has been developed the further case, viz., that the sales of the 24th of December 1892 were no sales at all, because the purchaser at one and all of them was the defaulter Chaudhri Raj Kumar, and not Muhammad Umar, Mashuk Ali, or any other of the persons who on that day were declared at the time of sale to be the actual purchasers.

Thus, then, the case in the plaint as it was filed, which is that the sales of the 24th of December 1892 and all subsequent proceedings are tainted with illegality and convey no title, has been developed into a case that they were sales, not to the certified purchasers, but to Raj Kumar himself; that they are in fact *benami* transactions.

The paragraph 9 is all the foundation in the plaint for what has been argued before us, viz., that the evidence points distinctly to one of two conclusions, either that the persons who pretended to purchase at the sales held on the 24th of December were *benamidars* for Chaudhri Raj Kumar and purchased with the agreed intention that, though the *benamidar* was declared actual purchaser, he should re-convey the property to Chaudhri Raj Kumar as soon as Chaudhri Raj Kumar re-paid any money advanced by the *benamidars*, or that the purchase money was to be advanced as a loan, the security for which was the particular mahal or mahals bid for by the pretending purchaser, Chaudhri Raj Kumar remaining throughout the *de facto* proprietor.

A third contention was raised that the evidence established that in some of the sales the money paid as purchase money was the money of Chaudhri Raj Kumar.

The first question then for determination is whether the sales of the several mahals held on the 24th of December 1892 were or were not illegal, either on the ground that there were in fact no arrears due from Chaudhri Raj Kumar on that date, or on the ground that they were held without a fresh proclamation issued.

[38] The Subordinate Judge has held, and rightly, that in the case of any irregularity in revenue sales application has to be made to the Commissioner of the Division, praying that the sale may be set aside. Applications were made by and on behalf of Chaudhri Raj Kumar to have the sales set aside, but such applications were rejected, and that order of rejection is final.

Section 178 of the North-Western Provinces Land Revenue Act, 1873, provides that every sale of land under the Act shall be reported by the Collector to the Commissioner. At any time within thirty days from the date of the sale application may be made under section 179 to the Commissioner of the Division to set aside the sale on the ground of some material irregularity or mistake in publishing or conducting it. There is nothing in the Act which limits the right to present such an application to the parties to the decree only. The right is left open to any and every person, and this being so, it does not lie in the mouth of any person who can show that he has suffered or may suffer from the sale to contend that the section was not intended to and does not provide a means of obtaining the remedy provided and of getting the sale set aside.

The Commissioner of the Division is required by section 180, on the expiration of thirty days from the date of the sale, where no application to set aside a sale has been made, or if such application has been made and rejected, to make an order confirming the sale, and every order so made is expressly declared by the law to be final.

A right is reserved under section 181 for the institution of a suit in a civil Court for the purpose of setting aside a sale on the ground of fraud. These provisions, and a further provision in section 241 (j) of the same Act, which enacts that no civil Court shall exercise jurisdiction over claims to set aside a sale for arrears of revenue other than claims under section 181, point irresistibly to the conclusion that the view taken by the Subordinate Judge, that the Commissioner's order of rejection is final, was the right and only conclusion.

[39] There is, however, the attempt made to contend that the sales were no sales because there were no arrears of revenue existing for which they could be held.

This contention is hardly worth considering. It is based upon a false foundation of fact, and it ignores the principle upon which sales of land for arrears of Government revenue proceed. The Government to which the revenue is due does not keep a debtor and creditor account with each individual landholder, but keeps its account for each mahal separately with the proprietor or proprietors of that mahal. When a mahal is once advertised for sale on account of arrears of land revenue due on it at the time of the advertisement, the defaulter can release such mahal only by paying the arrear due on that particular mahal at some time before the day fixed for the sale, either to the person appointed under section 147 to receive payment of the land revenue assessed on such mahal, or to the Collector of the district, or the Assistant Collector in charge of the sub-division of the district.

In the present case no such payment had been made by or on behalf of Chaudhri Raj Kumar to any of the three persons above mentioned on account of any one of the mahals which were sold on the 24th December 1892.

The Deputy Collector who conducted the sales on the 22nd of December has recorded, in a proceeding to be found at page 55 of the appellant's printed book No. I, the reasoning upon which he stayed sale and held that no arrears of land revenue were due. His conclusion that no arrears of land revenue were due is arrived at by crediting purchase money on account of the three villages

sold on the 22nd of December, i.e., moneys payable in the future which might or might not be realized, and which would be in any case moneys paid not before but after the day appointed for sale, and other moneys not paid as required by section 173 of the Act, but deposited in a civil Court. The proceeding shows most complete ignorance of the Land Revenue Act, 1873, and of the first principles of the land revenue system.

[40] I hold that the sales of the 24th of December 1892 were good and valid sales, and that we have no jurisdiction to entertain or determine claims to set them aside which are based upon alleged irregularities or mistakes in publishing or conducting the sales.

The next plea that we have to determine is whether the sales of the 24th of December were in fact sales made to Chaudhri Raj Kumar and not to the persons who were at the sale certified to be the auction purchasers or who have since been entered as certified purchasers in the certificate granted by the Government under section 184.

The first question in considering the plea is whether the law as it stands permits the Court to entertain the plea. Section 184 of the Land Revenue Act expressly states :—"The certificate shall state the name of the person declared at the time of the sale to be the actual purchaser, and any suit brought, whether in a civil or revenue Court, against the certified purchaser on the ground that the purchase was made on behalf of another person, not the certified purchaser though by agreement the name of the certified purchaser was used, shall be dismissed with costs."

To inquire therefore, as the appellant asks us to do, whether the purchases of the 24th of December 1892 were made on behalf of Chaudhri Raj Kumar would be, it appears to me, to evade the clear provisions of law. The appellant must go further and show us, before we can set aside the sales, that fraud has entered into them. This he has not done.

There is a long array of decisions which at first sight would appear to be in favour of the view that the operation of section 317* of the Code of Civil Procedure is confined to disputes between certified auction purchasers and persons who allege that such auction purchasers purchased on their behalf and are in reality fictitious purchasers.

It will be found, however, on examining them more closely, that the cases were one and all of them not cases against certified purchasers, but cases by certified purchasers, and therefore beyond [41] the letter and scope of section 317 of the Code of Civil Procedure.

The leading case is that of *Mussumat Buhuns Kowur v. Buhooree Lall*, 14 Moo. I. A., 496. This was a suit brought by Lalla Buhooree Lall, the certified purchaser, against a mortgagee in possession for the redemption of the taluk and possession of it, alleging that the mortgage debt had been paid off by receipt of the profits, and if not, that he was ready to pay what might remain due. The defence was that the purchase was made by Lalla Buhooree Lall in his own name and as a *benami* purchaser for one Brij Lal Opadhia and with his money, and that the attempt by Lalla Buhooree Lall to set up title in himself was a fraud. Their Lordships of the Privy Council had no hesitation

* [Sec. 317.—No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person, or on behalf of some one through whom such other person claims.]

Nothing in this section shall bar a suit to obtain a declaration that the name of the certified purchaser was inserted in the certificate fraudulently or without the consent of the real purchaser.]

In holding that this suit was not a suit within the words or scope of section 260* of the Code of Civil Procedure. Section 260 of Act No. VIII of 1859 is the corresponding section which has been replaced by section 317 of Act No. XIV of 1882, but with more than one addition to its terms. These additions I need not consider at present. As section 260 ran it was word for word identical with section 184 of Act No. XIX of 1873 as it now stands, except that the latter section prohibits suits being brought, whether in the civil or in the revenue Courts, and the former simply said "any suit brought shall be dismissed."

It is well to look closely into what the Privy Council did lay down in their judgment, for it seems to me that a wider intention has been, in some of the following cases, attributed to their Lordships than was ever intended by them. Their Lordships first point out that the Legislature had not by any general measure declared *benami* transactions to be illegal in India, and that it therefore followed that those transactions must still be recognized and effect given to them by Courts, except so far as positive enactment stands in the way and directs a contrary course. Their Lordships next examined section 260 of Act No. VIII of 1859, which was put forward as such a positive enactment. They [42] pointed out that this enactment was clear and definite, and went on to say:—"There is nothing from which it can be inferred that more is meant than is expressed. It is confined to the suit brought against the certified purchaser and to a specific direction as to what should be done with that suit, namely, that 'it shall be dismissed with costs.'" It will be observed that in this passage their Lordships do not lay down the person by whom the suit may be brought which is liable to dismissal. It has been contended, and the contention has been apparently approved, that their Lordships intended to confine the suit to one brought by the *benamidar* against the certified purchaser. But I can find no authority for such limitation. It is true that their Lordships went on to deal with the contention that there might be inferred from this section and other sections contiguous to it a general intention having for its object to prevent any inquiry between the purchaser *de facto* and the person for whom he is alleged to have purchased upon the question whether the purchase was *benami* or not, and that effect should be given to that general intention. This inference their Lordships refused to draw. But they had not before them for consideration any other contention such as arises in the case before us, and I am not prepared to hold that what they lay down in reference to the contention directly under their consideration would have been laid down with equal emphasis to any other contention that might have been raised. Further on their Lordships say that the object which the

* [Sec. 260.—When the party against whom a decree for the specific performance of a contract, or for restitution of conjugal rights or for the performance of or abstention from any other particular act has been made, has had an opportunity of obeying the decree or injunction and has wilfully failed to obey it, the decree may be enforced by his imprisonment, or by the attachment of his property, or by both.

When any attachment under this section has remained in force for one year, if the judgment-debtor has not obeyed the decree and the decree-holder has applied to have the attached property sold, the property may be sold; and out of the proceeds the Court may award to the decree-holder such compensation as it thinks fit, and may pay the balance, if any, to the judgment-debtor on his application.

If the judgment-debtor has obeyed the decree and paid all costs of executing the same which he is bound to pay, or if, at the end of one year from the date of the attachment, no application to have the property sold has been made and granted, the attachment shall cease to exist.]

framers of the Code probably had in view was to prevent judgment-debtors becoming secret purchasers at the judicial sales of their property and to empower the Court selling under a decree to give effect to its own sale without contention on the ground of *benami* purchase by placing the ostensible purchaser in possession of what it had sold and insuring him in respect of that possession by enacting that "any suit brought against him on the ground of *benami* shall be dismissed." If this be taken to be the object, it seems to me that it applies with equal force to those who seek to raise a contention against the ostensible purchaser and to prevent the Courts giving possession [43] to him because they claim to have a title derived from the judgment-debtor and which cannot be higher than that of the judgment-debtor. Their Lordships give the instance of cases where actual possession can be given of the things sold by the Court and where (they add) no difficulty arises, "for there the certified purchaser having both the certificate and possession can hold the property by virtue of clause 260 against any suit brought" (not any suit brought by the judgment-debtor alone) "against him, and if that possession should be interfered with either by force or fraud on the part of any person, even a *benami* claimant, it no doubt ought, without inquiry as to the *benami* claim, to be restored." Their Lordships were very emphatic that they were not justified in adopting a construction of section 260 beyond what the language of the Code imports, when such a construction would, in effect, be to declare that to be unlawful which the Code itself has not declared to be so. What I gather from the above is that every case that may arise to which it is sought to apply section 260 has to be carefully considered, and it is to be seen whether the case is one which falls within the expressed words of the section. If it does not, the section has no application. If it does, the section must be applied without any *arriere pensée* as to whether such a construction be one which might under certain circumstances encourage fraud.

Indeed to my mind the boundary line which separates a *benami* transaction from a fraud, though it may be abundantly real in some cases, in others dwindles down to a line so shadowy and unreal that it is impossible to say where the honest *benami* transaction, if there be such a transaction, ends and the fraud begins. While therefore I do not seek by the importation of extrinsic matter to expand the words "any suit," I am equally unprepared to import extrinsic matter which will limit or qualify the same words beyond those which are to be found in the section itself, and which limit the suit to a suit (1) brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. It seems to me that the [44] moment an attempt is made to limit those words, at once we limit the power of the Court "selling under a decree to give effect to its own sale without contention on the ground of *benami* purchase" and "of insuring respect to that possession." Is the suit before us against a certified purchaser and based upon this ground? It is a suit to enforce the mortgage covenant of the Bank as against Raj Kumar and assignees from Raj Kumar, i.e., certified purchasers; and on what ground? The only ground is stated in the ninth paragraph of the plaint, namely, that the said properties were purchased on behalf of Raj Kumar. The person who framed this paragraph might almost be said to have had before his eyes the fatal words of section 184 and to have copied them *verbatim*.

I know that it was held by STUART, C. J., and BRODHURST, J., in *Sohn Lall v. Lala Gya Pershad*, N.-W. P., H. C. Rep., 1874, p. 265, that the provisions of section 260 of Act No. VIII of 1859, which are very similar in terms, did not apply to a case in which a decree-holder brought a suit against the certified

purchaser of property sold by a Civil Court, and that a suit based on the allegation that the certified purchaser had purchased the property *benami* for the judgment-debtor of the decree-holder would lie. The only reason given is that the Code had certainly not for its object the desire to confer a benefit on fraudulent *benamidars*. There was, moreover, a circumstance in that case which does not exist in the case before us, and that was the fact that the judgment-debtor, the *benamidar*, had retained possession of property which in equity ought to have been given up to the decree-holder and was in possession of it at the time when the suit was brought. It was doubtless this fact which caused Mr. Justice BRODHURST to stigmatize the action as that of a fraudulent *benamidar* and to import the element of fraud into the case.

Again in the case *Kanizak Sukina v. Monohur Das*, I. L. R., 12 Cal., 204, MITTER and MACPHERSON, JJ., held that if a creditor of the real owner of a property brings a suit for declaration that it belongs to his debtor and not to the certified auction purchaser, such a suit would [45] not be precluded by the provisions of section 317. That section, they said, was intended to prevent fraud, and if it were to apply to a case like that stated instead of preventing fraud, it would promote fraud. The case which the learned Judges were considering and in which they uttered this pronouncement was a case by a certified purchaser to have his right declared as against his judgment-debtor and a third person, who were trying to resist his claim by a defence setting up the third person and not the judgment-debtor as the real owner. The suit was really one by, and not against, a certified purchaser, whose title was the purchase just made. It is true that as against the third person it proceeded upon an allegation that the third person's name had been used in the transaction as *benamidar* for her mother and that she had no right to the property in the suit. It was really a suit by a certified purchaser against a trespasser and is quite distinct from the present suit.

The case of *Chundra Kaminy Debea v. Ram Ruttun Puttuck*, I. L. R., 12 Cal., 302, is also in reality a case by a certified auction purchaser against trespassers, a person who set up a title adverse to the title of the person whose property had been ostensibly sold and purchased, a person who sought to use section 36 of Act No. XI of 1894 as a shield to cover her title. She may have been the certified purchaser at a previous sale, she was not the certified purchaser at the sale for the time being in question, and so far as the latter sale was concerned, was neither certified purchaser nor *benamidar*. Similar to this was the case of *Tara Soonduree Debee v. Oojul Monee Dossee*, 14 W. R., 111.

All these suits were suits which could not be brought within the terms of section 317, except by expanding the words of the section, and are therefore no guide in the case before us.

For these reasons I hold that the law does not allow us to entertain this plea, and that I ought not to go into the question whether the appellants can or cannot, on the evidence, now substantiate a case to the effect that the purchasers at any of the sales of the [46] 24th of December 1892 were not the certified purchasers, but Chaudhri Raj Kumar, though, had I to do so, I should be prepared to show that in none of the sales has it, in my opinion, been established that the real purchaser was any person other than the certified purchaser. On this matter I am quite in accord with the conclusions drawn by my brother BANERJI from his careful and exhaustive analysis of the evidence.

I would therefore dismiss this appeal with costs.

Banerji, J.—This appeal arises in a suit brought by the appellant, the Delhi and London Bank, Ltd., for sale under a mortgage dated the 17th of December 1892, executed by one Chaudhri Partab Bhaskar *alias* Raj Kumar,

who was the first defendant to the suit. He has died since the institution of this appeal, and is now represented by his widow. The amount secured by the mortgage is a lakh of rupees, and the property mortgaged consisted of the zamindari property of the mortgagor (whom I shall in this judgment designate by his commonly known name of Raj Kumar) in several villages. There is no controversy in this appeal between the mortgagor and the mortgagees, or in regard to the amount claimed as due upon the mortgage. The only question before us is whether the appellants are entitled to a decree for the sale of such of the mortgaged villages as are in the possession of the respondents other than the widow of Raj Kumar. Those villages were sold by auction on the 24th of December 1892 for arrears of land revenue due in respect thereof, and were purchased by the said respondents or their predecessors in title. Those respondents claim that under section 167 of the North-Western Provinces Land Revenue Act, 1873, they have acquired the villages purchased by them free of all incumbrances, and that the plaintiff's mortgage is void as against them.

Their claim is resisted on behalf of the plaintiffs on two grounds. First, that the sale was illegal and void; and second, that the property was in reality purchased by the mortgagor Raj Kumar in the names of the different purchasers.

[47] I propose to consider the questions thus raised in the order in which they were argued before us. The learned counsel for the appellants first addressed us on the second of those questions, and urged that Raj Kumar was the *de facto* purchaser of the property; that the persons in whose names it was purchased were his *benamidars*, and that as he was the real purchaser and the respondents acquired their title, if any, from him, they could not defeat the plaintiffs' mortgage. This plea of *benami* purchase was distinctly raised in the 9th paragraph of the plaint as amended, and was traversed by all the defendants in their written statements.

It has been contended before us on behalf of only one of the respondents, namely, Tulshi Ram, that the plaintiffs are precluded by the provisions of section 184 of Act No. XIX of 1873 from urging that the certified purchaser made the purchases on behalf of some other person, namely, the mortgagor Raj Kumar. It is noteworthy that this contention was not raised before us by the learned counsel who appeared for the other respondents. In my opinion the contention is untenable.

Section 184 of Act No. XIX of 1873, so far as it bears on the present question, runs as follows:—

"Any suit brought, whether in a civil or revenue Court, against the certified purchaser on the ground that the purchase was made on behalf of another person not the certified purchaser, though by agreement the name of the certified purchaser was used, shall be dismissed with costs." The above provisions are exactly the same as those of section 260 of Act No. VIII of 1859 (the former Code of Civil Procedure), and are similar to the provisions of section 317 of Act No. XIV of 1882 (the Code of Civil Procedure now in force), of section 36 of Act No. XI of 1859 (the Revenue Sale Law for the Lower Provinces), and section 21 of Act No. I of 1845 (the Revenue Sale Law—now repealed). The policy of all these sections is only to discourage *benami* purchases at auction sales, and it seems to me that the Legislature intended to give effect to that policy by forbidding the person who purchases property at auction in the name of another from bringing a suit [48] against the ostensible purchaser for recovery of the property from him on the ground that he is not the real purchaser. Those sections do not declare a *benami* purchase

to be illegal and absolutely void. This has been repeatedly held by their Lordships of the Privy Council.

In *Mussamat Buhuns Kowur v. Lalla Buhoree Lall*, 14 Moo. I. A., 496, their Lordships observed:—"It is well known that *benami* purchases are common in India, and that effect is given to them by the Courts according to the real intention of the parties. The Legislature has not by any general measure declared such transactions to be illegal, and therefore they must still be recognised, and effect given to them by the Courts, except so far as positive enactment stands in the way and directs a contrary course." With reference to the provisions of section 260 of Act No. VIII of 1859, which, as I have said above, are exactly in the same terms as section 184 of Act No. XIX of 1873, their Lordships said:—"The object which the framers of the Code probably had in view was to prevent judgment-debtors becoming secret purchasers at judicial sales of their property." They added:—"The Code had certainly not for its object the desire to confer a benefit on fraudulent *benamidars*. Its provisions must have been framed on grounds of public policy * * *. That policy, if it was meant to be carried to the extent of making such transactions unlawful, might have been so declared and enacted, but the Code stops short of such an enactment."

A similar view was entertained in *Both Sing Doodhuria v. Ganes Chunder Sen*, 19 W. R., C. R., 356, in which their Lordships, speaking of the provisions of the same section, remarked:—"They were designed to check the practice of making what are known as *benami* purchases at execution sales, i.e., transactions in which A secretly purchases on his own account in the name of B." This opinion was adhered to by their Lordships in *Lokhee Narain Roy Chowdhry v. Kalypuddo Bandopadhyay*, 23 W. R., C. R., 358: s. c., L. R., 2 I. A., 154. Upon the [49] authority of their Lordships of the Privy Council, the highest authority on the subject, it must be held as settled that a *benami* purchase is not illegal; that such a purchase at an auction sale is not *ab initio* void; that the policy of the Legislature in enacting section 260 of Act No. VIII of 1859 and similar sections is only to discourage *benami* purchases, especially by judgment-debtors; and that the Legislature intended to enforce that policy by forbidding the institution of suits by real purchasers against ostensible purchasers on the ground that the purchase made by the latter was on behalf of the former. Section 184 of Act No. XIX of 1873, like section 260 of Act No. VIII of 1859 (which, as I have said above, is worded exactly in the same terms as section 184), and like section 317 of Act No. XIV of 1882, contemplates, in my opinion, a suit between the person claiming to be the real purchaser and the certified purchaser, and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor, and that the certified purchaser is only the *benamidar* of the debtor. Even in regard to suits of the former description, the Privy Council has held in two of the cases cited above that if the certified purchaser is the plaintiff, his claim may be resisted on the ground that he is only a *benami* purchaser. In my judgment section 184 of Act No. XIX of 1873 does not preclude a creditor of the beneficial owner from suing the certified purchaser on the allegation that his purchase was *benami* for the debtor, and that the latter is the real purchaser. If any other construction were placed upon that section it would lead to the perpetration of fraud, and such surely could not have been the intention of the Legislature. The object of discouraging and checking *benami* purchases at auction sales by judgment-debtors is evidently to minimise the chance of the judgment-debtors being able to defraud their creditors. If therefore the

creditor of a person who has purchased his own property at auction in the name of another with the intention of preventing that property being availed of by his creditors be debarred of the right of establishing [50] the real nature of the purchase and showing that it was made on behalf of the debtor himself, the very object of the Legislature would be frustrated, and facilities would be afforded to the debtor for perpetrating the fraud which it was the intention of the Legislature to prevent. The case-law on the subject is entirely in support of this view. With reference to the provisions of section 317 of the Code of Civil Procedure (Act No. XIV of 1882), it was held by my brother AIKMAN and myself in *The Uncovenanted Service Bank Ltd., v. Abdul Bari*, I. L. R., 18 All., 461, that those provisions contemplate suits between the certified purchaser and the beneficial owner, and do not bar a creditor of the latter from asserting that the certified purchaser is not the beneficial owner. The same was the ruling of this Court in *Sohn Lall v. Gya Pershad*, N.-W. P. H. C. Rep., 1874, p. 265, and in *Puran Mal v. Ali Khan*, I. L. R., 1 All., 235, in regard to section 260 of Act No. VIII of 1859. The High Court of Calcutta also held the same view in reference to section 317 of Act No. XIV of 1882 in *Kanizak Sukina v. Monohur Das*, I. L. R., 12 Cal., 204, and *Subha Bibi v. Hara Lal Das*, I. L. R., 21 Cal., 519. The same Court held in *Amcer-oon-nissa Beebee v. Binoile Ram Sein*, 2 W. R., C. R., 29, with reference to the provisions of section 21 of Act No. I of 1845 (the Revenue Sale Law—now repealed) that they were “not intended to protect purchases made in the name of third parties from the operation of decrees against the person beneficially entitled to the purchased property.” In *Chundra Kumary Deba v. Ram Kuttun Pattuck*, I. L. R., 12 Cal., 302, that Court held, according to the head note, that “the object of section 36 of Act XI of 1859 is to prevent the true owner from disputing the title of his *benamidar* (certified purchaser), and not to preclude a third party from enforcing a claim against the true owner in respect of the *benami* property.” WILSON, J., in delivering the judgment of the Court, observed:—“It would be a departure from the principle on which these sections are framed, and would introduce, instead of checking [51] fraud and dishonesty, if we were to construe the section as meaning that where a creditor of the real owner has to bring the property to sale, this sham title of the *benamidar* may be set up against the purchaser. That would be making this provision, which was intended to discourage fraud, an instrument of fraud.” These remarks have my full concurrence, and apply exactly to the case before us. We have not been referred to any ruling, nor am I aware of any, in which the provisions of section 184 of Act No. XIX of 1873 were considered. But, as I have already said, that section is similar to section 36 of Act No. XI of 1859 (the Revenue Sale Law for the Lower Provinces), and the principle and policy of all these sections are the same. I may add that our attention has not been drawn to any case, reported or unreported, in which a contrary view was held. Upon the provisions of the law itself and upon the authority of the case-law on the subject, I am of opinion that section 184 of Act No. XIX of 1873 does not preclude the plaintiffs from showing that the respondents, or those from whom they derive their title, purchased the property in question *benami* for Raj Kumar.

[The judgment then went on to discuss the evidence as to whether the purchases in question were in fact made *benami* for Raj Kumar, and, finding on this point against the plaintiff bank, thus concluded]:—

The only question which now remains to be determined is that of the validity of the auction sale held on the 24th December 1892. That sale has been impeached in the argument before us on two grounds first, that upon

the sale not being proceeded with on the 22nd December 1892, the sanction which was granted by the Board of Revenue for the sale of the villages lapsed, and a further sanction was necessary; and secondly, that a fresh proclamation of sale should have been issued, and as no proclamation was issued, a sale could not legally be held on the 24th. Neither of these grounds is, in my judgment, a tenable and valid ground for holding the sale to be *ab initio* void. The sanction which the Board of Revenue grants for the sale of the patti or mahal for [52] arrears of land revenue remains in full force until the sale has taken place or the arrears have been paid up before sale, and the mere fact of a sale which has been duly ordered being for some reason postponed does not necessitate the obtaining of a fresh sanction. An alteration in the date on which a sale is to take place does not, under any provision of Act No. XIX of 1873, put an end to the sanction already granted.

As for the issue of a fresh proclamation of sale, it is not necessary to decide whether or not the law enjoins it. The omission to issue a proclamation was nothing more than an irregularity or a mistake in publishing the sale on the ground of which an application could be made to set aside the auction sale. There is nothing in the Act which limits the right of making such an application to the defaulter alone. In this particular case applications were made by Raj Kumar which were rejected. I am unable to hold that the non-issue of another proclamation of sale renders the sale a nullity.

For the above reasons I am of opinion that the Court below has rightly held that the plaintiffs are not entitled to enforce their mortgage against the property which was sold by auction on the 24th of December 1892, the purchasers of such property having acquired it free of all incumbrances.

I agree in dismissing the appeal with costs.

Appeal dismissed.

NOTES.

[Similar decisions were given in (1899) 21 All., 238; (1903) 26 All., 82; (1905) 28 Mad., 526; (1905) 8 O.C., 306.]

[53] PRIVY COUNCIL.

The 26th April and 24th June, 1898.

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Sri Mahant Govind Rao, Defendant, Appellant,
and

Sita Ram Kesho and others, Plaintiffs, Respondents, and a Cross-appeal.

[On appeal from the High Court for the North-Western Provinces.]

*Lapse to the British Government of a foreign State in ceded territory—
Grant of lands therein—Construction of official correspondence—
Obari, or abatement of revenue on the estate.*

The State of Jalaun, in the territory ceded in 1804 by the Peishwa, lapsed in 1840 to the British Government. Before the lapse, the lands now in suit belonged to the chief, and were in the hands of managers on his behalf. The last manager, the ancestor of the present parties, remained, after 1840, in possession of the estate till his death in 1890, having been continued therein for life in 1852. In 1867 the Government directed the continuance of the entire estate to " the loyal members of his family."

Held, that no proprietary interest in the estate had been shown to have belonged to the ancestors when Jalaun was a principality: that all that could be claimed by the descendants

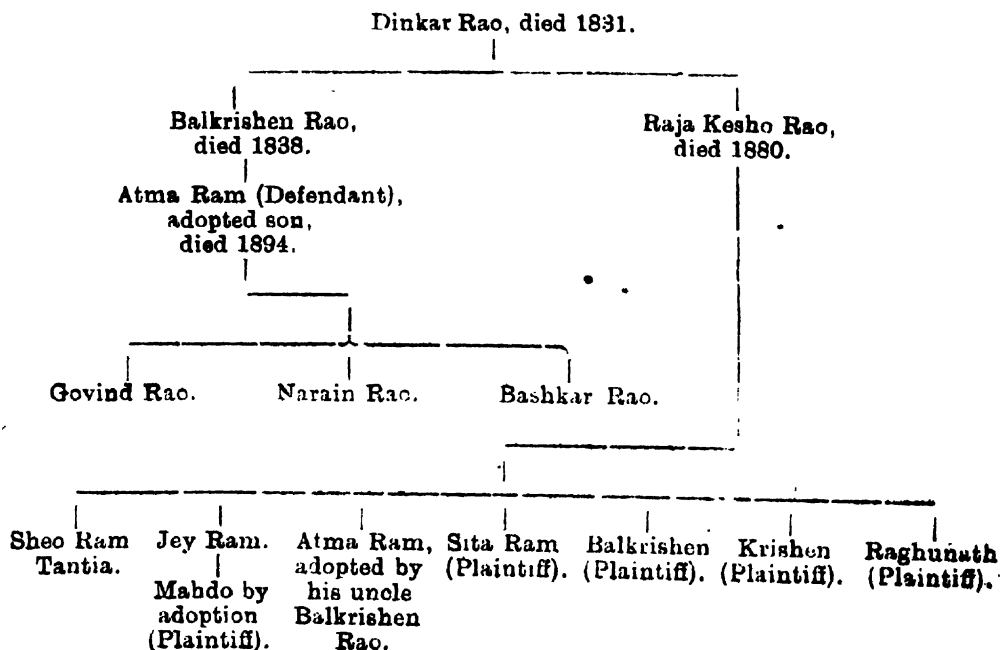
was derived from the Government, which, after the lapse of the State, had the right, at their discretion, to control the descent of the estate, and had exercised this discretion. There had been no formal sanad ; but on the true construction of the official correspondence, as to which the Courts below had differed, the Government first continued the possession of the ancestor for life, and afterwards conferred the inheritance, as to one moiety of the estate, upon the defendant, who was one of the sons of the original holder, and, as to the other moiety of the estate, upon the plaintiffs, who were the four brothers of the defendant, then living. The claim made by the plaintiffs, having been founded on a different title, was dismissed by the High Court. But this dismissal was accompanied by a declaration that the above grant had been made. This was now altered into a declaratory decree to the same effect, with the direction that inquiry be made as to who were entitled to the plaintiffs' moiety, and further directions were reserved.

APPEAL and cross-appeal, consolidated, from a decree (30th July 1890) of the High Court, reversing on second appeal a decree (14th January 1889) of the Commissioner of the Jhansi Division, who had decreed the plaintiffs' suit. The Commissioner had reversed a decree (21st April 1888) of the Deputy Commissioner of Jhansi, who had dismissed the suit.

The plaintiffs, now respondents and cross-appellants, claimed in this suit possession from the defendant of the estate of Gur-[54]sarai which, before 1840, was in the territory of the Mahratta State of Jalaun, which was brought under the administration of British India in that year. The estate consisted of sixty villages, the fort and town of Gursarai, with land. It was termed in the plaint a riasat, and described as having been, before the lapse of the State, managed by two brothers on behalf of the Rao, who then ruled Jalaun. The one brother was the father of the parties, and the other brother had adopted the defendant.

A claim for moveables had been found by the first Court to be barred by limitation, and had been no further pursued. The defendant Atma Ram died in 1894, and for him was substituted, on this record, his son Mahant Gobind Rao, now appellant, who was also guardian of two minor brothers.

The relationship of the parties is shown in the following table. All the facts appear in their Lordships' judgment.



The questions sought to be raised on these appeals related to alleged rights of inheritance in the estate held during his life by the late Raja Kesbo Rao, those rights being contested between Atma Ram on the one side, and his brothers on the other; and [56] related to a declaration of their rights made by the High Court. The object of the defendant's appeal was to get rid of that declaration.

The title alleged in the plaint, which claimed possession, was that "the father of the plaintiffs in 1852 obtained from the Government the estate of Gursarai on an obari of Rs. 22,500 a year as a reward for his services"; that this estate had been managed by their father and his brother Balkrishen Rao, under the Raj of Jalaun, to which the estate belonged. Balkrishen, according to this plaint, had adopted the defendant, Atma Ram, and had died in the year 1838, before the acquirement of the property by Kesbo Rao, and the defendant, being such adopted son, had no right to inherit from his natural father, Kesbo Rao.

The defendant, in his written answer, set up that, before the grant of 1852 to Kesbo Rao, the estate belonged to Balkrishen in proprietary right as ancestral property, and the defence was a title through Balkrishen. It was added that, with the sanction of the British Government, the defendant had been declared "owner, and possessor, and gaddi-nashin" of the estate in suit, which had been granted for life to Kesbo Rao on an obari of the above sum, it having been recorded that after his death, "the obari should be fixed in the name of this defendant."

The principal issues raised questions of the terms on which the estate was held under the British Government; as to whether it was ancestral property, or acquired by Kesbo Rao; as to what the character and effect of his possession had been, and whether the obari was a holding on the terms of the reduction of the revenue below what might have been assessed on the estate; also as to the meaning of the orders of the Government made in 1852 and 1867, and whether the last was effective to confer estates of inheritance, and on whom.

The Deputy Commissioner found that the brothers, Balkrishen and Kesbo Rao, had no proprietary interest in Gursarai. There was, in his opinion, no evidence to show that the defend-[56]ant was in possession of any heritable zemindari interest in respect of which such a suit as the present could be maintained. According to this judgment the defendant held only an obari, or right to have remitted to him a part of the revenue that was assessable on the estate. The suit was, accordingly, dismissed.

That decision was reversed by the Commissioner who, however, concurred in the findings of fact by the Court below that, under the Jalaun State, the Gursarai estate was only under the management of the brothers, who had no proprietary interest in it, but had to account for the revenue collected by them, and pay the allowances assigned thereout; while the ruler of Jalaun could make rent-free grants within the estate.

Under sections 584 and 585 of the Code of Civil Procedure this finding was final, as was adjudged by the High Court, who, however, assented to it.

The Commissioner found that in 1852 Kesbo Rao was in sole possession of the estate, as an obari, at Rs. 22,500 a year, receiving for his own benefit the difference between that sum and the annual yield of the estate. This privilege acquired by him was to pay a reduced jama, and was resumable by the Government, who could have raised, but allowed to remain as it was, the revenue to the full amount. To inherit the estate, subject to this, the plaintiffs,

in the Commissioner's opinion, had title. Their right, as they were the heirs of Kesho Rao, prevailed over that of the defendant, who had passed from among the sons of the latter, having been adopted by Balkrishen, who died before Kesho Rao acquired the estate.

The defendant's appeal to the High Court was heard by a Divisional Bench, SIR JOHN EDGE, C. J., and YOUNG, J. In his appeal he abandoned what he had claimed in his written statement, *viz.*, to be exclusively entitled to Gursarai as heir to Balkrishen. He now sought to maintain that the right to the inheritance, having been after the lapse of the State at the disposal of the Government, had been conferred upon himself; and that, in any event, he was entitled to half the properties in suit.

[87] The following contains that part of the judgment of the Chief Justice which is referred to at the beginning of the judgment of the Lords of the Judicial Committee.

"The estate of Gursarai had, prior to the death in 1840 of the boy-chief of the family of Jalaun, formed part of the property of the Jalaun State. On the death of the boy-chief without issue, in 1840, his territories lapsed to the British Government.

"As appears from the judgment of the Lower Appellate Court, Dinkar Rao, the father of Balkrishen Rao and Kesho Rao, had been in the management or charge of the Gursarai estate from at least 1815 down to his death in 1831. In 1815 Dinkar Rao made up the accounts of the estate from 1775. Those accounts were returned for revision, and were, fifteen years later, finally accepted by the then chief of Jalaun. On the death of Dinkar Rao, in 1831, Balaji Gobind, the then chief of Jalaun, wrote to Balkrishen Rao and Kesho Rao condoling with them on the death of their father Dinkar Rao, and desiring them to continue in the management of the fort and mahal.

"Gobind Rao Bala, who was the chief of Jalaun from 1832 to 1840, wrote, ordering a payment of a pension which had apparently been kept in arrear. The Lower Appellate Court considered that it appeared from letters which were in evidence that the Gursarai family, that is, Dinkar Rao and after him Balkrishen Rao and Kesho Rao, were treated by the chiefs of Jalaun with high consideration, and that, probably, the family of Gursarai was related to the chiefs of Jalaun.

"In considering what had been, prior to the lapse of the Jalaun territories and estates to the British Government in 1840, the position of the Gursarai family, Dinkar Rao and after his death Balkrishen Rao and Kesho Rao, and their connection with the Gursarai estate, the Lower Appellate Court has found:— 'The evidence, however, establishes very clearly the fact that, under the Jalaun Government, the Gursarai family had no [88] proprietary right in the estate. They had to pay the allowances assigned to individuals upon that revenue, and the ruler of Jalaun was free to make rent-free grants within the estate.' There can be no pretence for suggesting that, prior to the lapse of the Jalaun territories, including the estate of Gursarai, to the British Government in 1840, Balkrishen Rao and Kesho Rao, or Kesho Rao alone, had acquired any proprietary or any heritable interest in the estate of Gursarai. It would be contrary to rudimentary principles of law to hold that an agent could, adversely to his employer, acquire any proprietary or any heritable interest in an estate which he was managing for that employer, and in respect of which he was accounting to him. Indeed, the plaintiffs do not in their plaint suggest, nor is there any evidence, that any heritable interest in the Gursarai estate had been acquired by Kesho Rao or by any one prior to 1852. It is

obvious that the Lower Appellate Court, when it found that from the date of the lapse of the Jalaun estates in 1840 until the death of Kesho Rao on the 26th of October 1880, he had enjoyed the income of the Gursarai estate upon the sole condition of paying Rs. 22,500 annually to the British Government, did not mean by that finding that, prior to 1867, Kesho Rao had acquired any proprietary or any heritable interest in the Gursarai estate; for in the opinion of the Lower Appellate Court, such proprietary title as was conferred on the family of Kesho Rao was conferred by the order of the Secretary of State for India in Council, conveyed by the despatch of the 28th of February 1867, and not before. It is also clear from the judgment of the Lower Appellate Court that, from 1840 to 1852, Kesho Rao had been permitted to enjoy the income of the Gursarai estate as an obaridar under a misconception on the part of the Government as to his true position and rights."

It was then added that in 1852, when the orders of the Government, to the effect that Kesho Rao's rights should not be touched during his life, were communicated to the Governor-[59]General's Agent, with a representation that the estate was an obari, what was then intended as the recognition of an old status was, in fact, the recognition of a new one. That status was, however, merely for the life of Kesho Rao, and the estate did not carry with it heritable rights. The judgment also referred to a suggestion made to the Court that the existence of the obari gave rise to the inference of a heritable estate, already and before then, existing in Kesho Rao. There had, however, been no descent of the Gursarai riasat except* in the family of the chiefs of Jalaun; and all the documentary evidence was against there having been before the lapse of the estate any inheritance conferred.

The judgment passed on to the effect of the order of the Secretary of State of the 25th of February 1867, sanctioning the family arrangement between the sons of Kesho Rao, and conferring upon both the parties to this suit interests in the moieties of the estate. That the British Government had the right to confer such interests, and did confer them, could not be doubted. On the findings of fact of the Courts below, and on the construction of the order last mentioned, the judgment was that the claim of the plaintiffs to exclusive possession must fail.

This was followed by the dismissal of the suit. With a view to settling the rights of the parties, a declaration was added that the defendant was entitled to a moiety only of the Gursarai estate, and that the plaintiffs were entitled among themselves, to the other moiety.

The defendant appealed from this decree contending, among other objections, that this declaration should not have been made. The plaintiffs afterwards obtained special leave to cross-appeal, and now claimed that, as declared by the High Court, they were, at all events, entitled to the half of the estate under the order of the 25th of February 1867.

Mr. *Herbert Cowell*, for the cross-appellants, respondents, obtained leave to begin, as their cross-appeal raised the whole question of title to the estate. In 1840 the estate came under the revenue administration, and until December 1852 the Agent to [60] the Governor-General in Bundelkhand controlled that administration for Jalaun. After that time the Government of the North-Western Provinces administered the District. Thereupon all mahals, or estates, would in ordinary course be brought under settlement, a survey would be made, an assessment of revenue would take place, and a jama be adjusted with those responsible. The rules to guide collectors were compiled and issued in 1848, showing clearly that those persons who were entitled to surplus profits, beyond the revenue demanded, would be the proprietors of the land in respect of which

they engaged for the revenue. And as such proprietors they would, unless reason were assigned, possess the heritable estate. For the Gursarai riasat, or estate, Kesho Rao was admitted to engage for the revenue due thereon, and this he paid for forty years, from 1840 to 1880, in undisturbed possession. No village survey was made upon the estate, and in other respects it was treated as exempt from the ordinary course. The Government, in fact, instead of bringing Gursarai to an assessment at the full jama, on the half assets principle, allowed Kesho Rao to pay a privileged jama of Rs. 22, 500 annually. This remission of revenue was generally attendant upon an interest in the land where admitted, and had not the Government been under an implied promise not to enhance that amount, they might have exercised their right to raise this jama. No such right was enforced. The inference was a just one that, inasmuch as the Government when they succeeded to the rights of the Jalaun State did not effect any confiscation whatever of any Private right, there remained the proprietary right in the possessor, who was admitted on the above favourable terms to continue in the possession for forty years. The proprietor, as a general rule, was the person who engaged for the revenue, whether in a regular settlement or on special and exceptional terms, including such a holding as the one in question, locally known as an obari. It was argued that, as obaridar Kesho Rao had a heritable property in the land. The Government had the right to assess it to the full revenue, but there their right ended.

[61] Reference was made to Thomason's Directions for Settlement Officers, published by the authority of the Government of India in 1848.

The Raja Kesho Rao had held possession, exclusive and adverse, for a period beyond limitation, in virtue of a proprietary right by title, family arrangement, and by recognition of Government. Thus it appeared that, on his death in 1880, the plaintiffs, his sons, became entitled to possession of the riasat. The right of the Government was to bring the estate under assessment on full terms under the North-Western Provinces Land Revenue Act, XIX of 1873, Chapter III. The correspondence in evidence was referred to in order to show that the Government, not exercising any rights over the estate other than rights to the revenue, had left the proprietary rights to Kesho Rao, in whom they were at the time of the lapse, and had confirmed and granted the inheritance to him and his family. On the other hand, Atma Ram had not been shown to have acquired any right in the estate but such as he might have acquired under the grants made by the Government in 1852 and 1867 to Kesho Rao; and in virtue of such share in the succession as he might be found entitled to. If the contention failed that Kesho Rao's other sons could receive more than the moiety, which was declared in the Secretary of State's order of the 25th of February 1867, still that order itself was conclusive against Atma Ram's having a title to the whole estate. The High Court should not have dismissed the plaintiffs' suit, but, in order to give effect to the declaration which the Court had made, the suit should have been decreed in their favour. The claim to such a decree would have been covered by the issues raised and the evidence adduced.

Mr. J. D. Mayne and Mr. C. E. A. Ross, for the Appellant, were not called upon as to the title of Kesho Rao during his life, but as to the declaration added by the High Court at the dismissal of the suit. They urged that the plaintiffs had not come forward setting up the case which the High Court had declared in their favour. They had, on the contrary, set up a claim which [62] was inconsistent with the declaration made after the dismissal of the suit. The appellant now only asserted his title to the moiety assigned to him in the order of the 25th of February 1867.

Mr. *H. Cowall*, in reply, contended that the relief granted in the declaration was right, upon the whole of the evidence, and the issues. There was no reason why the form of the decree should not be reconciled with the declaration.

Afterwards, on the 24th June, their Lordships' judgment was delivered by Lord Hobhouse.

The question raised in these appeals arises out of transactions following on the merger of the Native State of Jalaun into the dominion of the East India Company. The earlier history of the case, which goes back so far as the year 1840, is stated both succinctly and lucidly by the learned Chief Justice of Allahabad, and their Lordships need not re-state it except in bare outline until they come to the documents on which the Courts have differed. There has been very little dispute as to matters of fact; and now, as the appeal to the High Court was a second appeal, the facts found by the Commissioner of Jhansi, the First Appellate Court, are conclusively found; but the three Courts below have taken different views as to the proper treatment of the case upon those facts.

The property in dispute is the riasat or estate of Gursarai, consisting of 60 villages and some other particulars. It was part of Jalaun, one of the subordinate Mahratta States or chieftainships within the large territory of Bundelkhand, the sovereignty of which passed to the Company by treaties with the Peishwa. The chieftainship was continued to the existing chief, called the Rao, and to his family, which became extinct in the year 1840. The estate of Gursarai was managed for the chief by Dinkar Rao, the head of a noble family, till his death in 1831. He had two sons, Balkrishen and Kesho. Balkrishen, having no issue, adopted his nephew Atma, one of Kesho's sons; and he died about the time of the change of dominion. When the [63] Company's officers came to make the requisite arrangements they found Kesho in occupation of the estate.

It is conclusively established in this suit that Dinkar Rao and his sons had no proprietary interest in the estate; they were only managers, accountable to their chief for the revenues and bound to deal with the estate as he ordered. It is probable that the officers of the Company who came to deal with the Jalaun lands were, as both the Deputy Commissioner and the Commissioner of Jhansi have intimated, under a misapprehension on this point, and thought that Kesho enjoyed some proprietary holding on a favourable rent, called locally an obari tenure. We need not examine this hypothesis very closely. It would account for some inaccurate expressions which occur in the official correspondence, but it does not affect the official acts of the authorities. Kesho made himself acceptable to the British Government, and, though no sanad or grant of any kind was made to him, his possession of Gursarai was continued, and his jama was assessed at the low rate of Rs. 22,500.

The earliest official document in the Record which relates to Gursarai is a letter dated the 8th of October 1852 from the Government of India to the Bundelkhand Agent. The material passage is as follows:—

"Case No. 1, Book 7.—Family arrangements of this description, His Lordship in Council observes, particularly where no deeds are executed, are in general open to revision on the death of incumbents. The present incumbent has done good service, and his rights should not be touched during his lifetime, but on his death, His Lordship in Council desires the case should be reported for orders."

There is no clue to the meaning of the terms "family arrangement" and "his rights." There may have been, as above observed, some misapprehension. But the important point to mark is that whatever benefit was given to Kesho,

the present incumbent, was for his life only, and that everything beyond that was reserved for further orders.

Kesho has had seven sons. The eldest, Tantia, rebelled in the year 1857, but he must have made his peace with the Government [64] afterwards, though not admitted to favour. The second, Jey, is dead and is represented in this suit by his adopted son Madho, one of the plaintiffs. Atma was the third. He was the sole defendant in this suit, and appellant in the first appeal to the Queen in Council, but he has since died and has been replaced by his eldest son, Mahant Gobind. The four younger sons are plaintiffs in this suit. Two of them were born subsequently to the transactions now about to be mentioned.

On the 31st of July 1866 Atma and his four then existing brothers signed an agreement to the effect that Atma, being the descendant of Balkrishen, the eldest son of Dinkar, was sharer of half the riasat, and the four others were sharers in equal shares of the other half. This agreement is of no legal validity in itself; if only because it was not registered; but it is of importance as leading up to and explaining that which has legal validity.

On the 4th of August 1866 Major McNeile, then Commissioner of Jhansi, wrote to the Provincial Board of Revenue intimating that Kesho was anxious to obtain the orders of Government regarding the terms on which his estate was to descend to his sons. The letter relates not only to Gursarai, but to other villages which it seems had been granted to Kesho for his loyalty during the Mutiny. The writer mentions the agreement between the brothers thus:—

"All parties interested in the matter have consented that Atma Ram shall take half the estate on his father's death and the other four brothers one-eighth each, and this may be considered as finally adjusted."

He then goes on to suggest what shall be done with what he calls the quit-rent, meaning the obari or reduced jama. He goes into many particulars which need not be detailed now because they are summed up in a document of higher authority, which was not produced to the two lower Courts, but was before the High Court.

That document is a letter from the Board of Revenue to the Government of the North-West Provinces. The material passages are as follows:—

[65] "The Raja's eldest son, who was a rebel in 1857, has been set aside by a family arrangement, duly executed by all parties and attested before the Deputy Commissioner; and Atma Ram, the third son of the present Raja, has been declared to be the heir to the Raj by virtue of an adoption on the part of his uncle, the late Raja.

"The rebel son of the present Raja is consequently excluded from the succession, and there would therefore appear to be no reason why the Government should not authoritatively declare its intention in regard to the tenure upon which the estate is to be held after the death of the present Raja.

"The proposal submitted by the Commissioner, and to which the Board see no objection, are as follows:—

"The family compact is that Atma Ram shall succeed to the Raj and to one-half of the estate as adopted son of the late Raja Balkrishen.

"That the other four sons of the present Raja shall each take one-eighth of the estate.

"The Commissioner's proposals in regard to the estate, are:—

"1st. That the villages in Jalaun, granted in reward for the loyal services of the family, be at once resumed.

"2nd. That on the death of the Raja, the present obari jama be raised from Rs. 22,500 to Rs 25,000 per annum, and be continued to the family in perpetuity.

"3rd. That this obari grant be continued on the condition of the estate remaining in joint undivided possession of the family, and that if any member of it should cause his share to be divided off, such share be liable to assessment at full jama.

"4th. That Atma Ram be recognised as the heir to the title and privileges enjoyed by the present Raja, the latter (privileges), which consist in the exercise of police and judicial powers, to be dependent upon a proper exercise of them by the Raja for the time being."

It may be observed here that the chieftainship of Atma in succession to Kesho did not form a term of the written agreement between the brothers, nor does it seem to have been at this time the wish of Kesho himself. But both Kesho and his sons recognized Atma as the son of Dinkar's eldest son; and in later years Kesho treated him as head of the family.

There are no letters in the records showing the transmission of the proposals through the regular stages to the Governor-General in Council, and to the Secretary of State in Council. They were probably pure formalities. The answer of the [66] Secretary of State is dated the 25th of February 1867, and is as follows:—

"Having considered in Council the letter of Your Excellency's Government, No. 190, dated 23rd November 1866, in which you suggest the continuance to the loyal members of the family of Kesho Rao Dinkar of Gursarai in Bundelkhand, of the entire estate now held by him, on the terms set forth by the Board of Revenue of the North-West Provinces and Commissioner of the Jhansi Division, I have to signify to you the ready assent of Her Majesty's Government to the indulgence now accorded to the family of this meritorious chieftain.

"You will of course take measures to prevent the occurrence, on the death of the aged chief, of any dispute relative to the succession of the second son."

Nobody has doubted that by the term "second son" Atma is meant. It is to be observed that this letter is not only the effective source of whatever title Kesho's descendants have, but is also the most accurate statement of the true nature of the grant to them. Previous documents in 1852 and 1866 use some inapt and inaccurate expressions such as "family agreements," "rights," "descent" of the estate, and so forth. The facts as we now know them were, that such grant as was made, or can be implied, to Kesho was for his life only; that there was no heritable interest to descend; that the reversion was vested absolutely in the Secretary of State in Council; and that his grant is described with exact precision as a continuance to Kesho's family of the estate then held by him, and as an indulgence to them, on account, it is hinted, of his merits.

The record contains other letters which passed between Kesho, Atma, and the officers, but they do not give any additional light, unless it be to show that Kesho himself was quite conscious that the enjoyment of the property after his death was entirely in the discretion of the Government, only he claimed favourable consideration on account of his services. He lived long, and died in the year 1880. In 1878 or 1879 he entrusted the management of the estate to Atma, and declared him in a formal letter to be head of the family. Some family disputes occurred, but were [67] composed, at least for the time, by the officials. On Kesho's death Atma took, or more probably retained, possession. The Government accorded the title of Raja to him, and the jama of the estate was raised, as intended, to Rs. 25,000.

How soon afterwards disputes took their present form is itself a matter of dispute, but at some time Atma refused to allow that his brothers owned shares in the estate, and they commenced this suit in March 1887. The plaintiffs claim the entire estate, as having been acquired by and inherited from Kesho; omitting mention of Tantia, and claiming to exclude Atma on the score that he had been adopted by Balkrishen. They refer to the

agreement of 1866, but only to contend that it is void. The defendant Atma also claims the whole estate, on the ground that it belonged to Balkrishen and had descended from him. He referred to the agreement of 1866 and to some order of Government in so obscure a way that it is difficult to know what he founds upon them. In fact both sides put forward unsustainable claims, and neither put forward the true case. When, however, the issues came to be settled the effect of the proceedings of 1866 was brought into question. The issue was not clearly defined, but it was clear enough for both parties to go fully into evidence, and for the Courts to treat it as being the substantial point of dispute in the case.

The Deputy Commissioner, who formed the Court of First Instance, shows that the family of Dinkar Rao were simply managers, and that the plaintiffs failed to prove any grant except that of the Secretary of State, which he calls the sanad on which the defendant bases his claim to succession. He dismissed the claim with costs.

On appeal the Commissioner found that the estate was acquired by Kesho, and that the plaintiffs as heirs of Kesho had a title superior to that of the defendant; and he decreed accordingly. His view, to state it very briefly, was that in some way not now apparent the ownership of the estate had become absolutely vested in Kesho, and that the official correspondence and acts in 1852 and 1866 are explained by confining the [68] discretionary action of the Government to the obari or favourable jama. That view has been supported by Mr. Cowell in argument at this Bar. It is true, as before observed, that some expressions in official letters tend to imply that the writers ascribed to Kesho some proprietary interest which it is shown that he did not in fact possess. It is also true that the estate and the jama are not always clearly distinguished. But their Lordships find it impossible to read even one of the material letters without seeing that it refers to both estate and jama; and the correspondence as a whole would lose the greater part of its meaning if it were supposed that the Government was not exercising the discretion which it had to determine how the estate should be enjoyed after Kesho's death.

To this effect was the opinion of the High Court, which reversed the decree of the Commissioner and dismissed the suit, but with a declaration the effect of which and the reasons for it are explained in the following passage at the end of the judgment of the learned Chief Justice:—

“ I would allow this appeal with costs, and dismiss the suit with costs in all Courts, with this exception that in order, if possible, to prevent further litigation between these parties, I would make a declaration, but without costs, that the defendant Atma Ram is entitled to a moiety only of the Gursarai estates, and that the plaintiffs *inter se* are entitled to the other moiety. It is true that no such declaration was asked for in the plaint, and that, as a general rule, according to the decisions of their Lordships of the Privy Council which have been cited to us, a relief, a right to which is not disclosed in the plaint, and which is not asked for in the plaint, should not be granted. Mr. Reid, who has appeared before us on behalf of the plaintiffs, has pressed us to make a declaration, declaring the rights of the parties in the Gursarai estate, and has informed us that the plaintiffs raise no question of their rights *inter se*. Mr. Reid also asked us for a decree for possession to the extent which might be covered by the declaration which we might make. This latter request we should not, in my opinion, accede to. The estate has not been partitioned and this is not a suit for partition. Should the estate be partitioned, then the plaintiffs can get possession of those portions of the estate which may be allotted to them on partition.”

The defendant's appeal is for the purpose of getting rid of this declaration.

[69] Their Lordships quite agree with the High Court that, as a rule, relief not founded on the pleadings should not be granted. But in this case, as their Lordships have been at pains to show, the substantial matters which constitute the title of all the parties are touched, though obscurely, in the issues; they have been fully put in evidence, and they have formed the main subject of discussion and decision in all three Courts. The High Court are right in treating the case as not within the rule. As between plaintiff and defendant the case has been thoroughly tried out. Indeed, Mr. Mayne for the defendant does not now dispute that the other members of the family are entitled to a moiety. It is quite right to make a declaration on the subject. But then their Lordships think that the terms of the declaration may be advantageously modified, and that the Court may found on the declaration an inquiry into the plaintiffs' title.

According to the letter of the 17th of August 1866, paragraphs 6 to 10, the persons entitled to the four shares, each to a separate share, are "the other four sons of the present Raja." Two of those sons are plaintiffs, and one being dead is represented by his adopted son, who is a plaintiff. Tantia, the eldest, is passed over in silence. But under the family compact which is the basis of the grant, Tantia takes a share. It was his claim by primogeniture which was set aside, not his claim as a sharer, as is clearly shown by Major McNeile's letter. What has become of his share does not appear. The two youngest sons took no share under the compact. It may be that by agreement of the brothers the plaintiffs are entitled as their Counsel state, but there is no proof, and no other allegation of it. The declaration should be founded on the grant by the Secretary of State, but that will not of course preclude the effect of any agreement between the brothers by which the younger brothers have been or may be admitted to a share, or other transfer of interest created.

The same reasons which support the declaration also show the propriety of giving in this suit such effect to the declared title of the plaintiffs as circumstances may admit. The High Court has [70] made a declaration in favour of the plaintiffs, but it has dismissed the suit. Neither Atma Ram nor his son has shown any disposition to yield anything which the law does not exact. If the title of the plaintiffs is still disputed, they must bring a new suit, which would certainly increase expense; and in which, considering the peculiar nature of the grant, the lapse of time, and the uncertainty whether a declaration in a dismissed suit can supply a fresh starting ground, the plaintiffs would run substantial risks of miscarriage. Instead of dismissing the suit, the better course will be to direct an inquiry who are the persons now entitled, and to reserve further directions, under which it will probably be found possible to place them in legal possession and so to terminate this unfortunate litigation. The High Court has quite rightly refused to make any order for possession under present circumstances.

The decree does not notice the personal position of Atma as head of the family. He is now dead, and it does not appear that the title of Raja or any other position of dignity which the Crown may confer has been conferred on his successor. The provision against partition appears also to concern the Treasury alone, which was not willing to continue the favourable jama to any sharer who would not hold his share in an undivided state.

With regard to costs, their Lordships think it just that both parties should bear their own. Both have made excessive demands. The plaintiffs have persisted in theirs up to the present moment.

The defendant persisted in his before the three lower Courts, though in the High Court he made an alternative case that he was at all events entitled to a moiety. Even now, though he does not claim the entirety, his whole appeal is grounded on his objection to any declaration as to the moiety which is not his. And he has excluded his co-sharers at least till the High Court judgment was delivered, if not later.

Though their Lordships agree with the High Court on the substance of the case, and indeed are doing little more than to apply the views of the learned Judges in a more ample way, it will be simpler in point of form to discharge their decree and to [71] substitute a decree to the following effect:—Reverse the decree of the Commissioner of Jhansi. Declare that the defendant Atma Ram was entitled to a moiety only of the Gursarai estate, and that his successors in title are now entitled to a like moiety. Declare that the other moiety belongs to the persons entitled thereto by virtue of the letter of the Secretary of State in Council, dated the 25th of February 1867, and according to the terms of the letter of the Board of Revenue dated the 17th of August 1866 (that is to say) the four brothers of Atma then living referred to in the last-mentioned letter or those who represent them in title. Inquire who, having regard to the above declaration, are either directly or by inheritance, transfer, agreement or otherwise entitled to the last-mentioned moiety. Declare that as regards all proceedings in the Courts below, the parties are to bear their own costs respectively. Reserve further directions, and costs subsequent to this decree.

As regards these appeals, both parties are in the wrong and they must bear their own costs.

Solicitors for the Appellant and Cross-respondent : Messrs. *Pyke and Parrott*.

Solicitors for the Respondents and Cross-appellants : Messrs. *Ranken, Ford, Ford and Chester*.

NOTES.

[For instances of the rule as to the decree being confined to reliefs in the pleadings, see also (1903) 28 Bom., 153 ; (1904) 6 Bom. L.R., 288 ; (1909) 11 Bom. L.R., 606.]

[21 All. 71]

The 24th June and 27th July, 1898.

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Sham Sundar Lal and others.....Plaintiffs, Appellants

and

Achhan Kunwar and another.....Defendants, Respondents.

[On appeal from the High Court for the North-Western Provinces.]

*Estate of Hindu widow, or daughter—Powers to alienate family estate—
Ancestral family trade—Powers of manager.*

The estate of a Hindu family, in which, after the death of the father and his widow, a daughter held an interest for life, comprised a family trade, carried on by a manager on her account.

Held that the restriction upon her power to alienate remained the same, notwithstanding the trade, without being relaxed on that account.

Justifying necessity, or good grounds, after due inquiry, for belief in its existence, would have been required to render valid an alienation made by her of the family estate.

[72] The case of a widow, or of a daughter under such circumstances, differs from that of the manager, or head of an undivided family, who manages an ancestral trade, and has a certain power to pledge for the requirements of the business. The validity of his charge, however, on the family estate, where there is a minority, or non-consent, among the members of the family, depends on proof that the charge was necessary, or was believed to be so by the mortgagee, after due inquiry.

The manager, appointed by the daughter, on whom the family estate has devolved, has no larger power to pledge the ancestral assets than his principal.

It is not incumbent on the defendant who relies on the absence of legal necessity for the borrowing by a woman, holding her limited estate, to plead or to prove such absence: but it is for the plaintiff to state and to prove all that will give validity to the charge.

Lala Amarnath Sah v. Rani Achhan Kunwar, (1892) L.R. 19 I.A., 196; S. C., I. L. R., 14 All., 426, referred to and followed.

APPEAL from a decree (15th January 1895) of the High Court, reversing a decree (9th June 1892) of the Subordinate Judge of Bareilly.

The plaintiffs now appellants were bankers in Philibhit. The defendants, respondents, Achhan Kunwar, and Inayat Singh, mother and son, were the daughter and grandson, of Raja Khairati Lal, who resided in Bareilly. He died without a son in 1866. The daughter, who was married to Raja Lalji, succeeded for her daughter's estate on the death of her father's widow, Hulas Kunwar, on the 22nd of June 1878. The son, Inayat Singh, was the only surviving, next reversionary heir, expectant on the death of his mother. She had one other son, Shamsher, who died before this suit was brought.

Besides owning zemindaris, Raja Khairati Lal had a hundi business, and lent money. This, after his death, was carried on by Raja Lalji, for the benefit of the widow. He was the husband of Achhan Kunwar, and he afterwards managed the business for her. He died in 1889.

This suit (2nd June 1890) was brought to enforce two mortgages securing sums of money, together with interest. The first was dated the 2nd of December 1877; the second, the 1st of April 1881.

[73] On the 5th of March 1877, a mukhtarnama to Raja Lalji was executed by the widow and the two respondents. This authorization came into question in 1886-87 in *Amarnath Sah v. Achhan Kunwar*, (1892) L. R., 19 I. A., 16; S. C., I. L. R., 14 All., 426.

The facts of the case, and the contents of the documents, are stated in their Lordships' judgment.

The main question on this appeal related to Achhan's having possession, as a daughter, for life, of a family inheritance, which included an ancestral trade, the latter having been carried on, on her behalf, by a manager. The question was whether the restriction on her power, as a daughter, to charge the inheritance with mortgages, was or was not relaxed by reason of the requirements of the family business, and her position in reference to it.

In a joint answer the two defendants set up that they had no knowledge of the mortgage of the 2nd of December 1877, which was signed by Raja Lalji only, and that his signing was unauthorized by them. They stated that the mortgage of the 1st of April 1881 had been sealed by them under his influence, and without their knowing that a liability upon the family estate was thereby acknowledged.

The Subordinate Judge found that Raja Lalji was duly authorized by the defendants, now respondents, in regard to the first of the two mortgages, and

that it was supported by good consideration. He found that the second, also, had been sealed by them of their own free will and consent. He decreed the plaintiffs' claim.

On appeal, see I. L. R., 17 All., 125, the High Court (Sir JOHN EDGE, C. J., and P. C. BANERJI, J.) held that Achhan Kunwar, who signed the mukhtarnama of the 5th of March 1877, understood that she was signing a document which empowered her husband, Raja Lalji, to act as the agent of the family in the management of the zamindaris and family estate, but no more. That its object and scope were not explained to any of the persons who executed it, and that neither [74] of the respondents was bound by it. In addition to this, the Court found that it was not proved that there was any necessity for borrowing the money secured by the mortgage of the 2nd of December 1877, or that those who were stated to have lent it had made due inquiry as to the necessity for the loan. With regard to the mortgage of the 1st of April 1881, the appellate Court found that no receipt of consideration by the respondents had been shown, nor had it been proved that the document was ever explained to Achhan Kunwar. They found that Inayat "blindly executed it at the bidding of his father Raja Lalji," but added "even if it were to be assumed that he understood its scope and effect, that would not entitle the plaintiffs to the relief claimed by them."

They found that Inayat had no present vested interest in the estate. As a reversioner he had no power to sell, or to mortgage, his interests in expectancy; *Ram Chunder Tantra Doss v. Dhurmo Narain Chuckerbutty*, (1871) 15 W. R., F. B., 17, was referred to on this point.

They found no proof that the daughter, or her son, or the family property, were under any liability in respect of any part of the money, the alleged consideration for the mortgage of the 1st of April 1881, or that either of the two had received any of it. They found that mortgage not to be binding upon Achhan Kunwar, or her estate as a Hindu daughter. Also, they found that Shamsheer, her son, was then alive, and had an equal interest with Inayat, in expectancy; neither of them being capable of binding that prospective interest. There was no valid mortgage at all; and further, that advantage had been taken of Inayat's inexperience. They decreed the appeal, dismissing the suit. The judgment of the High Court will be found reported at length in I. L. R., 17 All., at pp. 127, *et seq.*

The plaintiffs having filed this appeal—

Mr. Cozens Hardy, Q. C., and Mr. H. Cowell, for the appellants, argued that the respondents were bound by the mortgages in suit which operated as charges on the family estate. [75] There had been sufficient evidence that Rani Achhan Kunwar had, as well as her son, understood the documents which they had sealed. They could hardly have been under the belief that the mukhtarnama of the 5th of March 1877, which empowered Raja Lalji to act for them, was only to manage the zamindaris and general property left by Raja Khairati Lal, and not raise money for the family business. But the main point was one upon which there should have been an issue, as being the important question really in contest, what was the implied authority of the agent and manager Lalji to pledge the assets of the estate for the conduct of the family business in hundis and money dealings? The assets of the respondents had been taken to these particular transactions, from abundant caution, to obtain the concurrence of the members of the family having interests in the inheritance; but the engagement in trade must be regarded as the source, at once, of the authority and the necessity. In such a case third parties dealing with the firm, carried on after the death of the founder, could not know the precise rights vested in

each member of the family partnership, but they would regard the manager as empowered to act in the matter of raising money for the requirements of the business. The managing member of a family under the Mitakshara, where that family was a trading firm, was entrusted with the full conduct of its affairs, though some of the members might be minor in age. Trade liabilities affected the family estate. Thus a question had arisen of partnership liability and agency.

Reference was made to—

Ram Lal Thakursidas v. Lakhmichand Muniram, (1863) 1 Bom. H. C. R., App., LI at p. LXXI; *Johurra Beebee v. Sreegopal Misser*, (1876) I. L. R., 1 Cal., 470; *Joykisto Cowar v. Nittya Nund Nundy*, (1878) I. L. R., 3 Cal., 738; *Bemola Dassee v. Mohun Dassee*, (1880) I. L. R., 5 Cal., 792, 805; *Dowlut Ram v. Mehr Chand*, (1887) L. R., 14 I. A., 187; I. L. R., 15 Cal., 70; *Samalbhair Nathubhai v. Sameshvar Mangal*, (1880) I. L. R., 5 Bom., 38.

[76] Mr. J. D. Mayne for the respondent Achhan Kunwar, who alone appeared, argued that the suit had been rightly dismissed. There was no sufficient evidence of the defendants' having understood the effect of either of the documents, and one of them was a parda-nashin. The mukhtarnama under which Lalji professed to act in executing the mortgage of the 2nd of December 1877 was not understood by Achhan Kunwar, and the transaction was not binding on Inayat, who was a minor at the time. The mortgage of the 1st of April 1881 was without any more consideration given than what was already contained in security already invalid as against the daughter who sealed it.

There was no evidence that Achhan Kunwar knew anything about this second bond. Nor that Inayat Singh knew what he was executing, nor that he received such explanations as should have been given in the case of a son who had recently reached majority and was acting under his father's directions.

As to the question of necessity, the burden of proof had been entirely on the appellants to prove a justifying necessity. But on all the facts in evidence it was clear that the finding of the High Court was correct as to the absence of such necessity. Some of the items in the account belonged neither to the family expenses nor to the liabilities of the firm; and it was part of the appellants' case to establish affirmatively the necessity of the loan; *Lala Amarnath Sah v. Rani Achhan Kunwar*, (1892) L. R., 19 I. A., 196; I. L. R., 14 All., 420.

The authority of Raja Lalji could not be implied from his position as manager. The power to mortgage this ancestral family estate could only be founded on proof of recognised necessities. None had been shown to exist. Therefore neither the principal in this case, holding the daughter's estate, nor the agent, had power to bind by their direct alienation any part of the family estate inherited from Khairati.

Mr. Cozens Hardy, Q. C., replied. Afterwards on the 27th of July their Lordships' judgment was delivered by Lord Davey.

[77] On the 2nd June 1890 the present appellants brought their suit in the Court of the Subordinate Judge of Bareilly against the present respondents for Rs. 32,858-8-6 on account of a bond dated the 2nd of December 1877, and Rs. 53,485-4-6 on account of a subsequent bond dated the 1st of April 1881, in all Rs. 86,338-12, and to enforce payment by sale of the property purporting to be hypothecated by the two bonds. The First Court found that the personal remedy upon the bonds was barred by limitation, but that the bonds

were effectual against the property. The High Court held that the property was not bound and dismissed the suit.

The property sought to be sold for payment of the bond debts was formerly the estate of Raja Khairati Lal, who died in 1866. He seems to have carried on during his lifetime a business of money-lender and dealer in hundis. He left no sons, and his widow Rani Hulas Kunwar, on his death, succeeded to a widow's estate in his property. He left one daughter, the respondent Mussamat Achhan Kunwar, who was married to Raja Lalji and had two sons, Inayat Singh the other respondent and Shamsher who died some time after the 1st April 1881, the date of the second bond. Hulas Kunwar died on the 22nd January 1878 and Lalji died about 1888. Lalji during his lifetime seems to have managed the property for Hulas Kunwar, and after her death for his wife Achhan Kunwar, who on death of her mother succeeded to her father's property for a daughter's estate. Inayat Singh though named as a respondent did not appear on this appeal.

On the 5th of March 1877, Hulas Kunwar and the two respondents executed a mukhtarnama of that date whereby they purported to appoint Lalji as the mukhtar-a'am and to empower him on their behalf (amongst other things) to borrow money and execute documents or hypothecate, mortgage, sell or otherwise transfer moveable and immoveable property.

The bond of the 2nd of December 1877 purports to be made by Raja Lalji, son-in-law, Hulas Kunwar wife, and Achhan Kunwar daughter, and Inayat Singh grandson, heirs of Raja Khairati [78] Lal, and contains an hypothecation of certain property formerly of Khairati Lal and described as "in our possession and enjoyment as proprietors" for Rs. 10,000, of which Rs. 7,683-3 is deducted on account of debts previously due to the creditors and Rs. 2,311-13 is said to be paid in cash. It is signed by Lalji alone, and it is at least doubtful whether such an execution would be a valid exercise of the power of attorney, but the Counsel for Achhan Kunwar declined, very properly, to insist upon this point.

The second bond of the 1st of April 1881 purports to be made by the same parties other than Hulas Kunwar (who was then dead) under the same description as in the previous bond. It commences with a declaration that Rs. 20,000 have been found payable by them to the creditors on account of prior debts and interest on two bonds for Rs. 30,000 as detailed below in addition to the principal amount of the two bonds aforesaid, and contains a statement that "the creditors have no deed of any sort other than the bond dated the 25th of May 1877 and the bond dated the 2nd of December 1877, which are payable, and this bond." The zamindari property hypothecated is admittedly part of the estate of Khairati Lal. The mortgagors "profess to bind all rights which we possess or may possess in future." The Rs. 20,000 acknowledged to be owing is thus made up:—

| | | Rs. | a. | p. |
|--|--------|--------|----|----|
| Interest on two bonds, less previous payments | ... | 8,100 | 0 | 0 |
| In respect of the Rukka dated 1st December 1880 :— | | | | |
| Principal | | 10,475 | 0 | 0 |
| In respect of the interest on the amount of the Rukka... | | 1,300 | 14 | 0 |
| In cash ... | | 124 | 2 | 0 |
| | | 20,000 | 0 | 0 |

[79] And in a note to the Record the sum of Rs. 10,475 is explained to be made up as follows :—

| | | | Rs. | a. | p. |
|--|-----|-----|-------|----|----|
| On 22nd June 1879 for revenue | ... | ... | 2,000 | 0 | 0 |
| On 5th November 1879 to pay interest to Intizam Begam | ... | ... | 1,575 | 0 | 0 |
| On 17th May 1880 to defray expenses of daughter's marriage | ... | ... | 2,000 | 0 | 0 |
| On 2nd August 1880 to pay interest to Moti Ram Sah | ... | ... | 4,000 | 0 | 0 |
| On 9th October 1880 to pay interest to Intizam Begam | ... | ... | 900 | 0 | 0 |

This bond is executed by Raja Lalji by the affixing of the seal of Achhan Kunwar and by Inayat Singh then of age. It should be mentioned that by a previous power of attorney, dated 1st August 1878, Inayat Singh, Achhan Kunwar and Lalji in his own right and as father and guardian of Kunwar Shamsher Bahadur, appointed Lala Shankar Sahai their general attorney and agent with power (amongst other things) to have documents executed by them registered. The bond of 1881 was registered on the admission by this person of the execution, completion and receipt of Rs. 124-2 in cash on behalf of the executants.

What was the position of the parties at the respective dates of the execution of these two bonds? At the date of the bond of 1877, Hulas Kunwar as the heir of Khairati Lal was the owner of his estate, but with a restricted power of alienation. Achhan Kunwar was next in succession, and would, if she survived her mother, become her father's heir and take the estate subject to the same restriction. Inayat Singh was one of the two male heirs next in succession to the restricted estates who would be full owners in the event of their surviving their grandmother and mother. Inayat was moreover a minor. At the date of bond of 1881, Achhan Kunwar was owner of the property for a daughter's estate with restricted power of alienation and Inayat Singh was one of the heirs apparent. At both dates **[80]** Inayat Singh was living in his father's house and dependent upon him. In 1877 neither Achhan Kunwar nor Inayat Singh (even if he had been of age) could by Hindu law make a disposition of or bind their expectant interests, nor does the deed apply to any but rights in possession, and in 1881 Inayat Singh was equally incompetent to do so, though the deed purports to bind future rights. To give validity to the bonds as against the estate of Khairati Lal the plaintiffs and appellants must show that there was legal necessity for raising the money by a charge on Khairati's estate, or at least that in advancing their money the creditors gave credit on reasonable grounds to representations that the money was wanted for such necessity. It is not a case in which all the kindred of Khairati have assented or could assent to the bonds or either of them, and the circumstances are not such as, in the opinion of their Lordships, to raise any presumption from such concurrence as there was of Achhan Kunwar and Inayat Singh in the first bond or of Inayat Singh in the second bond that the transaction was a fair one or one justified by Hindu law. In order to raise such a presumption the consent of the deceased's kindred to his widow's or daughter's alienation must be shown to be given with a knowledge of the effect of what they were doing and an intelligent intention to consent to such effect. There is a complete absence of any such evidence in the present case. Achhan Kunwar was a purdah-nashin lady. In her evidence she states that she remembers having executed a

mukhtarnama in Lalji's name with a view to manage the villages. She did not know her estate was encumbered, and came to know of the existence of debt when the Paharwalas filed a suit. She does not know the mortgagees. She did not borrow any money from them and never heard of Lalji having borrowed money from them, but since the filing of the present suit she came to know that a demand was made upon herself and her son. "Raja Lalji never consulted me in matters relating to the management of the estate. He was my elder and malik, and out of respect for him I could not interfere." Inayat Singh admits the [81] execution of the power of attorney in 1877, but says that at that time he had not sufficient maturity of understanding to judge of what he was writing. Indeed, as already mentioned, he was a minor at the time. He says he signed the document of 1881 because filial duty prevented him from disobeying his father's order. So long as Lalji was alive the income of the ilaka was brought to and spent by him. His parents and he lived together. There is no evidence that either Achhan Kunwar or Inayat Singh had any advice on the matter independent or otherwise. It is unnecessary to pursue this topic further.

Nor is there any proof of any legal necessity for borrowing on the credit of Khairati's estate or of any such representation made to the creditors as could give validity to either of the bonds sued on. It is unnecessary to discuss the evidence that was offered because the learned Counsel for the appellants very properly admitted that if it was incumbent upon them to prove a legal necessity for the borrowing the appellants had failed to do so, but they contended, first, that the absence of necessity was not pleaded in the written statement of the defendants and there was no issue raising the question, and, secondly, that Khairati's estate included the business of a money-lender or dealer in hundis which was carried on after his death for the benefit of his heir under the management of Lalji, and that as such manager Lalji had by Hindu law a power to pledge any part of the estate for the purposes of the business.

As regards the bond of 1877 their Lordships think that paragraph 3 of the written statement of the defendants sufficiently, though not in such precise or accurate language as is desirable, raises the absence of necessity for the borrowing as a defence, and that the 3rd issue as settled by the Judge after presentation of the written statement is directed to the same point. But their Lordships observe that in a suit like the present on a bond made by a person with restricted power of alienation the defendants are not required to plead the absence of legal necessity for the borrowing. It is for the plaintiffs to [82] allege and prove the circumstances which alone will give validity to the mortgage, and they repeat what was said in the judgment of this Board in an appeal arising out of a suit on another bond executed by Hulas Kunwar, L. R., 19 I. A., 196:—

"When the issues were settled this point was treated as belonging to the defence and was raised in the form of a question how far the objections resting on the absence of necessity were tenable. It is obvious that such a mode of raising the question is incorrect, because it appears to assume that it was for the defendants to show absence of necessity; whereas the rule is that a mortgagee claiming title under a Hindu widow as against her husband's heirs should prove the validity of his mortgage."

Moreover it appears from the record that the question of necessity was explicitly raised in the first reason of the present respondents for their appeal to the High Court, and the present appellants, so far from complaining that the question was not in issue on the trial before the Subordinate Judge, accepted the issue, and in their 3rd and 6th reasons contended that upon the evidence it

had been established that the consideration of the bond of 1877 was advanced for legal necessity after due and proper inquiry, and as regards the consideration of the bond of 1881 also that it was advanced for meeting family necessities and in any case under the *bond fide* belief that it was required for such purposes and after due and reasonable inquiry. And the case was dealt with in the High Court upon this footing.

Their Lordships think that the second point made by the appellants is unsupported either by reason or authority. The owner of the business at the time of the execution of the bond of 1877 was Hulas Kunwar, and Lalji was managing it as her agent only and for her benefit, and she could not of course confer on her agent any larger power than she had herself, and there is no exception from the restriction on alienation by a Hindu widow when the estate consists of or includes a business. [83] The authorities quoted by Mr. Cowell have no application to the case. They were cases of a family business being carried on by the manager of an undivided family estate. In that case the manager of a family business has a certain power of pledging assets for the requirements of the business. But the position of a Hindu widow or daughter is not by any means the same as that of the head of an undivided family, and even in the latter case the validity of a mortgage by the manager of a family business without the concurrence of the other members of the family, or when some of those members are minors, depends on proof that the mortgage was necessarily entered into in order to pay the debts of the business. This is clear from the cases cited, including that of *Doulut Ram v. Mehr Chand*, L. R., 14 I. A., 187. To use the language of Mr. Justice PONTIFEX in a judgment quoted in that case, the touchstone of the authority is necessity.

These considerations dispose of the appeal so far as it rests on the bond of 1877 alone. But the appellants say that the earlier bond was confirmed by the bond of 1881. It remains to consider the validity of this bond as against Khairati's estate represented by the two respondents. By the 5th paragraph of their written statement the defendants plead that they signed the bond at the earnest request of Lalji, whose position in the family influenced them, and that at the time of execution of the said bond they did not understand the nature of the document, nor were they informed that the debt incurred or admitted under the bond in question was actually payable and was such as would create liability upon the estate of Khairati Lal. One of the issues upon which the case was tried was founded upon this paragraph of the defence. The evidence of the two respondents has been already referred to.

The admission of the bond of 1877 is contained only in the statement that the creditors have no deed except the bonds of the 25th of May 1877 and the 2nd of December 1877, "which are payable," and this bond. The effect of these apparently innocent [84] words was certainly not likely to attract the attention or arouse the suspicion of the executants of the bond unless it was specially explained to them.

The Subordinate Judge on this issue found in favour of the appellants. The High Court reversed this finding and found that the bond of 1881 was not explained to Achhan Kunwar and that it is not proved that she understood that bond or the liabilities it purported to create or admit. The Court also found that it was not proved that there was any family necessity for the making of the bond of 1881 or that the mortgagees satisfied themselves upon any reasonable inquiry that there was any family necessity for the making of that bond.

It will be convenient to examine the nature of the consideration for the bond of 1881. The first item is made up of compound interest on a bond

dated the 25th of May 1877 and the bond of the 2nd of December 1877. There is no evidence whatever that the bond of the 25th of May 1877 was binding upon Khairati's estate or upon either of the defendants—and their Lordships have already expressed their opinion that the bond of the 2nd of December was not binding on Khairati's estate. There is no proof that the sum of Rs. 2,000 was owing for revenue, or if it were that it was necessary to borrow in order to pay it. Then come two items for interest to Intizam Begam. The principal witness for the appellants was Nand Kishore, the father, of Gobind Prasad one of the appellants. He states that Lalji and Inayat Singh asked him to get some more money advanced to them and accordingly he got Rs. 30,000 advanced to them by Intizam Begam, wife of Asman Khan, and that she had obtained a decree, but against whom is not stated. Even assuming that Nand Kishore's statement may be relied on, it does not prove that Intizam Begam's debt bound the estate of Khairati Lal, but their Lordships observe that no question on this point was addressed to Inayat Singh in cross-examination, and Nand Kishore's statement is uncorroborated. There is no explanation why the expenses of "daughter's marriage" (which apparently means a daughter [85] of Lalji and Achhan Kunwar) should be paid out of Khairati's estate instead of by her father Lalji. And lastly the payment to Moti Ram Sah was for interest on the bond which was decided not to constitute a charge on Khairati's estate in the case already referred to and reported in 19 Ind. Ap., 196. It does not appear to whom the small balance of Rs. 124-2 was paid, and it is conjectured that it was applied in paying the cost of the stamp. It is therefore not proved that any part of the debt which Achhan Kunwar purported to admit and which formed the consideration of the bond of 1881 was a debt for which Khairati's estate was liable, and as to the greater part of it there is proof that Khairati's estate was not liable for it.

The respondents' admission could not make it a debt of Khairati, or one for which his estate is liable, and that is the only question in this suit. It was not contended that the bond could be enforced against Achhan Kunwar's interest in the income of the estate during her lifetime, but their Lordships think it right to add that there is no proof, and having regard to the relation both of Achhan Kunwar and Inayat Singh to Lalji, and to her own evidence and that of Inayat Singh which has been quoted above, the form of the professed admission of the bond of 1877 and to all the other circumstances of the case they do not believe that the nature and effect of the bond of 1881 or of the admission of liability for past debts contained in that bond was ever explained to or properly appreciated by either of the respondents, and they do not differ from the finding of the High Court on this issue.

Their Lordships will therefore humbly advise Her Majesty that the appeal be dismissed and the appellants must pay the costs of the respondent Achhan Kunwar, who alone appears on this appeal.

Solicitors for the Appellants—Messrs. *Railken, Ford, Ford and Chester*.

Solicitors for the Respondents—Messrs. *Pyke and Parrott*.

NOTES.

[I. The principles laid down in 6 M.I.A., 393, have been applied to the transactions of limited estate-holders, such as the Hindu widow :—33 Cal., 842 ; 8 C. L. J., 458.

II. Onus is on those who assert that the alienation was justified :—(1908) 35 Cal., 420 ; (1902) 14 M. L. J., 139 ; (1907) 6 C. L. J., 490.

III. As regards the difference between the powers of a Hindu widow and those of the manager, see also 13 Mad., 189 ; 20 M. L. J., 371 (unjustified alienation by former, *voidable* ; that by latter, *void*) ; (1910) M. W. N., 799 ; (1904) 7 Bom. L. R., 172 ; (1907) 9 Bom. L. R., 1114 ; (1908) 32 Bom., 577 (improvement).

IV. As regards trading debts and transactions of limited estate-holders, see the Full Bench decision in (1901) 26 Bom., 206 and also (1915) 29 M. L. J., 696 : 29 I. C., 957, on appeal from (1914) 24 I. C., 398 (Mad.).

V. As regards the scope and effect of the consent of reversioners to an alienation by the Hindu Widow, see the Privy Council decisions in (1915) 42 Cal., 876 ; (1907) 30 All., 1 ; the Full Bench decisions in (1913) 40 Cal., 721 ; (1898) 21 Mad., 128 ; (1908) 31 Mad., 366 ; (1915) 28 M. L. J., 1 ; also (1914) 24 I. C., 417 (Punjab)—the recent decisions adopting the view that in cases where the alienation cannot be supported on the theory of *surrender* and *acceleration* of estates, the consent of reversioners gives rise to a presumptive but rebuttable evidence of the existence of the justifying circumstances like necessity and has the practical effect of shifting the onus of proof.

VI. As regards the essentials for a valid consent, see also (1910) 11 C. L. J., 563 ; (1901) 28 Cal., 546 ; (1906) 8 Bom. L. R. 252.

VII. A reversionary interest is only a *spes successiones* and cannot be dealt with by way of transfer :—(1906) 29 Mad., 390 ; (1905) 29 Mad., 120 ; (1904) 14 M. L. J. 175 ; (1903) 13 M. L. J. 323 ; (1901) 24 All. 94 ; (1903) 31 All. 53 ; (1903) A. W. N. 284 ; (1909) 32 All. 88 ; (1910) 9 I. C. 26 (All.) ; (1902) 29 Cal. 355 ; (1907) 9 C. L. J. 50 (*Mahomedans*) ; (1909) 10 C. L. J. 268 ; (1909) 2 I. C. 865 (*Mahomedans*) ; (1906) 8 Bom. L. R. 781 (*Mahomedans*) ; (1908) 10 Bom. L. R. 210 ; (1910) 12 Bom. L. R. 911 ; (1907) 10 O. C. 277. See also (1905) 8 O. C. 349.]

[86] REVISIONAL CRIMINAL.

The 11th August, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Man Mohan Lal and another.*

*Criminal Procedure Code, sections 110, 121, 514, Sch. V, Form No. XLVI—
Security for good behaviour—Conviction of principal—Forfeiture of
bond—Mode of proving conviction.*

Where a person has given a security bond under section 118 of the Code of Criminal Procedure for the good behaviour of another, and the principal during the term for which the bond is in force is convicted of an offence punishable with imprisonment, the production of the conviction and, if necessary, of proof of identity of the principal, is sufficient evidence upon which the Magistrate is authorized to issue notice to the surety under section 514 of the Code to show cause why the penalty of the bond should not be paid. In such case it is for the surety to show what cause he can. It is not incumbent on the Magistrate to re-summon the witnesses on whose evidence the principal was convicted and practically to re-try the case against the principal.

THE facts of this case sufficiently appear from the order of the Court.

The Officiating Government Advocate, Mr. A. E. Ryves, for the Crown.

Kershaw, C. J., and Burkitt, J.—This is a reference made under the following circumstances by the learned Sessions Judge of Allahabad. In July 1897, one Ballam Das was bound over by the Joint Magistrate to be of good behaviour for two years, and two persons became sureties for his good behaviour during that period. In January 1898, the said Ballam Das was convicted by a bench of Honorary Magistrates at Allahabad of the offence punishable under section 323 of the Indian Penal Code. Subsequently the District Magistrate, in the exercise of his powers as such, recorded a proceeding setting forth the above facts, and stating that it had been proved to him that a breach of the bond had been committed. Thereupon the District Magistrate issued to Ballam

* Criminal Revision No. 451 of 1898.

and his surviving surety a notice in the Form No. XLVI in Schedule V. to the Code of Criminal Procedure. After hearing the cause shown the Magistrate ordered the penalty of the bonds to be paid by Ballam and by his surety.

[87] On an application in revision by the surety, the Sessions Judge referred the case to this Court, recommending that the Magistrate's order should be set aside. The wording of the notice prescribed by Form XLVI is important, and the difference between it and Form No. XLIX is noticeable. It recites the execution of the security bond by the sureties, and then proceeds to say that as the principal had been convicted of an offence—in this case the offence punishable under section 323 of the Indian Penal Code—the security bond had become forfeited. Now the Schedule No. V is as much a portion of the Code of Criminal Procedure as any other portion of it, and is most useful in throwing light on the meaning of those sections of the Code in connection with which the forms prescribed by it are to be used. Now the wording of the notice to which we have just referred distinctly lays down that a conviction for an offence, such as here, works a forfeiture of the bond, and this notice moreover is one which is to be issued after the Magistrate has satisfied himself that the bond has been forfeited.

Reading this notice with the provisions of section 121 and section 514 of the Code of Criminal Procedure, we are satisfied that the production of the conviction, and, if necessary, of proof of the identity of the principal, is sufficient evidence upon which the Magistrate is authorised to issue the notice No. XLVI. The purport of that notice is that the surety should show cause why his security bond should not be forfeited.

It was contended before the Magistrate and before the Sessions Judge, who apparently approves of the contention, that before the penalty of the bond can be forfeited it is necessary for the Magistrate practically to re-try the case in which the principal had been convicted, that is to say, in the words of the reference by the Sessions Judge, that the surety is entitled to have the witnesses to the offence again examined in his presence, and to be given an opportunity of cross-examining them and proving that the conviction was wrong. To this contention we cannot accede. The notice served on the surety is one calling upon him to show [88] cause. If he has any cause to show, the burden lies upon him. It is for him to produce his own witnesses, and from their mouths to establish that the conviction of his principal was wrong. We do not think that at the hearing of a notice of this kind it is incumbent on the prosecution to prove that the principal was properly convicted. On the form of the notice the burden of proof rests on the surety; and as to the suggestion that the surety would be allowed to cross-examine the witnesses, we do not see how that is possible. Just as much as the surety was not a party to the case in which his principal was convicted, so he would practically, though present, be no party to the renewed trial of the charge against his principal on the hearing of the notice to show cause. In the former case he would have had no *locus standi* to cross-examine the prosecution witnesses, and similarly at the re-trial on the hearing of the notice he would not be in a better position. When the surety appears before the District Magistrate under the notice to show cause he should then be prepared with any evidence he can produce to show the impropriety of the conviction of his principal, or with a list of witnesses whom he desires to have summoned to give evidence in his behalf; but we are quite satisfied for reasons given above, that it is no part of the duty of the prosecution to have re-tried, on the hearing of the notice to show cause, the case in which the principal was convicted and to prove again the guilt of the principal. In this case the surety did not produce any witnesses or ask for any to be summoned. We therefore see no reason for interfering in this case.

As to the further portion of his reference in which the Sessions Judge suggests that the District Magistrate did wrong in forfeiting the full amount of the bond, we need only say that we decline to interfere with the discretion of the Magistrate, who is responsible for the peace of the district. Let the record be returned.

NOTES.

[This was followed in (1911) 11 I. C., 588. See, however, 25 Cal., 440 ; (1903) P. R., 32.]

[89] REVISIONAL CIVIL.

The 11th August, 1898.

PRESENT :

SIR LOUIS KERSHAW, KT., CHIEF JUSTICE, AND MR. JUSTICE BURKITT.

Vias Ram Shankar.....Decree-holder

versus

Ralla Ram Misir.....Judgment-debtor.*

Act No. IX of 1887 (Small Cause Courts Act), section 25—Civil Procedure Code, section 622—Revision—Discretion of Court in dealing with applications under section 25 of Act No. IX of 1887.

Although section 622 of the Code of Civil Procedure may properly be taken as indicating the lines along which a Judge would do well to exercise his discretion in admitting an application under section 25 of the Small Cause Courts Act, a Judge is not absolutely bound to refuse any application under section 25 of the latter Act which could not be admitted under section 622 of the Code of Civil Procedure. *Sarman Lal v. Khuban*, I. L. R., 16 All., 476, I. L. R., 17 All., 422, referred to and explained.

THE facts of this case sufficiently appear from the order of the Court.

Pandit *Moti Lal* (for whom Mr. D. N. Banerji), for the Applicant.

Mr. C. E. Foy and Babu *Jogindro Nath Chaudhri*, for the Opposite Party.

Kershaw, C. J. and Burkitt, J.—This is an application for revision of an order passed by the Judge of the Court of Small Causes at Benares in the suit *Vyas Rama Shankar v. Ralla Ram Misir*. The applicant, it appears, had obtained a decree *ex parte* against the opposite party. The latter applied, under the provisions of section 108 of the Code of Civil Procedure, as amended by section 17 of the Provincial Small Cause Courts Act (No. XX of 1887), to have the *ex parte* decree set aside and the case re-heard. That application was allowed by the Judge of the Court of Small Causes, who directed the case to be re-tried. The contention on behalf of the plaintiff in the suit—the applicant here—was that, under Art. 164[†] of the second schedule to the Limitation Act of 1877, the application to have the *ex parte* decree set aside was time-barred and should not have been [90] entertained. That is the contention which the Court below overruled, and which is now repeated in the present application.

At the hearing before us Mr. *Chaudhri* took a preliminary objection to the effect that this application, which calls in question a decision of the Court of Small Causes, which by law is final between the parties, is one which, with reference to former rulings of this Court, we ought not to entertain. The learned advocate cited the cases of *Raghu Nath Sahai v. The Official Liquidator of the Himalaya Bank, Limited*, I. L. R., 15 All., 139, *Sarman Lal v.*

* Civil Revision No. 29 of 1898.

Khuban, I. L. R., 16 All., 476, and *Sarman Lal v. Khuban*, I. L. R., 17 All., 422. For the opposite party Mr. *Banerji* cited *Muhammad Bakar v. Bahal Singh*, I. L. R., 13 All., 277, and *The Poona City Municipality v. Ramji*, I. L. R., 21 Bom., 250. We have carefully considered all the cases cited on both sides.

The argument on one side in this matter proceeded very much on the assumption that in the cases cited from the 15th, 16th and 17th volumes of the Allahabad Series of the Indian Law Reports this Court had bound itself by an inflexible rule not to admit, under section 25 of the Small Cause Courts Act, any application which would not be admissible under section 622 of the Code of Civil Procedure. That assumption is entirely erroneous, as will be seen from the remarks of the late Chief Justice when delivering the decision of the Full Bench in the case of *Sarman Lal v. Khuban*, I. L. R., 16 All., 477. The judgment points out that section 622 of the Code of Civil Procedure should be taken as a guide indicating the lines along which a Judge would do well to exercise his discretion in admitting an application under section 25 of the Small Cause Courts Act. But neither that case, nor any of the others, professes to compel a Judge to refuse any application made under section 25 of the Small Cause Courts Act which could not be admitted under section 622 of the Code of Civil Procedure. Those cases leave the discretion of the Judge quite unfettered, while at the same time indicating to him a line which he might well follow, and a general principle which he ought to apply. [91] As to the case now before us, we, in the exercise of our discretion in this particular case, refuse (as in *Sarman Lal v. Khuban*, I. L. R., 17 All., 422), to try in revision and reopen questions of law and fact which have, in the lawful exercise of its jurisdiction, been decided by a Court whose decision the Legislature made final. We reject the application with costs.

Application rejected.

NOTES.

[The powers of revision under the Provincial Small Causes Courts Act, 1887, are wider than those under the C. P. C. :—(1900) 5 C. L. J., 413; (1904) P. R., 66; (1907) 9 Bom. L. R., 466; (1908) 5 A. L. J., 295.]

[21 All. 91]

PRIVY COUNCIL.

The 16th February and 3rd August, 1898.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN AND MORRIS AND SIR R. COUCH.

Mazhar Husen.....Defendant-Appellant

versus

Bodha Bibi and another.....Plaintiffs-Respondents.

Muhammadan will—Construction of a letter containing a bequest—Suicide of testator.

A letter, written shortly before the testator's death, contained directions as to his property, conferring the proprietary right therein in equal shares on certain persons, to take effect on his death. Accordingly, the letter acted as a will under Muhammadan Law. The testator died, within a few hours after, from poison administered by himself with the intention of suicide. The letter stated that he had taken poison, but this was construed as a representation of the state of things as they would present themselves at the time when the letter arrived.

Title under the will having been disputed in this suit, on the ground that the will having been made by a person who had taken poison for the above purpose, was invalid by Muhammadan Law.

Held, that the burden of proving that the will was written after the taking the poison was on the party impugning the will ; that the letter was consistent with its having been written before the taking the poison ; that the other evidence tended strongly to show that it was written before ; and that, therefore, the reason alleged against the validity of the will was not applicable to the case.

TWO appeals, by special leave, consolidated from two decrees (11th January 1894) of the High Court, reversing decrees (17th March 1891) of the Subordinate Judge of Allahabad.

The plaintiff in both these suits, which were heard together in the original and appellate Courts, was Bodha Bibi, widow [92] of Amir Ali, and in one of the suits Nasiban Bibi joined her. The defendants were the same in both. They were Haidri Begam ; her husband, Syed Mazhar Husen, who, after her death in 1894, represented her ; and Nazir Bandi, Habib Bandi, two sisters, with Fayed Fazal Husen, husband and representative of Rahim Bandi, a third sister.

In each of the suits proprietary possession was claimed of property alleged to have been bequeathed by the will of the late Syed Ibn Ali to the extent of one-third of his estate, consisting of zemindaris and other immovables, to the three sisters abovenamed, his first cousins.

The plaintiffs claimed, as assignees of the property from the legatees, to recover from the second defendant, who had obtained possession of the property from the first defendant, all such interests in it as had been validly bequeathed to them by Ibn Ali's will. And they joined two of the assignors, and the representative of the third, these being the said three sisters, as defendants.

The alleged testator, Syed Ibn Ali, died on the 2nd August 1878, unmarried and without issue. It was a fact not disputed that he committed suicide with arsenic ; and it was not contested that, if a letter written by him on the forenoon of the 1st August, the preceding day, had not contained a valid bequest of his property to the three sisters, his mother, Hindri, would have inherited his property.

The question raised was whether the letter of the 1st August contained a valid bequest to the three sisters ; this comprehending a further question (in view of what was alleged by the appellant to be the Muhammadan Law on the subject of wills), whether or not the deceased had taken the poison which caused his death before he wrote the letter alleged to contain his will.

The facts, as stated in the judgment of the appellate Court below, were that Syed Ibn Ali, early in the forenoon of the 1st August 1878, wrote a letter to his mukhtar, Zain-ul-Abdin, which was the document relied upon as containing his will, [93] and that he was found to be dead on the 2nd August 1878. The letter professed to be written an hour before his death, and used words which gave rise to the question whether they might, or might not, accord with his having already taken poison. The letter stated his desire that his mother should not get a pie of his property, and for a disposition in one part of the letter in favour of other persons the writer substituted a direction that the three daughters of his paternal uncle should share equally his property, directing Zain-ul-Abdin to see that each should get an equal share. The words of the bequest appear in their Lordships' judgment.

The two principal issues tried by the Subordinate Judge were, first, as to whether the letter of the 2nd August contained what could by the law of the

Shias be held to be a bequest to the three daughters. As to this the Judge was of opinion that Ibn Ali's object was to exclude his mother from a share in his estate, but he decided as follows :—

"There was no *tamlík ain* (constituting a proprietor of the property itself) nor *ijab* (proposal) which is one of the conditions for enforcement (of a bequest) in respect of the profit. For *tamlík ain* it would have been essential to write in clear terms—"My uncle's daughters shall be the owners of my property on my death." And for *ijab* it would have been necessary to write:—"I have given my property to my sisters (cousins) after my death." The modes of transferring the property suggested in the letter were calculated to waste the property, and they did not show an intention to carry out a bequest, or to bequeath the property absolutely to his cousins. From these circumstances it may be concluded that the contents of the letter do not amount to a will, and, according to Muhammadan Law, as observed by the *Shia* sect, a bequest cannot be inferred from such a declaration or writing."

Secondly, as to whether the will was or was not invalid on the ground that it had been written after the writer had taken poison. As to this the Subordinate Judge wrote :—

"The book called *Riyaz-ul mas'el*, commonly known as *Sharah Kabir*, Volume IV, chapter on wills, contains a [94] passage in Arabic which may be translated thus :—"If any one intentionally wounds himself so that there is a danger of death, and then makes a bequest, such bequest will not be accepted. *Sharah Suma*, chapter on wills, which is in Arabic, contains a passage which may be translated thus:—But a bequest made by any of these, namely, a lunatic, one in a state of intoxication, and he who has inflicted a fatal wound on himself is void; in the first two cases, apparently from want of sense, and in the last case there is a saying of Abi Vilad based on a tradition of Sadik, may peace be with him, that is, if any one makes a bequest after he has wounded himself or done an act which must necessarily result in his death, such bequest will be illegal, for this act goes to prove his want of sense, and also because he falls within the category of a dead man, and therefore the provisions which hold good in respect of the living will not hold good in respect of him, and consequently it is not necessary for him to pay *zakat*, though he be fit to pay it. And the less authoritative saying is that the bequest is valid provided the mind was sound. This opinion was a good one, if it were not inconsistent with the well-known tradition. The book called *Tahzib* also says that bequests made by such persons are invalid. In *Maula-yah Zar-ul-fakih* also this tradition is found. This doctrine was followed in the book called *Vasail Tashaya*. In *Furu Kafi* this doctrine has been recognized and *Jawahir-ul-kalam* contains a verdict that such bequests are invalid. In the book called *Sharaya-ul-Islam* and in its commentary, and in the book *Mukhtasar Mani* also this doctrine has been followed.

"The passage in the book called *Javahar-ul-Kalam*, which bears upon this doctrine may be translated thus,—'One who voluntarily does an act from which he thinks he must die, is to be classed with one who has committed suicide; for instance, one who has taken poison will come under the same category.' From the above authorities it will appear that, even assuming that the letter written by Ibn Ali amounts to a [95] will, such will is void and unenforcible, because Ibn Ali made it after his attempt at suicide."

From this decision the plaintiffs appealed, and the judgment of a divisional bench (TYRRELL and BLAIR, JJ.) reversed it. They were of opinion that the letter constituted a will under Muhammadan Law, and that it was not bad as

being executed by a suicide, who had already taken poison when he wrote it. They remanded the suit under section 562 of the Code of Civil Procedure.

Their judgment was the following,—part being omitted.

“The two leading questions sent to trial below were:—First, can it be concluded from the contents of the letter, and from its surrounding circumstances, that the letter is not a will under the Muhammadan Law of the Shias from the declarations of which a bequest cannot be inferred? and, secondly, whether the will is invalid because it was made by a man who had previously taken poison for the purpose of suicide?

“The Court below has found on both these issues against the appellant. It is convenient to deal with the suicide question first.”

With reference to this question the Judges, after examining the evidence on the record, decided as follows:—

“We think that the finding that the letter was written after the writer had poisoned himself is based on flimsy evidence and is against good and solid evidence to the contrary. So far, therefore, the appellant succeeds, and the bequest, if it was a bequest, is not bad for being the act of a suicide.”

With regard to the question as to whether it could be concluded from the contents of the letter and from its surrounding circumstances, that the letter or document dated August 1st, 1878, was not a will, under the Muhammadan Law of the Shias, from the declarations of which a bequest could not be inferred, the Judges differed from the conclusions arrived at by the Subordinate Judge, and held that the letter constituted a valid will, under the [96] Muhammadan Law of the Shias, and they concluded their judgment as follows:—

“In what we have said, we have tried to show that the very terms of this will are virtually the terms which the Court below would accept as fulfilling the requirements of the Shia law as to bequests. We believe that the word ‘bequeath’ has been rightly defined under that law, ‘as the act of conferring a right in the substance or the usufruct of a thing after death.’ We find on the 460th page of the first volume of Syed Amir Ali’s book on the Muhammadan Law relating to Shias that a bequest may be constituted by the use of any expression that sufficiently indicates the intention of the testator. A ruling of their Lordships of the Privy Council to be found in the 25th volume of the Weekly Reporter, page 121, where their Lordships held, that ‘no particular form, even of verbal declaration, is necessary as long as the intention of the testator is sufficiently ascertained.’ If this decision was between Shias, and we have no reason to think otherwise, it lends the strongest authority to our view of the effect of paragraph 10 of Ibn Ali’s document of the 1st August 1878. The result of these our findings is that this case must be remanded under section 562 of the Code of Civil Procedure, to be restored to the register of original suits, and to be disposed of on the other issues according to law. The costs will abide the result.”

The High Court refused to admit an appeal to Her Majesty against their decision, on the ground that their decree was not a final one within section 595 of the Code of Civil Procedure. But on an application for special leave to appeal being made on the 24th November 1894 it was granted. *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*, (1894) I. L. R., 17 All., 112; L. R., 22 I. A., 1.

Mr. J. D. Mayne and Mr. W. A. Raikes, for the Appellant, contended that the High Court should have found that there was no evidence that the poisoning took place after the letter had been written. As regards the state of the testator’s mind, the [97] important consideration, there would be little difference whether he had already taken the poison or had resolved to

take it immediately afterwards. The sources of the law on the point did not appear numerous. Reference was made to the translations on the judgment of the Subordinate Judge of the passages on the works cited by him.

They also referred to the Muhammadan Law Imamia by E. N. Baillie, 232, and to Taylor's Medical Jurisprudence (edn. 1883), 252.

The Indian Evidence Act, 1872, section 101.

Mr. *C. E. A. Ross*, for the Respondents, argued that the case that the letter operated as a will had been established.

The High Court had rightly reversed the finding of the original Court as to the arsenic having been taken before the letter was written. The expressions in the letter were consistent with the writer's not having, in fact, already taken it at the time of writing. The general evidence tended to show clearly that he had not. He referred to the Introduction, Baillie's Imamia, p. 26, and p. 232 of the book.

The order of remand under section 562 of the Code of Civil Procedure was right under the circumstances.

Mr. *J. D. Mayne* replied. Afterwards, on 3rd August, their Lordships' judgment was delivered by Lord MORRIS.

Ibn Ali died on the 2nd of August 1878. He was possessed of property. The Respondents are the assignees of two ladies, the first cousins of Ibn Ali, and described in the letter or will of the 1st of August as his paternal uncle's daughters.

The appellant is the assignee and representative of Haidri Begam, the mother and heir of Ibn Ali. The respondents claim the property in dispute under a letter or will of the 1st of August 1878.

Two questions arose: 1st, whether the letter of 1st August amounted to a will. 2nd, was it written after Ibn Ali had taken poison from the effect of which he died. On both questions the Subordinate Judge decided in favour of the appellants, [98] holding that the passages in the letter of 1st August did not amount to a bequest, and that even if they did it was written after Ibn Ali had taken poison, the cause of his death. On appeal, the High Court reversed the decision of the Subordinate Judge on both questions. The bequest on which the respondents rely is contained in the letter written by Ibn Ali to his general attorney, Syed Zain-ul-Abdin. The fact of the writing the letter by Ibn Ali was clearly proved and was so accepted by the Subordinate Judge and is not now disputed. The letter was sent by the hand of Musharraf, a servant of Ibn Ali. The Subordinate Judge decided that the contents of the letter did not amount to a bequest, as they did not bequeath the property directly to his cousins. The letter by clause 10 states "You should not have the property given to (my) grandmother and paternal uncle's wife, but you should give the whole to my three sisters, who are my paternal uncle's daughters. You should see that they all get an equal share, and in the same manner as stated by me in paragraph 3." This paragraph appears to their Lordships to confer a right on the three sisters in the property to take effect on Ibn Ali's death, and accordingly that the letter acts as a will under Muhammadan Law.

Now comes the more important question as to the writing of the will being before or after the poison was taken by Ibn Ali. It is not at all free from difficulty, but their Lordships are not prepared to dissent from the decision of the High Court. It appears reasonable to hold that the onus of proving whether the letter or will was written after the swallowing of poison should rest on the party impugning the will. The Subordinate Judge came to his

conclusion apparently on the terms of the letter itself in which the writer states "I, in consequence of my honour having suffered to a certain extent, and the exposure being so great that I could not show my accursed face to any one, thought it advisable to put an end to my life and therefore took poison and died to-day." And again in paragraph 5 the writer states: "Please begin to take all these [99] proceedings after perusing this letter. Don't delay in hope of my life, for, by God, I am actually dead and this letter I have written an hour before death." The Subordinate Judge considers these passages prove that Ibn Ali had taken the poison, but their Lordships are of opinion, though the words "took poison" are in the past tense, they are connected with the words "and died to-day," which cannot be read in the past tense, and the statement is consistent either with the fact that he had taken the poison or that he had resolved to take poison and resolved to die. The evidence is circumstantial and the evidence of Musharraf and Husen Bakhsh go strongly to show that it must have been subsequent to the sending of the letter that Ibn Ali retired from the mardana and went into the zenana on the 1st of August then apparently well. The circumstances lead their Lordships to agree with the conclusion of the High Court that the deceased Ibn Ali took the poison after sending the letter to his friend, who lived some twenty miles distant. Their Lordships will therefore humbly advise Her Majesty that the appeals in this case should be dismissed. The respondents will have their costs.

Solicitor for the Appellant.—Mr. *T. C. Summerhays*.

Solicitors for the Respondents.—Messrs. *Barrow and Rogers*.

[21 All. 99]

APPELLATE CIVIL.

The 11th August, 1898.

PRESENT:

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Shome Shankar Rajendra Varere.....Plaintiff

versus

Rajesar Swami Jangam.....Defendant*

Hindu Law—Mitakshara—Sūtras—Illegitimate sons—Collateral succession.

Amongst Sudras governed by the Mitakshara law an illegitimate son does not inherit collaterally to a legitimate son by the same father. *Sarasuti v. [100] Mannu*, (1879) I.L.R., 2 All., 134; *Jogandra Bhupati Hurro Chundra Mahapatra v. Nityanand Man Singh*, (1890) I. L. R., 18 Cal. 151; *Sadu v. Baiza*, (1878) I. L. R., 4 Bom., 37; *Nissar Murtojah v. Kowar Dhunwunt Roy*, (1863) Marshall p. 609, and *Krishnayyan v. Muttusami* (1883) I. L. R., 7 Mad., 407.

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi *Ram Prasad* and Pundit *Moti Lal* for the Appellant.

* First Appeal No. 117 of 1896, from a decree of Babu Nilmadhab Rai, Subordinate Judge of Benares, dated the 24th March 1896.

Pundit *Sundar Lal* and Munshi *Jwala Prasad* for the Respondent.

Banerji. J. (Aikman, J., concurring).—The appellant brought the suit out of which this appeal has arisen for recovery of certain sums of money and for possession of a grove and some moveable property alleged to have formed the separate estate of Raja Lingraj, a legitimate son of the ex-king of Coorg.

Raja Lingraj died on the 16th of January 1874, leaving two widows, Rani Deo Amma and Rani Chin Amma. The latter died shortly afterwards. The former took possession of her husband's estate, and continued in possession till her death on the 21st of May 1891. She devised the estate by will to the predecessor in title of the defendant, who has obtained probate of the will.

The property claimed consists of Government Promissory Notes for Rs. 31,000 in deposit in the Bank of Bengal at Benares, Rs. 20,000 deposited with the Maharaja of Vizianagram, withdrawn by the defendant, articles of furniture of the value of Rs. 1,000, and a grove valued at Rs. 1,000.

The plaintiff is one of the sons of the ex-king of Coorg by a lady alleged by the defendant to have been one of the concubines of the king. The plaintiff, however, claims to be of legitimate descent and to be a half-brother of the deceased Raja Lingraj, and as such his legal heir under the Hindu law. As the parties are admittedly Sudras governed by the Mitakshara law, it is further claimed on behalf of the plaintiff that even if he is illegitimate he is entitled to inherit the estate of Raja Lingraj as a collateral heir.

[101] The claim was resisted on two grounds; first, that the plaintiff being an illegitimate son of his father could not, under the Hindu law, inherit the separate estate of a legitimate son of his father; and, secondly, that the money and moveable property claimed did not form part of Raja Lingraj's estate, but belonged solely to Rani Deo Amma.

The lower Court has dismissed the claim on the first of the above grounds, and has expressed no opinion as to the other.

The learned advocate for the plaintiff who has preferred this appeal has frankly conceded that he is unable to support the plea of legitimacy. It appears that the ex-king of Coorg died in England, and upon his death a suit was filed in regard to his estate in the Court of Chancery. That Court declared the present plaintiff and other sons of the king similarly circumstanced to be illegitimate sons, and made a decree dividing the estate between them and Raja Lingraj, the legitimate son. There can be no question therefore that the plaintiff is an illegitimate son of his father.

It has been held in this Court in *Sarasuti v. Mannu*, (1879) I. L. R., 2 All., 134, that the son of a continuous concubine is a *dasi putra* (son begotten on a female slave), to whom the rule of succession laid down in chapter I, section XII of the Mitakshara applies. The plaintiff is therefore a *dasi putra* within the meaning of section XII.

It is stated by the author of the Mitakshara in § 1 of that section that Yajnavalkya "delivered a special rule concerning the partition of a Sudra's goods" in the following terms:—"Even a son begotten by a Sudra on a female slave may take a share by the father's choice. But if the father be dead, the brethren should make him partaker of the moiety of a share; and one who has no brother may inherit the whole property in default of daughter's sons." (vv. 134 and 135). According to this rule, which is interpreted by the author of the Mitakshara in § 2, an [102] illegitimate son of a Sudra inherits a part of his father's estate jointly with the legitimate son of his father, and it is by virtue of this rule that the plaintiff obtained a share out of his father's estate under the decree of the Court of Chancery. It has

been held by their Lordships of the Privy Council in *Jogendra Bhupati Hurro Ohundra Mahapatra v. Nityanand Man Singh*, (1890) I. L. R., 18 Cal., 151, affirming the decision of the Calcutta High Court in the same case, and approving the judgment of the Bombay High Court in *Sadu v. Baiza*, (1878) I. L. R., 4 Bom., 37, that where property was jointly inherited from their father by the son of a wedded wife and an illegitimate son, and was held jointly by them, the rule of survivorship applies, and upon the death of the legitimate son the property goes to the illegitimate son by right of survivorship. Had the property claimed in this suit been property which the plaintiff and the deceased Raja Lingraj had inherited jointly from their father and held as undivided property, we should have been bound to hold, upon the ruling of their Lordships of the Privy Council, that the plaintiff was entitled to it. The property in dispute in this case is, however, admitted to be the separate property of Lingraj, and the plaintiff claims it, not by right of succession to his father or by right of survivorship, but as heir to his legitimate brother, the deceased Lingraj. We have therefore to determine whether the plaintiff is, under the Mitakshara law, an heir to Raja Lingraj.

The special rule of succession of illegitimate sons among Sudras to which we have referred above, appears in chapter I of the Mitakshara, which deals with unobstructed heritage, that is, lineal inheritance. The plaintiff's claim is based upon the right of collateral inheritance, which is treated of in chapter II. In § 2, section I of that chapter, the order of succession on failure of sons "principal and secondary," is thus stated:— "The wife and the daughters, also both parents, brothers likewise and their sons, gentiles, cognates, a pupil and a fellow student; on failure of the first among these the next in order is indeed heir to the estate of one who departed for heaven [103] leaving no male issue. This rule extends to all (persons and) classes." No mention whatever is made in this chapter of illegitimate sons or persons who are entitled to inherit collaterally. On the contrary, we have in the 11th section of chapter I a text of Manu, that an illegitimate son, that is, the son of an unmarried woman, is not a collateral heir. With reference to the different classes of sons, it is laid down in that chapter as follows:—

"Section 30. Manu having premised two sets of six sons, declares the first six to be heirs and kinsmen and the last to be not heirs, but kinsmen. The true legitimate issue, the son of a wife, a son given, and one made by adoption, a son of concealed origin and one rejected (by his parents) are the six heirs and kinsmen. The son of an unmarried woman, the son of a pregnant bride, a son bought, a son by a twice married woman, and a son self-given, and a son by a Sudra woman are six, not heirs, but kinsmen."

"Section 31. That must be expounded as signifying that the first six may take the heritage of their father's collateral kinsmen (*sapindas* and *samanodacas*) if there be no nearer heir, but not so the last six."

This is a distinct authority for holding that the illegitimate son is not a collateral heir. By an exceptional rule laid down in section XII of chapter I of the Mitakshara on the authority of Yajnavalkya he takes only his father's estate by right of inheritance, and according to their Lordships of the Privy Council he does so by right of survivorship also. But there is no authority for holding that he succeeds to the estate of collaterals as heir. Had it been intended to confer on him the right of collateral succession in the same way that the right of lineal succession has been bestowed on him, we should have expected a similar rule in chapter II, as an exception to the general rule, in the case of Sudras. The enumeration of heirs in that chapter is no doubt not exhaustive, but the rule which guides collateral succession is based on the text of

Manu that "to the nearest sapinda the inheritance next belongs." As sapinda [104] relationship pre-supposes a lawful marriage, an illegitimate son cannot come within the category of sapindas so as to have a right of succession collaterally. He cannot be ranked as a brother within the meaning of section IV or of § 2 of section I. The brothers referred to in chapter I, section XII § 2, are sons of the wedded wife of a Sudra. The brothers referred to in the first portion of § 1 are also brothers of the same description. (See Virmitrodaya, Sarkar's Translation, p. 130). In the last clause of that *placitum* it is no doubt said that the son of a female slave "who has no 'brothers' may inherit the whole property in default of daughter's sons"; but there the word seems to have been used in its usual signification, an illegitimate son of the father being in one sense the brother of a legitimate son. As such brother he succeeds to the father lineally and by survivorship under the exceptional rule laid down in section XII, but there is no authority for holding that he can succeed collaterally to the separate estate of his legitimate brother. The authority of Manu and the author of the Mitakshara is, as has been pointed out above, the other way. To the same effect is the opinion of writers on Hindu law. In W. H. Macnaghten's Principles and Precedents of Hindu Law it is stated, at p. 15, that there is "no law admitting the son of a Sudra by a female slave to share the estate of collaterals." West and Bühler express the opinion that "illegitimates inherit collaterally only by caste custom" (p. 83) and Mayne in his Hindu Law and Usage says, in paragraph 508, that "illegitimate sons can only take to their father's estate. They have no claim to inherit to collaterals." The authority of decided cases, such as we have on the subject, is also to the same effect. In *Nissar Murtojah v. Kowar Dhunwunt Roy*, (1863) Marshall, p. 609, and in *Krishnayyan v. Muttusami*, (1883) I. L. R., 7 Mad., 407, it was held that illegitimate sons cannot succeed collaterally, and we have not been referred to any authority in which a contrary view was adopted. The learned counsel for the appellant has urged that the decision of the Privy Council in the case to which we have referred above must be held to be conclusive [105] on the point and to have finally decided it in favour of the appellant's contention. As we have pointed out above, all that their Lordships held was that an illegitimate son succeeds by right of survivorship to the paternal estate which jointly passed to him and his legitimate brother. The question of collateral succession was neither raised nor considered, nor was it decided. So far as the illegitimate son's right of survivorship goes, the ruling of their Lordships must be regarded as conclusive. But the question which we have to decide in this case was not raised before their Lordships and was not decided. In the case of *Sadu v. Baiza*, (1878) I. L. R., 4 Bom., 37, NANABHAI HARIDAS, J., advisedly abstained from deciding that question. We see no reason therefore to extend the operation of the ruling of the Privy Council beyond what was actually decided in the case with which their Lordships were dealing. In *Sadu v. Baiza*, Sir MICHAEL WESTROPP, C. J., observed that a legitimate son and an illegitimate son who had jointly inherited the estate of their father should be regarded as joint tenants and not as tenants in common, and that therefore the rule of survivorship would apply to them. This view, it seems, was approved by the Lords of the Privy Council. In a case like this where the legitimate son and the illegitimate son were separate that rule can have no application. It does not follow from the fact that a person is entitled to succeed by right of survivorship that he is an heir and may inherit collaterally also, although the converse proposition may be true.

The learned advocate for the appellant referred us to a passage on p. 944 of Sarvadhikari's Tagore Lectures on the Hindu Law of Inheritance, where the

author expresses the opinion that the son of a *dasi* should "by all the analogies of Hindu law and the plain rules of equity and justice" be declared entitled to the property of collaterals. The analogy to which he refers is that of an adopted son; but it must be observed that by an express text of Manu an adopted son is declared "entitled to take the heritage [106] of his father's collateral kinsmen." (See Mitakshara, Chapter I, section XII, §§ 30 and 31).

For the above reasons we are of opinion that the plaintiff appellant has been rightly held not to be the heir of Raja Lingraj, deceased, and his suit has been properly dismissed. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This was approved in (1901) 25 Mad., 429; (1901) 25 Mad., 519; (1906) 9 O. C., 352.]

[21 All. 106]

CRIMINAL REVISIONAL.

The 22nd August, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Queen-Empress

versus

Babu Lal.*

Criminal Procedure Code, section 285—Assessors—Effect of incapacity of assessors to understand the proceedings.

Three assessors were chosen to assist the Court at a trial. Before the case commenced it was discovered that one of the assessors was deaf, and his presence was accordingly dispensed with. The trial proceeded with two assessors present; but after the Public Prosecutor had closed his case, it was discovered that one of the remaining assessors was so deaf as to be incapable of understanding the proceedings. Under these circumstances it was held that the trial having been held with practically only one assessor, the proceedings ought to be set aside and a new trial ordered.

THE record of this case was submitted to the High Court by the Officiating Sessions Judge of Azamgarh for such orders as the Court might think fit to pass. There was also an appeal to the High Court by the convict. The facts which led to the case being referred are stated in the order of the High Court, which was as follows:—

Banerji, J.—This case has been reported to this Court by the learned Sessions Judge of Azamgarh. It appears that before the trial began it was discovered that, of the three assessors who attended, one was deaf, so that the trial began with two assessors. It was discovered, after the Public Prosecutor had closed his case, that another assessor was so deaf as to be incapable of understanding the proceedings. The learned Judge, however, proceeded with the trial, being of opinion that by the analogy [107] of section 285 of the Code of Criminal Procedure the trial would be a valid one, one assessor having been present throughout and having understood the proceedings. I am

* Criminal Miscellaneous No. 86 of 1898.

unable to agree with the learned Sessions Judge. Section 285 contemplates the case of a trial which had commenced with the aid of two or more assessors, who at the commencement of the trial were capable of acting as assessors. Such was not the case here. The assessor who has been discovered to be deaf and incapable of understanding the proceedings was not a fit person to be selected as an assessor; therefore the trial was really held with the help of one assessor only. Section 268 requires that all trials before a Court of Session should be either by jury or with the aid of assessors, and under section 284 two or more assessors should be chosen to aid the Judge. Where, as in this case, the trial was held with the aid of only one assessor who was capable of acting as such, the Court holding the trial was not properly constituted, and all the proceedings were null and void. The same view appears to have been taken by the Madras High Court—see the case cited at p. 270 of Henderson's edition of the Code of Criminal Procedure, 1898. I set aside the proceedings held by the learned Sessions Judge of Azamgarh, and direct that the accused be tried again with the aid of assessors chosen according to law.

NOTES.

[This was followed in 25 Bom., 694. See also 24 Mad., 523.]

[21 All. 107]

REVISIONAL CRIMINAL.

The 24th August, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Queen-Empress

versus

Mutasaddi Lal.*

*Criminal Procedure Code, sections 110, 119—Security for good
behaviour—Power to order further inquiry—Accused
person—Criminal Procedure Code, section 437.*

Held, that a person against whom proceedings under Chapter VIII of the Code of Criminal Procedure are being taken is " an accused person " within the meaning of section 437 of the Code. *Queen-Empress v. Mona Puna*, (1892) I. L. R., 16 Bom., 661, and *Jhoja Singh v. Queen-Empress*, (1896) I. L. R., 23 Cal., 493, followed.

[108] IN this case a Magistrate of the first class of the Muzaffarnagar district instituted proceedings, upon a report made by the Police, against Mutasaddi Lal under section 110 of the Code of Criminal Procedure. Mutasaddi Lal appeared to show cause before the Magistrate; evidence on both sides was heard, and ultimately the rule against Mutasaddi Lal was discharged. Subsequently the Magistrate of the district again took up the proceedings against Mutasaddi Lal, purporting to act in doing so under section 437 of the Code of Criminal Procedure. Mutasaddi Lal was called upon to show cause why the order of the first class Magistrate discharging him should not be set aside. On the date fixed no cause was shown, and the District Magistrate set aside

* Criminal Revision No. 441 of 1898.

the order of discharge, and called upon Mutasaddi Lal to show cause again why he should not furnish security to be of good behaviour.

Against this order Mutasaddi Lal applied in revision to the High Court, on the ground mainly that, as he was not an "accused person" within the meaning of section 437 of the Code, the District Magistrate had no jurisdiction to reopen the proceedings against him under section 110.

Mr. G. W. Dillon, for the Applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

Banerji, J.—The applicant was called upon by a Magistrate to furnish security for good behaviour. After holding proceedings under Chapter VIII of the Code of Criminal Procedure, the Magistrate being of opinion that sufficient reasons had not been made out for ordering the applicant to give security, discharged him under section 199 of the Code. The District Magistrate has ordered further inquiry into the matter, purporting to act under section 437. It is urged that under that section the Magistrate of the District was not competent to order further inquiry, as the applicant was not an "accused person" within the meaning of that section. The Code of Criminal Procedure contains no definition of an "accused person," but it was held by the Bombay High Court in [109] *Queen-Empress v. Mona Puna*, (1892) I. L. R., 16 Bom., 661, that the term "accused" means "a person over whom a Magistrate or other Court is exercising jurisdiction." The same view was held by the Calcutta High Court in *Jhoja Singh v. Queen-Empress*, (1896) I. L. R., 23 Cal., 493. I see no reason to put a different interpretation on the words "an accused person" in section 437. The District Magistrate was therefore competent to order further inquiry, and this application is not sustainable. I dismiss the application.

NOTES.

[As regards the meaning of 'accused' person, this was followed in 34 All., 593; (1908) 36 Cal., 168; (1911) 35 Bom., 614; 13 Bom. L.R., 505; (1901) 24 All., 148; (1908) 25 All., 375; but dissented from in (1911) P.R., 6 F.B.; (1905) P.R., 42; 27 Cal., 662; 20 M.L.J., 137. See also (1901) 28 Cal., 709.]

[21 All. 109]

REVISIONAL CRIMINAL.

The 25th August, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Queen-Empress

. versus

Abdul Razzak Khan and another.*

Criminal Procedure Code, sections 190, 191—Cognizance taken by Magistrate under section 190, sub-section 1, clause (c)—Jurisdiction of the Magistrate to hold preliminary inquiry not thereby ousted.

Held, that the fact of a Magistrate having taken cognizance of a case under section 190, sub-section 1, clause (c) of the Code of Criminal Procedure, does not disqualify such Magistrate from holding a preliminary inquiry and committing the case to the Court of Session.

* Criminal Miscellaneous No. 87 of 1898.

IN this case a preliminary inquiry was pending before the District Magistrate of Mainpuri into a charge of offences under section 218 of the Indian Penal Code alleged to have been committed by one Abdul Razzak Khan, an Inspector of Police, and another. Previously to this inquiry the same Magistrate had made a departmental investigation into the charges against the accused, and had thus taken cognizance of the case under section 190 (1) clause (c) of the Code of Criminal Procedure. The accused accordingly under section 191 of the Code moved the District Magistrate to transfer the case to some other Magistrate. This the District Magistrate declined for various reasons to do, mainly, because the charge was exclusively triable by the Court of Session, and must necessarily [110] be committed if any case against the accused were made out, and, if the transfer were to be granted as a matter of grace, the case was one which ought to be in the hands of the Magistrate of the District, and the other Magistrates to whom it was possible to transfer it were for one reason or another unsuitable.

Against the order of the District Magistrate rejecting their application for transfer, the accused applied in revision to the High Court, urging that the Magistrate having taken cognizance of the case under section 190 (1) clause (c), was thereby debarred from making a preliminary inquiry into it.

Mr. B. E. O'Connor and Kunwar Parmanand, for the Applicant.

Banerji, J.—This is an application for the transfer to another Court of a criminal case now pending in the Court of the District Magistrate of Mainpuri. The application purports to be made under sections 191 and 526 of the Code of Criminal Procedure. The case is one exclusively triable by a Court of Session, so that the Magistrate is only holding a preliminary inquiry into the matter. It appears that he has taken cognizance of the case under sub-section 1, clause (c) of section 190, and it is urged that, that being so, the Magistrate is not competent to hold a preliminary inquiry in this case, having regard to the provisions of section 191. I am unable to agree with this contention. In my opinion that section does not disqualify a Magistrate who has jurisdiction even to try the case from holding a preliminary inquiry. What that section provides is that if a Magistrate takes cognizance of an offence under sub-section 1, clause (c) of section 190, and if, before any evidence is taken, the accused objects to being tried by such Magistrate, he may either transfer the case to another Magistrate or commit the case to the Court of Session. He is thus empowered to make a commitment in a case within his cognizance. He cannot make commitment without holding a preliminary inquiry, so that the section distinctly empowers him to hold a preliminary inquiry even in cases triable by him-[111] self. It necessarily follows that he is competent to hold a preliminary inquiry in cases exclusively triable by a Court of Session. In this case it has not been satisfactorily shown that there is a sufficient reason under section 526 of the Code of Criminal Procedure to transfer the preliminary inquiry to some other Court. It is desirable that the inquiry should be held by an officer holding the position of the District Magistrate, and there is no reason to assume that the District Magistrate of Mainpuri will not make his inquiry with an open mind. I dismiss the application and withdraw the order for stay of proceedings.

NOTES.

[See also 22 Mad., 148.]

[21 All. 111]

APPELLATE CRIMINAL.

The 7th September, 1898.

PRESENT:

MR. JUSTICE BANERJI.

Queen-Empress
versus
Jeochi.*

*Criminal Procedure Code, section 288—Evidence—Use in Sessions Court
of evidence taken before the Committing Magistrate.*

Although under certain circumstances a Court of Session may use evidence given before the Committing Magistrate as if it had been given before itself, it is not proper for a Court of Session to base a conviction solely upon such evidence, there being no other evidence on the record to corroborate it. *The Queen v. Amanulla*, (1874) 12 B. L. R., App., 15; *Queen-Empress v. Bharamappa*, (1888) I. L. R., 12 Mad., 123, and *Queen-Empress v. Dhan Sahai*, (1885) I. L. R., 7 All., 862, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Satya Chandar Mukerji for the Appellant.

The Government Pleader (Munshi Ram Prasad) for the Crown.

Banerji, J.—The appellant, Musammatt Jeochi, was charged with having torn off an earring from the ear of a boy named Muneshar, and has been convicted under section 394 of the Indian Penal Code. The evidence adduced in the Court of Session did not at all prove the guilt of the appellant. On the contrary, [112] that evidence showed that the ear of the boy had been torn by a mere accident. The witnesses examined in the Court of Session had all of them, with the exception of Sukhu, made statements before the Committing Magistrate which were diametrically opposed to those made in the Court of Session. The learned Sessions Judge purporting to act under section 288 of the Code of Criminal Procedure, admitted in evidence the statements made by the witnesses in the Court of the Committing Magistrate, and has convicted the accused on that evidence alone. I must observe that, beyond the evidence which was so admitted, there was no other evidence before the learned Sessions Judge which proved the guilt of the accused. It is contended that the learned Sessions Judge was not justified in convicting the appellant on the evidence given by the witnesses in the Court of the Committing Magistrate and retracted in the Court of Session. The contention of the learned vakil is supported by the ruling of the Calcutta High Court in *The Queen v. Amanulla*, (1874), 12 B. L. R., App., 15, which was followed by the Madras High Court in *Queen-Empress v. Bharamappa*, (1888) I. L. R., 12 Mad., 123, and by this Court in *Queen-Empress v. Dhan Sahai*, (1885) I. L. R., 7 All., 862. In the case last mentioned, it was observed by STRAIGHT, J., that "section 298 was never intended to be used so as to enable a Court trying a case to take a witness' deposition bodily from the Magistrate's record, as the Judge has done here, and treat it as evidence before himself." With these observations I fully concur. As remarked by MORRIS, J., in *Queen v. Amanullah*, (1874) 12 B. L. R., App., 15, a Court of Session may admit in evidence the statements made by witnesses before the Committing Magistrate when such evidence "is to a certain extent corroborated by independent testimony before himself." There

* Criminal Appeal No. 793 of 1898.

was no such testimony in the present instance. It is true that the attention of the witnesses was called to the statements made by them before the Committing Magistrate, and that those statements were read to them; but the fact of that being done was not alone sufficient to justify the learned Sessions [113] Judge in basing the conviction solely upon evidence no part of which was given before him. Further, having regard to the fact that the witnesses had in two Courts made diametrically opposite statements, it was unsafe to found a conviction on their testimony. I accordingly allow the appeal, and setting aside the conviction and sentence, I acquit the appellant of the offence of which she was convicted, and direct that she be at once released.

NOTES.

[A Sessions Court would not be justified in basing a conviction solely on statements made before another tribunal and retracted before itself :—28 All., 683.]

[21 All. 113]

The 7th September, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Queen-Empress
versus
Muhammad Saeed Khan.*

*Act No. XLV of 1860 (Indian Penal Code) sections 463 et seq.—Forgery—
Meaning of the term "fraud" discussed.*

A Police head-constable's character and service roll in his custody was found to have been tampered with in this way, that a page, apparently containing remarks unfavourable to the head-constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of Police, had been inserted in its place, the intent being to favour the chances of the promotion of the said head-constable.

Held, that this interpolation amounted to forgery within the meaning of section 463 of the Indian Penal Code, but that inasmuch as it was not proved that the head-constable himself prepared and inserted the false page in his character roll, he was rightly convicted of abetment only. *Queen-Empress v. Shoshi Bhushan*, (1893) I. L. R., 15 All., 210; *Queen-Empress v. Vilhal Narayan*, (1886) I. L. R., 13 Bom., 515, and *Lolit Mohan Sarkar v. The Queen-Empress*, (1894) I. L. R., 22 Cal., 313, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. Wallach for the Appellant.

The Government Pleader (Munshi Ram Prasad) for the Crown.

Banerji, J.—The appellant, Muhammad Saeed Khan, has been convicted of having been in dishonest possession of stolen property and of having abetted the offence of forgery. He has been sentenced for these offences to a total term of ten years' rigorous imprisonment.

[114] He was a head-constable stationed at a police station in the city of Agra. Upon information received by the District Superintendent of Police that Saeed Khan had received a bribe in marked rupees, the District Superintendent searched his quarters, and found in a box belonging to him, of which he produced the key, certain books and papers. Among these were eleven

* Criminal Appeal No. 711 of 1898.

"character and service roll" books of the N.-W. P. and Oudh Constabulary, five of which were blank. These books are Government property, and, with the exception probably of one, were kept either in the Police Office at Agra or in the Office of the Inspector-General of Police. They must have been stolen from the place where they were kept, and as the accused has not given any explanation of his possession of them, it is clear that he knew that they were stolen property. He has therefore been rightly convicted under section 411 of the Indian Penal Code.

Mr. *Wallach*, the learned counsel for the appellant, addressed his argument chiefly to the second branch of the case, namely, that relating to the abetment of forgery. He does not dispute the facts as found by the learned Sessions Judge, which are as follows:—In the character and service roll of the accused (Ex. 14), page 11 has been substituted for some other page, very probably Ex. 12, which contained remarks apparently unfavourable to the accused made by several District Superintendents of Police as to the general conduct and Police work of the accused, and the entries in p. 11 of Ex. 14 are undoubtedly false entries, in which the unfavourable remarks contained in Ex. 12 do not find place. A glance at the entries on p. 11 of Ex. 14 leaves no room for doubt that they are false. Mr. *Wallach* contends that, accepting the entries to be false, they do not amount to forgery as defined in section 463 of the Indian Penal Code. He urges that the fabrication of p. 11 was not made dishonestly or fraudulently, and therefore the said page is not a false document within the meaning of section 464, and that even if it is a false document, it was not made with any of the intents mentioned in section 463, and is consequently not a forgery. Two questions thus arise for [115] determination. First, whether the document is a false document; and second, whether it was made with one or more of the intentions specified in section 463. In reference to the first point, it may be conceded that the document was not made "dishonestly;" but was it made "fraudulently," that is, "with intent to defraud?" If the document was made "with intent to defraud," as stated in section 25, and "with intent to commit fraud or that fraud may be committed," as stated in section 463, it is a forgery. The terms "fraud" and "defraud" are not defined in the Indian Penal Code. Sir James Fitz-James Stephen in his *History of the Criminal Law of England*, vol. II, p. 121, observes that "whenever the words 'fraud' or 'intent to defraud' or 'fraudulently' occur in the definition of a crime, two elements at least are essential to the commission of the crime; namely, first, deceit or an intention to deceive, or in some cases mere secrecy; and secondly, either actual injury or possible injury, or an intent to expose some person either to actual injury or to a risk of possible injury by means of that deceit or secrecy." "This intent," he adds, "is very seldom the only or the principal intention entertained by the fraudulent person, whose principal object in nearly every case is his own advantage. * * * A practically conclusive test as to the fraudulent character of a deception for criminal purposes is this:—Did the author of the deceit derive any advantage from it which could not have been had if the truth had been known? If so, it is hardly possible that the advantage should not have had an equivalent in loss or risk of loss to some one else, and if so, there was fraud." Where, therefore, there is an intention to deceive and by means of the deceit to obtain an advantage there is fraud, and if a document is fabricated with such intent, it is a forgery. This was held by this Court in *Queen-Empress v. Shoshi Bhushan*, (1893) I. L. R., 15 All., 210. A somewhat wider interpretation has been placed on the word 'fraud' by the Bombay High Court in *Queen-Empress v. Viithal Narayan*, (1886) I. L. R., 13 Bom., 515, which was followed by the Calcutta High Court in *Lolit Mohan Sarkar v. The* [116] *Queen-Empress*, (1894)

I. L. R., 22 Cal., 313. In the case in the Bombay High Court the learned Judges, accepted the interpretation of LEBLANC, J., in *Haycraft v. Creasy*, (1801) 2 East, 92, that "by fraud is meant an intention to deceive; whether it be from any expectation of advantage to the party himself or from ill will towards the other is immaterial." Whatever interpretation of fraud may be adopted, the false entries in the character roll of the accused were made with the intention of committing fraud. The intention was to deceive the superior officers of the accused, and by means of such deception to secure his advancement in the service, and thus to gain an advantage for him at the sacrifice of others. The entries were therefore a forgery within the meaning of section 463. As it has not been shown that the forgery was committed by the accused himself, he has been rightly convicted of the abetment of that offence.

It is next urged that the sentence passed on the accused is unduly severe. The learned Judge has inflicted on him the highest penalty to which he could be liable under sections 411 and 466. In my opinion this was not such a gross case as to call for such severe punishment. The stolen character books, of which the accused was in possession, were of little value, and had his object in retaining possession of them not been to obtain facilities for the perpetration of the forgery, his offence would not have justified a heavy sentence. The forgery also was not of a very heinous character, although fabrication of the writing and signatures of several superior officers of the Police was a most impudent act. In my opinion it will be sufficient for the ends of justice to sentence the appellant to two years' rigorous imprisonment for the offence under section 411, and to three years' rigorous imprisonment for the other offence, and altogether to a term of five years' rigorous imprisonment. While, therefore, I confirm the convictions, I reduce the sentence to the extent stated above.

NOTES.

[See also (1905) 28 Mad., 90 F.B.]

[117] APPELLATE CIVIL.

The 11th November, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Jamna Das and another.....Defendants

versus

Udey Ram and others.....Plaintiffs.*

Procedure—Appeal—Appeal by defendants against whom specifically no decree was made but whose defence to the suit was necessarily disposed of by the decree.

Certain plaintiffs sued as second assignees of a debt to recover the debt, and made defendants to the suit their assignors, the original debtors, and certain persons whom they alleged to have been prior assignees of the debt, but whose assignment, according to them, had become void through non-fulfilment of the conditions upon which it was made. The Court of First Instance gave a decree to the plaintiffs against the original debtors. An appeal by the

* Second Appeal No. 723 of 1896, from a decree of Syed Muhammad Tajammul Husen, Additional Subordinate Judge of Cawnpore, dated the 11th August 1896, confirming a decree of Bala Banke Behari Lal, Munsif of Cawnpore, dated the 24th December 1895.

first assignees was dismissed by the Lower Appellate Court, on the ground that there being no decree against the appellants their appeal would not lie. On second appeal it was *held* that the appeal would lie, inasmuch as the decree, though not a decree against the appellants by name, necessarily implied a finding that the assignment to the appellants, upon the basis of which they resisted the plaintiffs' claim had become void.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the Appellants.

Mr. *T. Conlan* (for whom Mr. *A. H. Hamilton*), for the Respondents.

Burkitt and Dillon, JJ.—This suit was one to recover a debt alleged to be due by the defendants Nos. 1 and 2 to one Sri Kishan Das, defendant No. 3 in the array of parties, by virtue of an assignment from the said Sri Kishan Das. The debt had originally been assigned by Sri Kishan Das to the defendants Nos. 4 and 5, Jumna Das and Lachmi Narain, the present appellants; but it was alleged that these defendants Nos. 4 and 5 had failed to perform the conditions upon which the assignment to them had been made, that the assignment was thereupon cancelled and a new assignment in favour of [118] the plaintiffs was substituted. The material issues framed by the Court of First Instance upon the pleadings of the parties were:—(1) Upon what condition was the debt assigned to the defendants Nos. 4 and 5? (2) Had that assignment become void by reason of any default on the part of the defendants Nos. 4 and 5? The Munsif found that the assignment had been made to these defendants upon certain conditions; that they had not fulfilled those conditions, and that therefore the assignment to them had become void. The Munsif accordingly, in pursuance of those findings, gave a decree in favour of the plaintiffs against the defendants Nos. 1 and 2, whose debt had been assigned to the plaintiffs by Sri Kishan Das, the third defendant. The decree drawn up in pursuance of the judgment containing the findings mentioned above was as follows:—“It is ordered and decreed that the claim for Rs. 790-3-0, with future interest at 8 annas per cent. per mensem, be decreed against the defendants Nos. 1 and 2. The plaintiffs and the defendants Nos. 1 and 2 shall recover their costs from Sri Kishan Das, defendant No. 3. The other defendants Nos. 4 and 5 shall bear their own costs.” The defendants Nos. 4 and 5 appealed against that decree, but the Lower Appellate Court (Subordinate Judge of Cawnpore), on a preliminary objection raised before it by the respondents, refused to hear and dismissed the appeal, on the ground that no portion of the claim had been decreed against the appellants. He held in effect that the decree as drawn up did not damage the appellants. These appellants have now come to this Court in second appeal, contending that the Lower Appellate Court was wrong in holding that they had no right of appeal.

For the respondents it has been contended, as before the Lower Appellate Court, that the appellants should have made an application to the original Court under section 206 of the Code of Civil Procedure, and should have procured an entry in the decree of the finding that their assignment had become void.

[119] In our opinion the decision of the Lower Appellate Court which gave effect to that contention is wrong. We are unable to perceive any variance between the decree and the judgment which the appellants could have asked the Munsif to remedy. The decree as it stands does, in our opinion, fully and necessarily imply a finding that the appellants' assignment had become void, inasmuch as, but for the existence of such a finding, a decree could not have been given in favour of the plaintiffs, who admittedly were but subsequent assignees of the debt originally assigned to the appellants.

Under these circumstances we think the decree of the Lower Appellate Court was wrong. We allow this appeal. We set aside the decree of the Subordinate Judge, and, as his decree proceeded upon a preliminary point and as we have overruled his decision upon that point, we remand the case for trial upon the merits under section 562 of the Code of Civil Procedure. The appellants will have their costs of this appeal in any event.

Appeal decreed and cause remanded.

NOTES.

[These are similar decisions:—(1905) 9 C.W.N., 584; (1907) 30 Mad., 447. See however, (1904) P.R., 56; (1907) P.R., 57; and also (1911) 12 I.C., 167 where the case of a party in whose favour a decree is passed is discussed.]

[21 All. 119]

The 12th November, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Mujib-ullah.....Plaintiff
versus

Umed Bibi and another... ..Defendants.*

Pre-emption—Muhammadan Law—Wajib-ul-arz—Pre-emptor disentitled by his own conduct to pre-empt part of the property sold—Pre-emptor not entitled to pre-empt any portion thereof.

Where a pre-emptor sued for possession by right of pre-emption of certain property sold by one and the same sale deed, claiming as to one portion of the property sold under the Muhammadan law and as to another under the *wajib-ul-arz*, and it was found that he had by his own acts or omissions disentitled himself from claiming that portion of the property to which the Muhammadan law applied, it was held that the pre-emptor was not entitled to pre-emption in respect of any portion of the property covered by the said sale deed. *Muhammad Wilayat Ali Khan v. Abdul Rab*, (1898) I. L. R., 11 All., 108, followed.

[120] THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. T. Conlan and D. N. Banerji, for the Appellant.

Pandit Sundar Lal and Pandit Moti Lal, for the Respondents.

Burkitt and Dillon, JJ.—This is an appeal brought by a plaintiff in a pre-emption suit. The sale deed, in respect of which the suit has arisen, was dated the 7th of May 1894, and purported to convey to the vendee shares in some 47 villages, 3 pacca houses and a mortgage deed. In the Court of First Instance (Subordinate Judge of Gorakhpur) the suit was dismissed on the ground that the document upon which the suit was founded was not a sale deed, but was a deed of gift. On the appeal on that point to the District Judge it is not easy to say what the opinion of the Lower Appellate Court was. The learned Judge disagreed with the finding of the Court of First Instance, that the document was a deed of gift, but at the same time seems to have held that it was not a sale, that it was only a "family arrangement," and finally affirmed the decree of the Court of First Instance, on the ground that there were "no materials for determining the plaintiff's share of the Rs. 15,500 set forth in the sale deed, and it passes the wit of man to devise a decree which should assign to the

* Second Appeal No. 806 of 1896, from a decree of V. A. Smith, Esq., District Judge of Gorakhpur, dated the 13th June 1896, confirming a decree of Pandit Bansidhar, Subordinate Judge of Gorakhpur, dated the 30th March 1896.

plaintiff his proper share of the contingent liabilities imposed on the transferee." With respect to the judgment of the Lower Appellate Court we desire it to be understood that we do not concur in any proposition of law laid down therein, but as the question as to the nature of the deed and the manner in which the sum payable by the pre-emptor should be calculated have not been fully discussed on both sides in this case, we refrain from saying any more on that matter. On behalf of the respondent Pandit *Moti Lal* contended that this case was exactly on all fours with the case of *Muhammad Wilayat Ali Khan v. Abdul Rab*, (1888) I. L. R., 11 All., 108. In that case, as in the present case, two properties were claimed by right of pre-emption, one property being claimed under the Muhammadan law and the other by virtue of the provisions of the *wajib-ul-arz*. [121] Such is also the case here, the three houses being claimed under the Muhammadan law, and 8 out of the 47 shares sold being claimed under the provisions of the *wajib-ul-arz*. In the case just cited the plaintiff pre-emptor failed to prove that he had fulfilled the conditions required by Muhammadan law as preliminaries to the institution of a claim for pre-emption. So here also it has been found as a fact by both the lower Courts that the plaintiff here failed to perform these preliminaries. The result is that the plaintiff appellant, being shown to be disqualified from claiming to pre-empt these houses under the Muhammadan law, cannot possibly get a decree for the whole of that which by law, but for his own laches, he would be entitled to pre-empt. In the case of *Muhammad Wilayat Ali Khan v. Abdul Rab*, (1888) I. L. R., 11 All., 108, cited above, the late Chief Justice of this Court, whose opinion on such a matter is entitled to every weight and respect, remarked as follows:—"The question then arises, can there be any difference between the case of the plaintiff coming into Court and claiming a portion of the property sold, and the case of a plaintiff coming into Court and claiming the whole, he being at the time disentitled by his own act or laches to maintain a claim as to a part? It appears to us that there can be no difference in principle, and that exactly the same result must follow in this case as would have followed if the plaintiff had come into Court and had abstained from claiming the property in Moradabad. A person who claims to be a pre-emptor and has disqualified himself from claiming the whole, cannot be in a better position than a person who has come into Court and has claimed a part only when he was entitled to claim the whole." The case now before us and the case just cited are admittedly on all fours. No attempt has been made, or indeed could be made, to show any distinction between them. It is contended that we should not follow the rule laid down in that case. We, however, fully concur in the rule laid down therein and in the reason given for it. We agree with the learned Judges who decided that case, that an intending [122] pre-emptor who has placed himself in the position occupied by the plaintiff here and by the pre-emptor in the case of *Muhammad Wilayat Ali Khan v. Abdul Rab*, (1888) I. L. R., 11 All., 108, must be considered to have, by his own act as a matter of law, forfeited his right to pre-empt any portion of the property. We follow the rule of law laid down in that case and for the reasons given above, and not because we agree with the Lower Appellate Court, with whose judgment, as a matter of fact, we disagree, we dismiss this appeal with costs.

Appeal dismissed.

[12 All. 122]

APPELLATE CRIMINAL.

The 16th November, 1898

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Queen-Empress

versus

Timmal and others.*

Act No. XLV of 1860 (Indian Penal Code), Sections 96, et seqq.—Right of private defence—Act No. I of 1872 (Indian Evidence Act), Section 205—Presumption—Pleadings.

Held, that an accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant. *Queen-Empress v. Prag Dat*, (1898) I. L. R., 20 All., 459, referred to.

THE facts of this case are fully discussed in the judgment of the Court.

The Officiating Government Advocate (Mr. A. E. Ryves), for the Appellant.

Babu Bishnu Chandar, for the Respondents.

Knox, Acting C. J., and Banerji, J.—This is an appeal presented under directions of the Local Government from an appellate order of acquittal passed by the Sessions Court of Mirzapur. The Magistrate of the 1st class at Mirzapur, before whom the case originally came, had found five persons guilty of offences under sections 147 and 325 read with section 149 of the [123] Indian Penal Code: but had passed sentences upon the five only for offences under section 147. The learned Sessions Judge arrived at the following conclusions upon the evidence, namely, first, that the appellants before him had acted in exercise of the right of private defence of property; secondly, that there was no evidence that the same accused formed an unlawful assembly. He accordingly acquitted them of the charge under section 147, and apparently omitted to take any notice of the conviction under section 325 read with section 149 of the Indian Penal Code. Holding the views he did, the learned Sessions Judge should have in terms recorded an acquittal upon this charge also.

The facts found by the Magistrate were that Timmal, one of the respondents before us, considered he possessed a right to gather the fruit of certain mahua trees. That fruit was being peaceably gathered by certain persons on behalf of one Altaf Husain. With a view of enforcing Timmal's right or supposed right the five accused came upon the spot and with clubs assaulted five men. The injury caused to two was, according to the medical evidence, which has not been rebutted, "grievous hurt." The Magistrate added to the above recital of facts the words:—"Timmal's party cannot claim that they were defending the enjoyment of a right actually in possession." The appeal as presented sets out that the respondents have not made out their defence that they acted within their right of private defence of property. This ground is not happily worded. We have, with the assistance of the learned vakil who

* Criminal Appeal No. 1007 of 1898.

appeared for the respondent, examined the defences raised by the various respondents before the Magistrate. Timmal says that he never beat any one and that he saw no assault. Badan does not say, so far as he is concerned, that he hit any one; he says, on the contrary, that he was hit. The other three respondents all say that they were not on the spot at the time when the disturbance took place. The only hint that such a plea was ever in contemplation as a plea in defence [124] is to be found in the examination of Badan, and of Badan alone. We need not go into the question whether Badan, an accused, can, in his statement, raise a plea on behalf of the co-accused, which those co-accused never raised for themselves, and which they virtually repudiated in the statements made by them. In appeal before the Court of Session all the five respondents, who were then appellants, did put forward as one of the grounds of appeal that they had acted as they did in exercise of the right of private defence of property.

The learned Government Advocate contended that the respondents were precluded from raising this plea by the very nature of the defences which they had set up. He drew our attention to an unreported case, and further to the case of *Queen-Empress v. Prag Dat*, (1898) I. L. R., 20 All., 459. It was laid down in both these cases, more particularly in the latter case, that the law in India is that, when a person is accused of an offence, the burden of proving the existence of circumstances bringing the case within any of the general exceptions in the Indian Penal Code, is upon the accused, and it is directed by that law, as enacted in section 105* of the Indian Evidence Act, 1872, that the Court shall presume the absence of such circumstances. He pointed out that not only had the accused not set up the plea that they had acted in the exercise of the right of private defence of property, but further that there was no evidence on the record upon which any circumstance could be inferred which would substantiate such a plea.

We followed the learned vakil very carefully in his answer to this part of the Government case. Taking all that he said as being matter proved, we found it amounted to this, namely, that Timmal and his party had been put into possession of the mahua trees in dispute before any lease of the same trees had been given to the persons on whose behalf the persons assaulted were on the day in question collecting the mahua fruit, and that the fact of possession having been given to [125] Timmal and his party had, at the time possession was given, been proclaimed in the village. At this point the learned vakil stopped, and rightly stopped; he had no evidence upon which to set up a case that any one of his clients had struck a single blow or committed any assault. No blows having been struck and no assault committed, the exercise of the right of private defence fell at once to the ground. The learned vakil made some attempt to show that a conviction under section 147 was not justified by the evidence, and he referred us to the case of *Pachkauri v. Queen-Empress*, (1897) I. L. R., 24 Cal., 686, and *Queen-Empress v. Narsang Patha Bhai*, (1890) I. L. R., 14 Bom., 441. Neither of those cases is in point here. In *Pachkauri v. Queen-Empress* the accused were at the time the assault was committed on the spot, and exercising their rights over the property claimed by them. In the present case the circumstances were the very reverse; the persons before us, who were assaulted, were picking up the mahua

* [Sec. 105 :—When a person is accused of any offence, the burden of proving the existence of circumstances bringing the case within any of the General Exceptions in the Indian Penal Code, or within any special exception or proviso contained in any other part of the same Code, or in any law defining the offence, is upon him, and the Court shall presume the absence of such circumstances.]

Burden of proving that case of accused comes within exceptions.

fruit peaceably and under cover of a lease; the assailants came upon them while so employed, and commenced the attack with a view of enforcing the right which they considered rested with them. In *Queen-Empress v. Narsang Patha Bhai* the assault was commenced by the complainant and not by the persons assaulted by the complainant. In the case before us the respondents did form an unlawful assembly, and in using force committed rioting; they could not plead as a justification, for their act that the persons picking the mahua were in so doing guilty of theft, mischief or criminal trespass. They were acting throughout in the *bond fide* belief that they had a right to the mahua, and the element of dishonesty was wanting. Hence there could be no theft or mischief. When they went upon the land they did not go on it with the intention of committing any offence, hence there was no criminal trespass. From every point of view the plea of private defence of property was one which could not have been raised in this case, and was in fact never raised by the accused until they went before the appellate Court. There being no evidence on the [126] record, the learned Sessions Judge was distinctly in error, and that error an error of law, when he presumed the presence and not the absence of circumstances which would form any basis for the plea of private defence of property.

The learned vakil, probably feeling the weakness of this portion of his argument, commenced his defence by urging that the appeal before us was one which should never have been put forward by the Local Government. He referred us to the cases of *Queen-Empress v. Gayadin*, (1881) I. L. R., 4 All., 148; *Queen-Empress v. Chotu*, (1886) I. L. R., 9 All., 52, and *Queen-Empress v. Robinson*, (1894) I. L. R., 16 All., 212. All these cases were considered by this Court in the recent case of *Queen-Empress v. Prag Dat*, to which we have already referred. It is true that the right vested in the Local Government is a right which should be advanced with care and caution. In two of the cases cited by the learned vakil the errors which the Local Government sought to have rectified were errors on questions of fact. In the case before us the learned Sessions Judge erred upon a question of law, and he was at the time sitting as a Court of Appeal, and his error of law led him to set aside the conclusion of the Magistrate upon facts that he himself would probably have accepted but for the error of law into which he had fallen. A riot in the jungles of Mirzapur, where it is not easy to have recourse to the protection of the police, is an offence which wounds public security, and very often leads to fatal results. We cannot therefore agree with the learned vakil in holding, as he wishes us to do, that we ought not to exercise the powers vested in us in this particular case. We set aside the finding of acquittal, restore the conviction recorded by the Magistrate, and pass the sentence which was in the first instance passed by him. In computing the term of imprisonment any portion of the imprisonment already undergone will be deducted. Subject to the above the sentences will run from to-day's date.

[127] REVISIONAL CRIMINAL.

The 19th November, 1898.

PRESENT :

MR. JUSTICE AIKMAN.

Queen-Empress

versus

Mathura Prasad.*

*Act No. XLV of 1860 (Indian Penal Code) ss. 21, 161 — "Public servant" —
Manager employed under the Court of Wards.*

Held that the manager of an estate employed under the Court of Wards is a "public servant" within the meaning of section 21 of the Indian Penal Code. *Queen Empress v. Arayi*, (1883) I. L. R., 7 Mad., 17, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Messrs. C. Ross Alston, A. H. C. Hamilton, and Babu Satish Shandar, for the Applicant.

The Government Pleader (Munshi Ram Prasad), with whom Babu Satya Chandar Mukerji, for the Crown.

Aikman, J.—This is an application asking this Court to exercise the powers of revision conferred on it by section 439 of the Code of Criminal Procedure.

The applicant, Mathura Prasad, was an employee of the Court of Wards on an estate under the Court in the Shahjahanpur district. He was charged with and tried before a Magistrate of the 1st class for nine different offences, six of which were under section 409 of the Indian Penal Code, namely, criminal breach of trust by a public servant, and three under section 161 read with section 114 of the Indian Penal Code, abetting the receipt of illegal gratification by a public servant. Objection was taken before the Magistrate to all these offences being tried together. The Magistrate was under the erroneous impression that the provisions of section 234 of the Code of Criminal Procedure empowered him to try at one time any number of offences, provided no more than three offences of one kind were charged. Although he found the accused guilty of all the nine offences, he considered therefore that he complied with the law by convicting him of three only of the six offences under section 409 of the Indian [128] Penal Code. He also convicted him of the three charges under section 161 read with section 114 of the Indian Penal Code. In the result he sentenced him to an aggregate punishment of four years' rigorous imprisonment and a fine of Rs. 120. On appeal the learned Sessions Judge sustained one of the convictions under section 409 and one of the convictions under sections 161 read with section 114 of the Indian Penal Code. The convictions and sentences under the other charges were set aside.

Before this Court the first plea urged by the learned counsel, who appears in support of the application, is that an employee under the Court of Wards is not a public servant. So far as the charges of criminal breach of trust are concerned, this question is of little importance, for on the facts found the applicant was guilty, if not under section 409, at least under section 408 of the Indian Penal Code, and the sentences imposed on him are within the

* Criminal Revision No. 548 of 1898.

limit of punishment prescribed for offences under the latter section. But the question is of importance with regard to the charge of abetment of the taking of an illegal gratification, for if the manager of the Court of Wards, whom the appellant is said to have abetted in taking illegal gratifications, cannot be held to be a public servant, the offence charged was not committed. The learned Counsel relies, in the first place, on the decision in the case *The Queen Empress v. Arayi*, (1883) I. L. R., 7 Mad., 17. In that case it was held by TURNER, C. J., that a peon employed by a manager of an estate under the Court of Wards is not a public servant within the meaning of that term in the Penal Code. Counsel were not instructed in that case, and no reasons are given for the view taken. Whether the learned Chief Justice would have held that the manager of an estate under the Court of Wards was not a public servant, does not appear.

Reference was next made to the provisions of section 12, sub-section (ii) of Act No. XVII of 1885, which is entitled "An Act to make better provision for the Superintendence of Government Wards in the Central Provinces." That sub-section [129] is as follows:—"Every manager, or other servant of the Court of Wards, shall be deemed a 'public servant' within the meaning of section 161, 162, 164 and 165 of the Indian Penal Code; and in the definition of 'illegal remuneration' contained in the said section 161 the word 'Government' shall, for the purposes of this sub-section, be deemed to include the Court of Wards." It was argued that if the Legislature found it necessary to make this provision in the Act for the Central Provinces, it was clear that the provisions of section 21 of the Indian Penal Code, which section defines what persons fall under the description of "public servant," were not sufficient to cover the case of a Court of Wards' employee.

As neither Act No XIX of 1873 (The North-Western Provinces Land Revenue Act), nor any other Act applicable to these Provinces, contains any provision similar to that quoted from section 12 of Act No. XVII of 1885, it is clear that a Court of Wards' employee cannot be held to be a "public servant," if he cannot be brought within one or other of the ten clauses of section 21 of the Indian Penal Code. Reference was also made to section 35 of the North-Western Provinces Land Revenue Act, which contains the following provision:—"Every kanungo and patwari and every person appointed temporarily to discharge the duties of any such officer shall be deemed to be a public servant within the meaning of the Indian Penal Code." It was contended with much force that if the Legislature had intended that Court of Wards' employees should be held to be public servants, some provision similar to that quoted above would have appeared in Chapter VII of Act No. XIX of 1873, which contains the law as regards the Court of Wards. I must say that I was much impressed with the force of this reasoning: but after full consideration I have arrived at the conclusion that the provisions of the 9th clause of section 21 of the Indian Penal Code are wide enough to include the case of Court of Wards' employees. The material words of that clause are—"Every officer whose duty it is as such officer to take, receive, keep or spend any property on behalf of [130] Government." Now the Board of Revenue, which is a department of Government, is the Court of Wards for these Provinces, and as such is in charge of the estates of proprietors who are held disqualified to manage their own lands. It is true that section 202 of Act No. XIX of 1873, which lays down the duties of a manager, says that the manager "shall in every respect act to the best of his judgment for the proprietor's interest as if the property were his own." But while the disqualification of a proprietor lasts he has no power to collect any rents from his own estates. If he does

receive rents he cannot give a good discharge to tenants. The collection of rents is taken from him by the Court of Wards, that is, by the Government, and although the Government may ultimately be accountable to the proprietor for the money which it has realized, it is none the less Government which receives the money. Therefore it seems to me that an officer of the Court of Wards does, when he realizes money from a Court of Wards' estate, realize that money "on behalf of Government." The provisions referred to above from the Central Provinces Act may have been enacted with the object of removing any doubts; but as the words of the Penal Code seem to me to be wide enough to cover the case of Court of Wards' servants I overrule the objection which the learned counsel urged with so much ingenuity and force.

The next point taken on behalf of the applicant is, that the defect in the trial which has been referred to at the outset of this judgment, is a defect which, *ipso facto*, renders the whole proceedings void. In support of this reliance is placed on a dictum of PETHERAM, C. J., in the case *In the matter of Lachmin Narain*, (1886) I. L. R., 14 Cal., 128. At page 131 of the judgment the learned Chief Justice says:—"It is clear from the terms of that section (section 234 of the Code of Criminal Procedure), that a man can only be tried for three separate offences of the same kind at the same trial and, speaking for myself, I think that if a man were tried for four specific offences at one trial it would not only be an [131] irregularity which could be cured by section 537 of the Code, but a defect in the trial which would render the whole trial inoperative, unless it were cured by some subsequent proceeding by striking out some portions of the charge, and as to the propriety or legality of such a proceeding, we do not at present express any opinion." There is no doubt that this dictum is clearly in favour of the applicant, but it must be taken to be *obiter*, for it was not necessary for the decision of the case then before the Court. Section 233 of the Code of Criminal Procedure provides that, with certain exceptions therein specified, for every distinct offence of which any person is accused there shall be a separate charge, and every charge shall be tried separately. I think there is much force in the view taken by PETHERAM, C. J., that a breach of the provisions of this section is some thing more than a mere irregularity, but, in my opinion, it is not open to me to adopt that view, inasmuch as I find that not only in this Court but in the Calcutta and Bombay High Courts a breach of the provisions of section 233 or of the corresponding section 453 of the former Code, has been treated as an irregularity, and not as an illegality rendering the whole proceedings void.

That a grave irregularity was committed there cannot be any doubt, and I have to consider whether the irregularity has in fact occasioned a failure of justice. In the explanation appended to section 537 of Act No. V of 1898, it is said that in determining whether any error or omission or irregularity in any proceeding under the Code has occasioned a failure of justice, the Court shall have regard to the fact whether the objection could and should have been raised at an earlier stage in the proceedings. It is clear from the Magistrate's own record that the accused did take objection before him, and I am informed that immediately after the accused had been furnished with a copy of the charges and when his objection before the Magistrate was overruled, he had recourse to the Court of Session by a petition presented on the 7th of June, the charges having been framed on the 2nd of June, in which the same objection to the trial of so many offences [132] together was urged. The Court of Session, however, declined to interfere at that stage of the case. The object of the law which enacts that, with the exceptions specified, there must be a separate trial for each offence, is framed no doubt, as well to prevent the cumulative effect upon

the mind of the Court of a number of charges being brought forward together, as in the interest of the accused, who cannot but be harassed and bewildered by having to meet in one trial a number of separate charges. Now in this case the accused had not only to meet nine separate charges, but in reality a much larger number. For instance, charge No. 8 includes not only a charge of abetting the manager in the receipt of a bribe of Rs. 10, but a charge against the accused of accepting one for himself. Again, it appears that in charge number 9, in which the applicant is accused of having accepted on behalf of the manager a sum of Rs. 175, this sum was made up of a number of small sums realized from a number of tenants as an illegal gratification for allowing them to continue in their holdings. Although the amount is said to have been handed over to the manager in a lump sum, the evidence of a number of tenants was called to prove the payments of separate sums by them to the applicants. The result was that the record swelled to an enormous length, to upwards of 300 closely written pages. To meet all these different accusations at one trial must, it appears to me, have seriously prejudiced the applicant in his defence, and that the bringing forward of so many different charges must have influenced the mind of the Magistrate is equally clear. It is further argued with reference to the 9th charge, the conviction under which has been sustained by the learned Sessions Judge, that the accused was prejudiced by the manner in which it was drawn up. In it the offence is said to have taken place in the "month of *Magh*" last year. Evidence was called on behalf of the defence which the Sessions Judge seems to hold has the effect of proving that the offence could not have taken place in that month, inasmuch as the manager is said to have been during the whole of that month absent from Shahjahanpur, where the offence is alleged [133] to have been committed. It is to be noted that the charge is not worded "in or about the month of *Magh*," and it is contended that the accused was prejudiced by being called on to meet only a charge for that month. The Sessions Judge is of opinion that the offence may have been committed in the following month of *Phagun*. If so, the accused ought to have had an opportunity of calling evidence to prove that the offence was not committed by him in *Phagun*. The result of the above examination of the record is, that I am constrained to come to the conclusion that the irregularities committed in the Court of the Magistrate are such as are not covered by the provisions of section 537 of the Code of Criminal Procedure. It is to be regretted that the Magistrate, who seems to have gone into the case before him very patiently, should have, by neglect of the provisions of the Code of Criminal Procedure, rendered the interference of this Court necessary. But, in my opinion, I have no alternative but to set aside the convictions and sentences, and direct that the accused be re-tried according to law. The fines, if paid will be refunded; the sentence of rigorous imprisonment will cease. Accused will be detained in custody until the District Magistrate makes arrangements for the re-trial of the accused, which he will proceed to do forthwith. In the event of a fresh trial resulting in conviction, the term of imprisonment which the applicant has already undergone ought to be taken into account.

NOTES.

[The Calcutta High Court dissented from this in (1900) 28 Cal., 344; 4 C.W.N., 798.]

[21 All. 133]
FULL BENCH.

The 10th November, 1898.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, MR. JUSTICE BANERJI AND
MR. JUSTICE BURKITT.

The Secretary of State for India in Council.....Opposite Party
versus
Jillo.....Applicant.*

Civil Procedure Code, section 409—Application for leave to sue in forma pauperis—Decree—Appeal.

Held that no appeal will lie from an order rejecting an application for leave to appeal *in forma pauperis*. *Baldeo v. Gola Kuar*, (1886) I. L. R., 9 All., 129, and *Lekha v. Bhauna*, (1895) I. L. R., 18 All., 101, referred to.

[134] THIS was an application for leave to sue *in forma pauperis*. The applicant, Musammat Jillo, came into Court alleging that she had been married to the defendant, Chand Khan, on the 13th of October 1886, on a prompt dower of Rs. 10,000; that she had lived with her husband up to 1895, but that in January 1895 her husband had turned her out and refused to pay her dower. She prayed for a decree for Rs. 10,000 and costs of suit. On presentation of this application in the Court of the Subordinate Judge of Moradabad the applicant's statement was recorded, the application was registered and notice was issued fixing the 26th October 1895 for the further hearing. The case was adjourned from time to time until the 4th of January 1896, on which date the Subordinate Judge recorded the following order:—"The applicant's pleader stated that he was not directed to conduct the case, and he did not produce any evidence as to (the applicant's) poverty. The defendant's pleader also is absent. As the application is rejected for want of prosecution, the Government Pleader also is not entitled to any costs. Order: The application be rejected with costs." This order was followed by a decree, the operative part which was in the following terms:—"It is, therefore, ordered that the application be rejected with costs in default of prosecution." Against this order an appeal was preferred to the High Court by the Government, claiming its costs on the application.

The Officiating Government Advocate (Mr. A. E. Ryves) for the Appellant.

Munshi Gobind Prasad for the Respondent.

Knox, Acting C. J., Banerji, and Burkitt, JJ.—Musammat Jillo, the respondent to this first appeal, presented in the Court of the Subordinate Judge of Moradabad an application praying for permission to institute a suit *in forma pauperis*. She was examined and her deposition recorded. After that a date was fixed, and notice given to the Government Pleader, as required by section 408 of the Code of Civil Procedure. Upon the day on which inquiry was to be made as to whether Musammat Jillo was or was not a pauper we find the Court recording [135] an order, which is

* First Appeal No. 101 of 1896, from an order of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 4th January 1896.

both extraordinary and in its terms contradictory. The order runs as follows :—" The applicant's pleader stated that he was not directed to conduct the case, and he did not produce any evidence as to (the applicant's) poverty. The defendant's pleader also is absent. As the application is rejected for want of prosecution, the Government Pleader also is not entitled to any costs. Order :—The application be rejected with costs." We examined the original order, as we found it difficult to believe that the translation before us was a correct translation. We find that the order has been correctly translated and is as above. We next examined the decree: we find the language of that equally, if not more, unsatisfactory. The effective order of the decree is in these terms: "It is therefore ordered that the application be rejected with costs in default of prosecution." There is nothing whatever to indicate by which of the parties and in what proportion the costs are to be paid, or to whom they are to be paid. It would be a matter of regret if we found a decree like this passed by the most junior Munsif in these Provinces. From this decree the present appeal before us has been filed by the Secretary of State for India in Council, contending that the appellant is entitled to his costs, inasmuch as he appeared to protect the revenue, and, it might have been added, after he had received notice from the Court calling on him so to appear.

A preliminary objection was raised to the hearing of the appeal, on the ground that the order under consideration was not a decree within the meaning of the Code of Civil Procedure, and that the order was not one appealable under section 588 of the Code of Civil Procedure. We are of opinion that the objection taken is a sound one and must prevail. The learned Government Advocate attempted to support the appeal upon the authority of the case *Baldeo v. Gola Kuar*, (1886) I. L. R., 9 All., 129. That case is one not entirely on all fours with the present, still it very much resembles it, and was certainly one on which the learned Govern-[136]ment Advocate was entitled to rely in support of his contention. If the learned Judges who pronounced that decision intended to lay down that an order like the one in appeal here was a decree within the meaning of the Code of Civil Procedure, we find ourselves unable to concur with them. The order before us was not an adjudication in any stage of a suit. It was passed upon an application which, if granted, would, after the order granting it, and only then, have matured into a plaint in a suit. It was not therefore an adjudication deciding a right claimed in a suit. It is true that the definition given for the word "decree" goes on to say that an order rejecting a plaint, or directing accounts to be taken, or determining questions mentioned or referred to in section 244, is, under certain circumstances, within the definition of a decree. The only part of this portion of the definition which bears at all upon the present case are the words "an order rejecting a plaint." We have, however, pointed out above that in the case before us the stage had not been reached in which the application filed by Musammat Jillo could be deemed a plaint. A similar point to that before us was considered by this Court in the Full Bench ruling in the case of *Lekha v. Bhauna*, (1895) I. L. R., 18 All., 101, in which the Court held that an order under section 549 of the Code of Civil Procedure was not a final expression of an adjudication upon any right claimed or defence set up within the meaning of the first paragraph of the definition clause relating to decrees and was not an order appealable as a decree. We therefore, dismiss this appeal, but without costs. The order passed by the Subordinate Judge is so extraordinary that we direct this case to be treated as a case in revision under section 622 of the Code of Civil Procedure, and that it be taken up on a further date so as to allow Musammat Jillo, if she be so advised, to be heard.

Appeal dismissed.

[187] Under the above order the case was taken up in revision on the 27th of February 1899, * when the following order was passed :—

Knox, Banerji and Burkitt, JJ.—We have in previous proceedings commented upon the extraordinary nature of the order passed by the learned Subordinate Judge. There is no question whatever that in passing the order he did on the 4th of January 1896, he acted with material irregularity. We accordingly set aside that order, whatever it may be, for its terms are so ambiguous and contradictory that it is impossible to interpret it, and in lieu of it we pass this order. We direct that the application of Musammat Jillo for permission to sue *in forma pauperis* be dismissed with costs, which will be paid by Musammat Jillo. The Secretary of State will get his costs both in the lower Court and in these proceedings.

NOTES.

[The order is open to revision :—(1898) 2 C.W.N., 474 ; (1903) 8 C.W.N., 70 ; (1908) 12 O.C., 381. See also 28 I.C., 448.

As regards the rules of the Allahabad High Court relating to revision, see also (1905) 28 All., 72.]

[21 All. 137]

APPELLATE CIVIL.

The 25th November, 1898.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Kunj Behari Lal and another.....Plaintiffs

versus

Parsotam Narain.....Defendant.†

*Act No. XIX of 1873 (N.-W. P. Land Revenue Act), sections 185 and 186—
Sale for arrears of revenue—Disposal of surplus proceeds—Distribution
amongst creditors of defaulter—Suit by one of such creditors
against another—Cause of action.*

An estate which had been mortgaged separately to two different mortgagees was sold for default in payment of Government revenue. By the sale a much larger sum than was sufficient to satisfy the arrears of revenue was realized. The Collector, instead of paying the surplus to the defaulter, mortgagor, paid therewith one of the mortgagees in full and the other in part. The mortgagee who had been paid in part only sued the other mortgagee for the balance due on his (the plaintiff's) mortgage, alleging that it was prior to that of the defendant and ought to have been paid off in full. *Held*, that the suit would not lie. The [138] action of the Collector in contravention of the express provisions of section 185 of Act No. XIX of 1873 gave the plaintiffs no cause of action against the other mortgagee.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri and Munshi Ratan Chand, for the Appellants.

* Civil Revision, No. 49 of 1898.

† Second Appeal No. 688 of 1896, from a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 11th June 1896, reversing a decree of Babu Ishri Prasad, Munsif of Mainpuri, dated the 24th September 1894.

Pandit *Sundar Lal* and *Munshi Gobind Prasad*, for the Respondents.

Burkitt, and Dillon, JJ.—We are unable to agree with any of the reasons given by either of the two lower Courts for their decisions in this case. Put very briefly, the facts are as follows:—

A certain estate, which had been mortgaged separately to the plaintiffs and to the defendant, was sold to pay arrears of Government revenue. The effect of that sale was to wipe off all incumbrances theretofore existing on the estate, though of course leaving untouched the mortgagee's personal remedies, if any, against the mortgagor. The estate, when sold, produced a much larger sum than was necessary to discharge the arrears of revenue. When such an event occurs the duty of the Collector is distinctly laid down by section 185 of the Land Revenue Act of the North-Western Provinces (Act No. XIX of 1873). That section directs the Collector to pay the surplus to the person whose land has been sold, and section 186 further directs that the surplus shall not be paid to any creditor of the person whose land is sold except under the order of a Civil Court; and further that, except under such order, the money shall not be retained in the Government treasury. It is admitted here that no order of any Civil Court was passed in the matter or served on the Collector. The Collector's duty therefore, as laid down by the sections referred to above, was to have paid the money forthwith to the person whose land had been sold. That person, it seems, did apply to the Collector for the money, and the two mortgagees, the plaintiffs and defendant in this case, also applied. The Collector, disregarding the provisions of sections 185 and 186 of the Revenue Act, refused to [139] pay the money to the person whose land had been sold, and, disregarding the claim of the latter, he handed the money over to creditors, thereby paying off the whole of the amount alleged to be due to one creditor and part of the money alleged to be due to the other creditors. The latter thereupon, alleging that their mortgage had priority over the former creditor's mortgage, have instituted this suit against the creditor whose debt the Collector had paid in full, and claim from the latter a sum of money sufficient to pay off the balance of their own debt.

The two lower Courts, for reasons into which it is unnecessary to enter, as they are absolutely wrong from beginning to end and have failed to touch the real point in the case, have decided, one in favour of the plaintiffs and the other in favour of the defendant.

In our opinion, the plaintiffs have failed to show any cause of action in this case. According to their plaint they seem to be of opinion that they and the other creditors had a right by law to call on the Collector to discharge their debts in order of priority. That is an entirely erroneous and unfounded position. The Collector not only was not bound to discharge their debts, but he was forbidden by law to adopt such a course. In the absence of any order from a Civil Court, the Collector's duty was to have forthwith paid the surplus proceeds of the sale to the person whose land had been sold, and to no one else. He has chosen to disregard the provisions of the Act by discharging the debts of the creditors according to his own notions of equity. Such an unauthorized, and, we may call it, voluntary payment by him in violation of his duty did not, in our opinion, create any cause of action in the plaintiffs as against the defendant. In illustration of our meaning we would take the case, say, of a wealthy and philanthropic individual who, hearing of these debts, was good enough to pay off one in full and the other in part. Can it be said that such payment of one debt in full created a cause of action in the other creditor to have the balance of his debt made good, because of its priority, by the other creditor? We think not, and we [140] regard the payment of this

sum to this creditor by the Collector as nothing more than a voluntary act of the Collector, who, disregarding the law he was bound to administer, thought fit to divide the money in his hands, which was payable to the defaulter only, between the two creditors of the latter.

In our opinion this suit fails, there being no cause of action. For that reason, and not for the reasons given by the Lower Appellate Courts, which, in our opinion, are completely erroneous, we dismiss this appeal with costs.

Appeal dismissed.

[21 All. 140]

REVISIONAL CIVIL.

The 7th December, 1898.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE DILLON

Harbans Lal.....Decree-holder

versus

Kundan Lal and others.....Opposite-Parties.*

Civil Procedure Code, sections 311, 312—Execution of decree—Sale in execution—Application to set aside sale—Court limited to grounds mentioned in section 311.

A Court to which an application under section 311 of the Code of Civil Procedure, to set aside a sale held in execution of a decree, is made, is limited to the grounds set forth in that section. If the Court fails to find both a material irregularity in publishing or conducting the sale and consequent loss to the applicant, it is bound to dismiss the application and confirm the sale. It cannot set aside the sale upon other grounds not pleaded by the applicant. *Tassaduk Rasul Khan v. Ahmad Husain*, (1893) L. R., 20 I. A., 176, and *Shirin Begam v. Agha Ali Khan*, (1895) I. L. R., 18 All., 141, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the Applicant.

Pandit *Madan Mohan Malaviya*, for the Opposite Parties.

Knox, Acting C. J., and Dillon, J.—On the 22nd of September 1897, certain property, the property of the judgment-debtor Kundan Lal, was sold by auction in execution of a decree held by Harbans Lal. After the sale had been held the judgment-[141] debtor put in an application which he termed an application under section 311 of the Code of Civil Procedure. He alleged that no sale notification had been issued and no proclamation duly and properly made; that owing to these irregularities he had sustained great loss, and he asked that the sale might be set aside. The Court found that there had been an irregularity in publication, but it also distinctly found that no loss had accrued to the applicant by reason of the irregularity. Having so found, the course which the Court should have taken, in our opinion, was, that

* Civil Revision, No. 35 of 1898.

it should have disallowed the objections and passed an order confirming the sale. So far as we can see, section 312 of the Code of Civil Procedure gave the Court no other alternative. Instead, however, of so acting, the Court came to the conclusion, it does not appear at whose instance or on whose application, that there had been no sale, as there had been no attachment of the property sold, and it proceeded to set aside the sale. On appeal the learned Judge took the same view and confirmed the order of the Court of First Instance setting aside the sale. We are asked in revision to hold that as no irregularities in the conducting or publishing of the sale had been found and as the judgment-debtor had sustained no injury, the Court had (and here we must have recourse, not to the petition, but to the argument before us) no jurisdiction to set aside the sale on an application under section 311 of the Code of Civil Procedure. This contention is undoubtedly supported by a ruling of this Court in the case of *Shirin Begam v. Agha Ali Khan*, (1895) I. L. R., 18 All., 141, a case which can in no way be distinguished from the present. It was, however, contended by the learned vakil for the opposite party that there were a number of rulings, which he proceeded to lay before us, in which this Court had held that where the question complained of was not a mere irregularity, but an illegality, Courts had jurisdiction, under section 311 of the Code of Civil Procedure, to set aside a sale, even though it had not been proved that substantial loss had resulted to the applicant by reason of such irregularity. Those [142] cases were *Mahadeo Dubey v. Bhola Nath Dichit*, (1882) I.L.R., 5 All., 86; *Jasoda v. Mathura Das*, (1887) I.L.R., 9 All., 511; *Raghu Nath Das v. Raj Kumar*, (1885) I.L.R., 7 All., 876; *Ganga Prasad v. Jag Lal Rai*, (1889) I. L. R., 11 All., 333; *Sant Lal v. Umrao-un-nisa*, (1889) I. L. R., 12 All., 96; he also referred us to the case of *Mohendro Narain Chaturaj v. Gopal Mondul*, (1890) I. L. R., 17 Cal., 769. With reference to all these cases one remark applies, namely, that they were all decided before the case of *Tassaduk Rasul Khan v. Ahmad Husain*, (1893) L. R., 20 I. A., 176, in which their Lordships of the Privy Council ruled very positively as to the object and purport of section 311 of the Code of Civil Procedure. We find nothing in section 311 which allows a Court to go into any question over and above that of material irregularity in the publication and conduct of the sale. Before the Court can set aside a sale under section 311, the applicant must prove a material irregularity and substantial injury sustained thereby. He cannot come into Court upon these allegations, and when he has failed, as in the present case, to make them out, then ask the Court to pray in aid some further ground which he considers would entitle him to the relief asked for, and, as was pointed out before, the Court cannot do this of its own motion. When put in motion under section 311, it must either find the irregularities complained of established, or, if it does not find this, it must pass an order confirming the sale. We accordingly reverse the orders setting aside the sale, and direct that the sale held on the 22nd of September 1897 be confirmed. The petitioner will get his costs throughout.

NOTES.

[See also (1906) P. R., 132; (1909) 9 O. C., 289; (1911) 9 I. C., 816 (Punjab); (1914) 25 I. C., 18 (All.), wherein this was followed.]

[143] APPELLATE CIVIL.

The 7th December, 1898.

PRESENT:

MR. JUSTICE BURKITT AND MR. JUSTICE DILLON.

Ram Sukh and others.....Defendants
versus
 Gokul Chand.....Plaintiff.*

Jurisdiction—Civil and Revenue Courts—Act No. XII of 1881 (N.-W. P. Rent Act), sections 34 et seqq, 95 (d) and 206 et seqq,—Landholder and tenant—Suit to eject a tenant on the ground that the tenant had denied the landholder's title.

The reason which a landholder may have for desiring to eject a tenant of agricultural land has nothing to do with the procedure to be adopted for the tenant's ejectment. Where the procedure laid down in sections 36 *et seqq* of the North-Western Provinces Rent Act, 1881, is available, the landholder must adopt that procedure, and the mere fact that the landholder's alleged cause of action is the denial by the tenant of the landholder's title will not give the landholder a right to sue for ejectment in a Civil Court.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. J. Simeon, for the Appellants.

Mr. Roshan Lal and Pandit Sundar Lal, for the Respondent.

Burkitt, and Dillon, JJ.—In the suit out of which this appeal has arisen the plaintiff, a zamindar, sued to eject the defendants, who were his tenants. The suit was brought in a Civil Court, and the appeal before us is one from the Court of the Subordinate Judge of Saharanpur. The suit is founded on the allegation that the defendants, being tenants without rights of occupancy, have denied the landholder's title and have set up a title as owners in themselves. The landholder therefore sues to eject them. A great part of the judgment of the lower Court is occupied in discussing the question as to whether a tenant of agricultural land who denies his landlord's title thereby renders himself liable to ejectment. We do not mean to enter into that question further than to say that neither of us—one of us having had a very long experience at the bar, and the other having had [144] a very long experience as a revenue officer—are aware of the existence in these Provinces of the common law respecting that matter upon which the Subordinate Judge has founded his decision. But, putting that matter aside, the suit, in our opinion, fails and must be dismissed for two reasons. Firstly, because it violates the provisions of clause (b) of section 34 of the North-Western Provinces Rent Act. That section distinctly lays down that "no tenant shall be ejected otherwise than in execution of a decree or order under the provisions of this Act." The defendants here were admittedly tenants. The plaintiff is the landlord. Secondly, the defendants, according to the plaintiff's showing, are tenants without a right of occupancy. To such a state of things the opening words of section 95 of the Rent Act apply, which say that:—"No Courts other than Courts of revenue shall take cognizance of any dispute or matter on which any application of the nature mentioned in this section

* Second Appeal No. 831 of 1896, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 26th May 1896, confirming a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 18th June 1895.

might be made." Now one of the applications mentioned in clause (d) of section 95 is an application by a landholder to have a notice of ejectment issued and served under section 38. Section 38 supplies the machinery under which the provisions of section 36 are put into action, and section 36 provides that if a landlord desires to eject a tenant not having a right of occupancy, he shall have a notice of ejectment served on such tenant. Then follow sections 37, 38, 39 and 40, which provide the subsidiary machinery for giving effect to a notice issued under section 36. Now the defendants in this case being, according to the respondent, tenants without right of occupancy, and being tenants whom the landholder desired to eject, it is perfectly clear that this is a case in which an application might be made under section 95, clause (d) of the Rent Act. The reason which the landholder may have for desiring to eject the tenant is perfectly immaterial. The law does not require him to state any reason. All that section 36 requires is that he should be desirous of ejecting the tenant. He is not bound to give any reason for that desire, whether he wishes to eject the tenant as a troublesome person, as one who denies his title, or for any other [145] reason. It therefore follows, in our opinion, that this suit is one the cognizance of which by a Civil Court is absolutely forbidden by section 95, the matter of the suit being one in which an application might be made under clause (d) of section 95 of the North-Western Provinces Rent Act. We quite fail to understand why the respondent, having at his disposal the summary procedure provided by section 36 and the following sections of the Rent Act, should have preferred to take his case into a Civil Court. This is not a case in which we can proceed under the provisions of section 206 and the subsequent sections of the North-Western Provinces Rent Act. As has been frequently held, these sections contemplate those cases only in which a suit would lie in the Rent Court: but the procedure in the present case in the Rent Court would be by application and not by suit. It therefore follows that we cannot apply to the proceedings in this case the sections mentioned above. For the above reasons we allow this appeal. We set aside the judgment and decree of the Lower Appellate Court, and we direct that this suit do stand dismissed with costs in all Courts.

Appeal decreed.

NOTES.

[This was followed in (1907) 4 A. L. J., 253 n ; (1909) 1 I. C., 665.]

[21 All. 145]

The 12th December 1897.

PRESENT :

MR. JUSTICE BANERJI.

Fida Husain.....Defendant

versus

Maula Bakhsh.....Plaintiff.*

Execution of decree—Civil Procedure Code, section 268—Attachment of debt—Payment of debt attached out of Court.

Where a debt, which had been attached under section 268 of the Code of Civil Procedure, was paid out of Court to the only person who, had the money due been paid into Court

* Second Appeal No. 876 of 1897, from an order of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Saharanpur, dated the 13th August 1897, modifying an order of Pandit Mohan Lal, Munsif of Deoband, dated the 11th January 1897.

as required by the terms of the said section, would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, it was *held* that such payment amounted to a sufficient compliance with the requirements of section 268.

THE facts of this case are fully stated in the judgment of the Court.

Mr. *Amiruddin*, for the Appellant.

Maulvi *Ghulam Muftaba*, for the Respondent.

[146] **Banerji, J.**—This appeal arises out of proceedings relating to an application for an order absolute for sale under section 89 of Act No. IV of 1882. Certain property which belonged to the appellant Fida Husain and to other persons was mortgaged by them to one Ulfat Rai in 1886. The same property was subsequently mortgaged in 1887 to Ulfat Rai and Murlidhar, the father of one Atma Rai. The second mortgage fell by partition into the share of Atma Rai, and was assigned by him to the respondent, Maula Bakhsh, so that Maula Bakhsh became the holder of the second mortgage over the property. Before the assignment to Maula Bakhsh, Ulfat Rai brought a suit for sale upon his first mortgage and obtained a decree. It is alleged that he did not make Atma Rai, who, as I have said above, was at that time, jointly with Ulfat Rai, the holder of the second mortgage, a party to that suit. In execution of the decree which Ulfat Rai obtained on his first mortgage, he caused the mortgaged property to be sold by auction, and himself became the purchaser. He then sold the property so purchased to Fida Husain, and for a portion of the amount of the consideration for the sale he took a bond from Fida Husain. Maula Bakhsh brought a suit for sale upon the mortgage of 1887, of which he was the assignee, and in that suit he offered to redeem the first mortgage in favour of Ulfat Rai, the benefit of which had been acquired by Fida Husain by virtue of his purchase from Ulfat Rai. On the 13th of April 1896, a decree was passed in favour of Maula Bakhsh. The decree directed that Maula Bakhsh should pay to Fida Husain or into Court within three months of the date of the decree Rs. 250, the amount due on the first mortgage, and that upon his doing so he, Maula Bakhsh, would be entitled to bring to sale the whole of the mortgaged property for the realization of the said sum of Rs. 250, as also of the amount due upon the mortgage of 1887. After the decree was passed, Ulfat Rai brought a suit against Fida Husain upon the basis of the bond executed in his favour by Fida Husain for a part of the consideration for the sale effected by Ulfat Rai in favour of Fida Husain. In that suit he obtained an order on the 3rd [147] of June 1896 for attachment of the money payable by Maula Bakhsh to Fida Husain under the decree of the 13th of April 1896. This was an order passed, before judgment, under section 484 of the Code of Civil Procedure. Under section 486 a prohibitory order in the terms of section 268 of the Code was issued to and served upon Maula Bakhsh. On the 11th of July 1896, that is, before the expiry of the three months fixed in the decree of the 13th of April 1896, Maula Bakhsh paid into Court Rs. 85-8-0, and informed the Court that he had paid the balance of Rs. 164-8-0 to Ulfat Rai in pursuance of the attachment. I may here observe that before the date last mentioned Ulfat Rai had obtained a decree in the suit brought by him against Fida Husain. On the 12th of November 1896, Maula Bakhsh presented the application which has given rise to this appeal, on the allegation that he had complied with the requirements of the decree passed in his favour, and that, as the amount of that decree had not been paid, he was entitled to an order absolute for sale under section 89 of the Transfer of Property Act. The application was opposed by Fida Husain, who contended that the payment of Rs. 164-8-0 to Ulfat Rai was not equivalent to a payment to him, and was in violation of the terms of the decree of the 13th of April 1896. The Court of First Instance

overruled this contention, but the Lower Appellate Court allowed it and held that Maula Bakhsh had not performed the obligation which lay on him under the terms of the decree referred to above. That Court, however, for the reasons stated in its judgment, granted Maula Bakhsh an extension of time for payment of Rs. 164-8-0. From the order granting extension Fida Husain has preferred this appeal. Maula Bakhsh has taken objection under section 561 of the Code of Civil Procedure, contending that there was a sufficient compliance on his part with the decree passed in his favour. After the case for the appellant had been stated, the objection under section 561 was allowed to be first argued, because if it prevailed it would not be necessary to consider the appeal. In my judgment the objection under section 561 must be allowed. Under the decree made in [148] favour of Maula Bakhsh he was no doubt liable to pay to Fida Husain or into Court Rs. 250 within three months from the date of the decree. There is no question that he has paid Rs. 85-8-0 out of that amount within the time fixed in the decree. It is also not disputed, and indeed the Courts below have found, that he paid Rs. 164-8-0 to Ulfat Rai within the three months. Now the question is, whether such payment was a payment in compliance with the decree. After the prohibitory order under section 486 (read with section 268) of the Code of Civil Procedure had been issued to Maula Bakhsh, he was not competent to pay the amount for which the prohibitory order had been issued to Fida Husain. If he had made such payment to Fida Husain he would have been guilty of non-compliance with the order of the Court which issued that prohibitory order. Under section 268 a debtor, prohibited to pay the debt due by him, might pay the amount of the debt into Court, and such payment would discharge him as effectually as payment to the party entitled to receive the debt. If the sum of Rs. 164-8-0, to which the prohibitory order related, had been paid into the Court which issued the prohibitory order, such payment would undoubtedly have absolved Maula Bakhsh from liability to Fida Husain for payment of the amount. In this case, instead of paying the amount into Court, he paid it to the person who would have been entitled to withdraw it from the Court if it had been paid into Court. The fact of the payment to Ulfat Rai appears to have been certified to the Court, so that although in fact the payment was made to Ulfat Rai, it was in reality a payment which, by reason of the certification of it into Court, was equivalent to a payment into Court within the meaning of section 268. The Lower Appellate Court seems to think that payment to a creditor who has obtained an attachment from the Court is the same thing as payment to any ordinary creditor. This view of the Court below is, in my opinion, erroneous. No creditor other than a creditor who had obtained an attachment of a debt due to his debtor could enforce payment of such debt. After the issue of the order of [149] attachment Maula Bakhsh could not have paid the sum of Rs. 164-8-0 to Fida Husain without being called upon by the Court, which had forbidden him to make the payment, to answer for his conduct. The only way in which he could have obtained immunity from liability was by paying the amount mentioned in the attachment order into Court. In order to reap the fruits of the decree obtained by him, he was also bound to make the payment within the three months allowed in the decree, and as he made the payment to the person who, as I have said above, was the only person who could withdraw it from Court, the payment to such person was equivalent to payment into Court, and consequently to a payment made to Fida Husain. That being so, Maula Bakhsh complied with the decree, and was entitled to an order absolute for sale under section 89. The fact that after the order of the Lower Appellate Court allowing the objections of Fida Husain, Maula Bakhsh deposited the Rs. 164-8-0 over again, does not preclude him from maintaining his present

objection. I allow the objection, and, setting aside the order of the Lower Appellate Court with costs, restore the order of the Court of First Instance.

The appeal must necessarily fail, and I dismiss it with costs.

Appeal dismissed.

[21 All. 150]

The 12th December, 1898.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Ishaq Ali Khan.....Plaintiff

versus

Chunni and others.....Defendants.*

Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—Non-joinder of parties—Subsequent mortgagee after suit on prior mortgage filed.

Held, that section 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequently to the filing of such suit.

IN this case one Moti Singh, who was the owner of a certain share in mauza Muhammadpur Ghiror, mortgaged, on the 12th [150] of September 1881, one-half of his share in favour of Chunni and Kharagjit. On the 31st of January 1884, Chunni and Kharagjit brought a suit for sale of the mortgaged property, for interest on their mortgage, against Moti Singh. On the 24th of April 1884, Moti Singh caused the mortgaged property to be recorded in equal shares in the names of Bhup Singh, his son, and Zabar Kunwar, his wife. Moti Singh died in 1884, and the names of Bhup Singh and Zabar Kunwar were recorded as defendants to the suit of the mortgagees then pending. The mortgagees obtained a decree in that suit on the 15th of May 1885. Bhup Singh subsequently to the filing of the suit, namely, on various dates between the 15th of July 1884, and the 2nd of November 1885, mortgaged a half share of the property, which Moti Singh had caused to be entered in his name in 1884 to Imam Ali Khan, the father of Ishaq Ali Khan. On the 22nd of July 1886, Chunni and Kharagjit filed a second suit for recovery of interest by sale of the mortgaged property against Bhup Singh, and obtained a decree on the 5th August 1886. Neither in this suit nor in the former suit of the 31st of January 1884, was the subsequent mortgagee Imam Ali Khan made a party. On the 19th of April 1895, Ishaq Ali Khan (his father, the subsequent mortgagee, having died) brought the present suit against Chunni and Kharagjit, the original mortgagees, Bhup Singh and another person alleged to be in possession of a portion of the mortgaged property, in which he asked for a declaration that unless the defendants Chunni and Kharagjit obtain as against the plaintiff such decrees as they have obtained as against Bhup Singh and Zabar Kunwar (dated the 15th of May 1885), and against Bhup Singh (dated the 5th of August 1886), and get the property entered in the name of Zabar

* Second Appeal No. 825 of 1896, from a decree of H. W. Lyle, Esq., District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Mainpuri, dated the 23rd December 1895.

Kunwar to be charged, they cannot take out execution of those decrees for sale of the share of the village Muhammadpur Ghiror entered in the revenue papers against the name of Bhup Singh and mortgaged to the plaintiff.

The Court of First Instance (Subordinate Judge of Mainpuri) dismissed the plaintiff's suit *in toto*.

[181] On appeal by the plaintiff the Lower Appellate Court (District Judge of Mainpuri) confirmed the decree of the first Court, though upon different grounds. The District Judge found as follows:—"The lower Court has pointed out that appellant's deeds were executed *pendente lite* and are therefore void as against the first suit. As regards the second suit, however, the deeds were prior to its institution, and the lower Court has got out of the difficulty by finding that the deeds were not proved. This reason will not stand. The deeds were never denied, and no issue was framed as to whether they were valid or not. Under the circumstances no proof was adduced with regard to them, and none was necessary. It seems to me, nevertheless, that the deeds are bad in respect to both suits. Both suits are for interest on the same deed, it having been apparently stipulated that interest should be separately sued for. I cannot hold that deeds which were void owing to having been executed while the first suit was pending are valid with regard to a second suit for interest on the same deed but for a subsequent period. One suit must be regarded as a continuation of the other, and appellant's deeds are void with regard to both."

The plaintiff thereupon appealed to the High Court.

The Court (STRACHEY, C. J., and KNOX, J.), allowed the appeal so far as it related to the decree against Bhup Singh, dated the 5th of August 1886, but dismissed it so far as it related to the decree against Bhup Singh and Zabar Kunwar of the 15th of May 1885, observing that it was not necessary for the mortgagees of 1881 to have made Iman Ali Khan a party to their first suit, inasmuch as the earliest of his mortgages was not executed until after that suit was filed.

Decree modified.

[182] REVISIONAL CIVIL.

The 16th December, 1898.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Abdul Sadiq and others.....Defendants

versus

Abdul Aziz.....Plaintiff.*

Civil Procedure Code, section 622—Revision—Discretion of Court in exercising revisional powers—Civil Procedure Code, sections 623 et seqq—Review of judgment.

A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a

* Civil Revision, No. 37 of 1898.

right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to section 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's appellate order it was held that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Baldeo Ram Dave*, for the Applicants.

Pandit *Moti Lal Nehru*, for the Opposite Party.

Strachey, C. J.—The suit out of which this application has arisen was originally heard by a Munsif, and one of the pleas taken by the defendants was that the suit was barred by limitation. The Munsif, holding that a period of twelve years' limitation applied, overruled this plea, and on the merits decreed the suit. The defendants subsequently applied to the Munsif for review of judgment on the ground that there had not been brought to the notice of the Court a certain decision of the Full Bench of this Court, according to which a period of six years', and not twelve years', limitation was applicable to the suit. This decision of the Full Bench had been pronounced previously to the passing of the original decree, but, either because it had not then been published, or for some other reason, had not been brought to the notice of the Munsif. The Munsif considered the Full Bench ruling, thought it applicable, reviewed his decree, and dismissed the suit as barred by limitation. [153] In giving his reasons for granting the review the Munsif refers to that portion of section 623 of the Code of Civil Procedure which speaks of the discovery of new and important matter or evidence, and to the question whether, at the original hearing, the applicant or his pleader knew, or had means of knowing, of the existence of the Full Bench ruling. That portion of section 623 can have no application. The words "new and important matter or evidence, which after the exercise of due diligence was not within his knowledge, or could not be produced by him at the time when the decree was passed," have never been held to apply to the non-production of a ruling in force when the decree was passed. They refer to evidence or other matter in the nature of evidence, and not to legal authority in existence, but not brought to the Court's notice. Apparently the Munsif himself had misgivings on this point, for he did not rest his decision on this ground alone, but also expressly referred to the other words in section 623 of the Code, which allow a review of judgment "for any other sufficient reason." Although he does refer to the earlier part of the section about the discovery of new matter, still the real meaning and substance of his judgment on the review is, in our opinion, that by reason of his having been unaware of the Full Bench ruling, his original decision was based on a mistake in law; whether that was a proper ground for review of judgment we need not consider.

The plaintiff appealed to the District Judge, not from the decree dismissing the suit, but from the order granting the review. The Judge had no power to entertain an appeal from that order except under section 629 of the Code of Civil Procedure. The only part of section 629 which, it has been suggested, would have been applicable in this case is cl. (b), namely, if the admission of the application for review is in contravention of the provisions of section 626. The only part of section 626 of which any contravention was suggested was cl. (b). If section 626, cl. (b), had no application, section 629, cl. (b), also could not apply. In our opinion section 626, cl. (b), had no application to the appeal [154] before the Judge. What it says is, in effect, that an application for review on the ground of discovery of new matter or evidence must not be

granted without strict proof of the allegation that the applicant was ignorant of the matter or could not have adduced the evidence when the decree or order was passed. But that could no more apply to the discovery of a Full Bench ruling, than could the corresponding words of section 623 about the discovery of new and important matter or evidence; and hence it was impossible to say that there was any contravention of section 626, cl. (b), or that the Munsif ought to have put the applicant to strict proof of his allegation that, when the decree was passed, he and his pleader were ignorant of the ruling. Nor does the District Judge express any such view. He does not in his judgment make any reference to section 626, cl. (b), or discuss the question whether there has been any contravention of it. The only question which he discusses is whether the Munsif was right in holding that the discovery of a High Court ruling was a sufficient ground for review: he comes to the conclusion that the Munsif was wrong in so holding, and he accordingly sets aside the order as passed on insufficient grounds. Whether the Judge's view was correct, is a question upon which we need express no opinion. It is sufficient to say that he overlooked the provisions of section 629, and that he had no power to set aside the order on the ground that he thought it unreasonable, or on any ground not mentioned in the section.

Now, a Judge who, in contravention of section 629, entertains an appeal from an order admitting a review undoubtedly acts with material irregularity within the meaning of section 622 of the Code. But orders for revision under section 622 are discretionary, and Mr. *Moti Lal* contends that here we ought not to interfere. He contends that, although the Judge may have acted irregularly in setting aside the Munsif's order, still he was right in his objections to that order, and in holding that if a review might be granted whenever a ruling was overlooked or afterwards discovered, applications for review would be endless. Mr. *Moti* [155] *Lal* therefore argued that the result arrived at by the learned Judge was substantially right and ought not to be disturbed in revision. But in deciding whether or not we should interfere with the Judge's irregular order, we must look a little further into the matter and consider what would be the consequences of interfering or not interfering. If we refuse to interfere, the result is that the suit stands decreed. If we interfere, the result is that the suit stands dismissed. The reason why the Munsif ultimately dismissed the suit was that, according to the Full Bench ruling, it was barred by limitation. The Judge does not hold that the Munsif was wrong in this view. It has not been disputed that, assuming the Full Bench ruling to be applicable, the suit was barred. Although the question whether the Full Bench ruling was applicable has not been argued before us, it seems at least probable that it did apply. The Judge appears to assume that it did, but says that it is to the same effect as earlier rulings, and that its discovery was no ground for review. In one of the two memoranda of appeal to the Judge from the two connected orders of the Munsif there was no plea that the ruling was inapplicable. The result of our refusing to interfere with the Judge's order would therefore be that a suit which the Munsif dismissed is barred by limitation, which has not been shown to be within time, and which was probably beyond time, would stand decreed. We allow this application for revision, set aside the order of the Judge, and restore that of the Munsif with costs.

Application allowed.

NOTES.

[This was followed in (1912) 14 I. C., 810 (All.).]

[21 All. 155]
APPELLATE CIVIL.*The 21st December, 1898.*

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Jit Mal and others.....Decree-holders

versus

Jwala Prasad.....Judgment-debtor.*

*Execution of decree—Limitation—Civil Procedure Code, section 230—**Warrant of arrest—Warrant not exhausted if on one occasion the serving officer is unable to find the judgment-debtor.*

The holders of a decree for money, dated the 2nd of December 1885, after various infructuous applications for execution, applied, on the 4th of August [156] 1897, for a warrant for the arrest of the judgment-debtor. That application was granted, but the peons sent to arrest the judgment-debtor reported that he had concealed himself, and the Court in consequence struck off the application for execution. On the 29th of November 1897, the decree-holders again applied for the arrest of the judgment-debtor, but that application also was struck off without the arrest having been made. Against the order striking off this latter application the decree-holders appealed to the High Court, where, on objection made that the decree could no longer be executed, having regard to section 230 of the Code of Civil Procedure, it was held that the warrant of arrest issued on the decree-holders' application of the 4th of August 1897, still subsisted and ought to be executed. *Anwar Ali Khan v. Phul Chand*, Weekly Notes, 1898, p. 137, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Ratan Chand, for the Appellants.

Babu Satish Chandar Banerji, for the Respondent.

Blair and Aikman, JJ.—This is an appeal on behalf of certain decree-holders, who, on the 2nd of December 1885, got a money decree against the respondent, Jwala Prasad, for a sum of Rs. 8,228. The lower Court rejected the application filed on the 29th of November 1897, for the arrest of the judgment-debtor. That application was presented within twelve years from the date of the decree. The decree-holders come here in appeal. The history of the case set forth by the lower Court in its finding of the 28th of September 1898, is a melancholy and forcible illustration of the truth of the saying that a successful suitor's troubles only begin when he has obtained his decree. The decree, as stated above, was passed in December 1885. On the 9th of January 1886, the unfortunate decree-holders began their attempts to recover the money which had been found due to them. From that time onwards they have made one attempt after another to have the decree executed, with the result that only an insignificant portion of the decretal amount has been realized, and that the sum still due under the decree, with interest thereon, amounts to upwards of Rs. 10,000. The judgment-debtor has by one device or another succeeded in evading up to now payment of the money which was found due from him. That the satisfaction of the judgment-[157] debt was delayed by the property of the judgment-debtor, we cannot believe. The history of what has taken place during the past twelve years is sufficient to show that it is not from want of means that he has not paid his

* First Appeal No. 85 of 1898, from an order of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 15th January 1898.

debts. He has blocked the execution by transfers made in the names of his sons and son-in-law. Property, which was on the point of being attached, was removed. When warrants of arrest were issued, the ministerial officers of the Court sent to execute the warrants seem to have been seized with sudden blindness and incapacity to discover the whereabouts of this judgment-debtor. On one occasion only is he said to have been found, and then, according to the report, he managed, with the help of his friends, to make his escape from the custody of the peons. On the 4th of August 1897, the decree-holders applied for and obtained an order of the Court for the judgment-debtor's arrest. As usual the peon reported that the judgment-debtor had concealed himself; and thereupon the Court lost no time in striking off the case. What impresses us in these proceedings is the singular want of sympathy exhibited by the Court towards the decree-holders. We should have thought that in a case like this the lower Court would have taken some pains to see that its order was carried out, and not have hastened to trike off the case on the mere report of its peons that the judgment-debtor had concealed himself. The last application was made on the 29th of November 1897. In this also the decree-holders asked that the judgment-debtor should be arrested. The judgment-debtor filed an objection. That objection was allowed by the Court on grounds which appear to us, looking to the past history of the case, to be quite inadequate, and the case was struck off on the 20th February 1898. When the appeal was last before us, a difficulty presented itself to us, arising out of the wording of section 230 of the Code of Civil Procedure, namely, that even if we were of opinion that the Court was wrong in striking off the application of the 29th of November 1897, it would be impossible to grant it now, looking to the fact that upwards of twelve years has elapsed since the date of the decree sought to be enforced and that previous applications [158] for execution have been granted. The learned vakil for the appellants contended, with reference to this difficulty, that his clients were entitled to the benefit of the proviso contained in the last paragraph of the section just quoted, namely, that notwithstanding the lapse of twelve years, they were still entitled to execute their decree owing to the fact that previous applications for execution had been defeated by the judgment-debtor through fraud or force. In order to enable us to dispose of this plea, we asked the lower Court for a finding on the issue as to whether execution had been prevented by the fraud or force of the judgment-debtor. The return to this order of reference is, that no fraud or force on the judgment-debtor's part preventing the execution of the decree, has been established. To this finding objections have been taken. In the view, however, which we now take of the case, we deem it unnecessary to express any opinion whether or not the finding is warranted by the evidence. We have the fact that in August 1897, the Court issued an order that the judgment-debtor should be arrested, and that order has not yet been carried out. With reference to this we may quote the following passage from a recent judgment of this Court in the case of *Anwar Ali Khan v. Phul Chand*, Weekly Notes, 1898, p. 137:—"The mere fact that a warrant issued and came back unexecuted is not, in our opinion, sufficient evidence of the proceeding for execution in pursuance of which it issued being exhausted and thereby determined." With this view we are in entire accord. The learned vakil for the respondent argues that the application of the 29th of November 1897, is in terms a fresh application under section 235 of the Code of Civil Procedure. We do not think that this is material. In our judgment that application is merely ancillary to the previous application. To yield to the contention of the learned vakil for the respondent, we should have to hold that the order passed on the application of August 1897, is exhausted by the return of the warrant, stating that the peons had been unable to find the

judgment-debtor. [159] That is a position which, as stated above, cannot, in our opinion, be maintained. For the above reasons we allow the appeal with costs, and, setting aside the order of the lower Court, we direct the execution to proceed. We must, in conclusion, express a hope that the Judge of the lower Court will devote his personal and particular attention to the execution of this decree, and will see that trustworthy men are sent to carry into effect the order for arrest.

Appeal decreed.

NOTES.

[See also (1910) P. L. R., 6 ; (1905) P. R., 27, (1910) P. R., 17 ; (1907) 11 O. C., 57.]

[21 All. 159]

REVISIONAL CRIMINAL.

The 21st December, 1898.

PRESENT :

MR. JUSTICE BANERJI.

Queen-Empress

versus

Zakir Husain.*

Act No. XLV of 1860 (Indian Penal Code), sections 192 and 123—

Fabricating false evidence—False entry made by a Police officer in a special diary.

Held, that a Police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted therefor of the offence of fabricating false evidence as defined in section 192 of the Indian Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress v. Gauri Shankar*, (1883) I. L. R., 6 All., 42, and *Keilasum Putter*, (1870) 5 Mad. H C. Rep., 373, referred to.

THE facts of this case sufficiently appear from the order of the Court.

Alston, for the Applicant.

The Officiating Government Advocate (*Ryves*), for the Crown.

Banerji, J.—The applicant, Zakir Husain, has been convicted, under section 193 of the Indian Penal Code, upon the two following charges :—

First, that on or about the 30th July 1898, he fabricated the special diary of July 29th, in the case of *Queen-Empress v. Balla and others*, so as to make it appear that the list of stolen property was furnished on that date ; and, secondly, that [160] on or about the 4th of August, in the Court of the District Magistrate, in the same case, he stated that the list of stolen property was furnished before the search and arrest of the accused.

The conviction and sentence have been affirmed by the learned Sessions Judge on appeal. It is urged that the conviction on each of the two charges is bad in law. In my opinion the contention is valid.

The facts found are these :—The house of one Ranjit was broken into by burglars, who carried away some of his property. He made a report of the

* Criminal Revision, No. 600 of 1898.

burglary at the Etah Police station. The applicant, who was the second officer at that station, suspected Balla and others, and searched their houses. He discovered certain property, and after having done so, caused Ranjit to give him a list of the property stolen from his house, so as to make it correspond with the articles found in the houses of Balla and others. This was on the morning of the 30th July 1898: but in his special diary of the previous day, the 29th, he entered a list of stolen property as given to him on that date before the search. It is in respect of this entry in the special diary that the applicant has been held guilty of having fabricated false evidence as defined in section 192 of the Indian Penal Code.

In my opinion the conviction for that offence cannot be maintained. In order to constitute the offence of fabricating false evidence, three things must exist:—First, that the entry or document in question is false; second, that the false entry or document was made with the intention that it may appear in evidence in a judicial proceeding, or in a proceeding taken by law before a public servant as such, or before an arbitrator; and, third, that so appearing in evidence it may cause any person who in such proceeding is to form an opinion upon the evidence to entertain an erroneous opinion upon a material point. Where any of these elements is wanting, the offence is not that of fabricating false evidence. As two of the elements of the offence are that [161] the false document is intended to appear in evidence, and that when it so appears in evidence it should cause a judicial officer, or other public servant, or an arbitrator, to form an erroneous opinion upon a material point, it is clear that the document must be capable of being used in evidence. The offence of fabricating false evidence cannot therefore be committed in respect of a document which is not admissible in evidence. This view is supported by the ruling of this Court in *Empress v. Gauri Shankar*, (1883) I. L. R., 6 All., 42, and that of the Madras High Court in *Keilasum Putter*, (1870) 5 Mad. H. C. Rep., 373, to which the learned counsel for the applicant has drawn my attention. The document which the applicant, Zakir Husain, is said to have fabricated is a Police special diary, which under section 172 of the Code of Criminal Procedure, is not evidence. It was held by a Full Bench of this Court in *Queen-Empress v. Mannu*, (1897) I. L. R., 19 All., 390, that "entries in the special diary cannot by themselves be taken as evidence of any date, fact or statement therein contained." The diary may, it is true, be used by a Police officer for the purpose of refreshing his memory, or it may be used for the purpose of contradicting the Police officer who made the entries which it contains; but the entries by themselves are not evidence, and therefore a special diary is not a document which is capable of being used in evidence. The learned Sessions Judge is wrong in holding that the entry in the diary could be referred to in support of the allegation that the list of the stolen property was produced before the discovery of the property. The entry could not be used as corroborative evidence, and this is conceded by the learned Government Advocate. He contends that it is the intention of the accused which is the *gravamen* of the charge, but he loses sight of the fact that not only must the accused intend that the document may appear in evidence, but the document must be such as may appear in evidence before the officer who is to form an opinion upon the evidence. [162] A document which is inadmissible in evidence can never be produced for the purpose of enabling an officer to arrive at any conclusion, erroneous or otherwise, upon a relevant point. A special diary, which can never be used as evidence, cannot be produced for the purpose mentioned above, and therefore the offence of fabricating false evidence cannot be committed in respect of it. Whether the accused in this case committed

the offence punishable under section 218 of the Indian Penal Code, or any other offence, it is unnecessary at present to decide. But I am of opinion that his conviction for the offence of fabricating false evidence cannot be sustained.

The conviction of the accused upon the second charge, namely, that of giving false evidence, is equally unsustainable. The charge itself as drawn is very defective. It does not set out the particular statement in respect of which the accused is charged with perjury. It only states the substance of what the accused is said to have stated in his deposition. As the accused pleaded not guilty to the charge, it was the duty of the prosecution to prove the particular statement which the accused was charged with having made falsely. For this purpose the deposition itself ought to have been put in evidence and formally proved. This was not done in this case, and there is absolutely no evidence on the record to prove that the accused made any statement on the 4th of August, and, if he made any, what that statement was. I am unable to follow the observation of the learned Sessions Judge that the "Court could take judicial notice" of the deposition, and that the accused "did not, and could not, deny having made it." When the accused pleaded not guilty he did deny everything. If by the judicial notice to which the learned Judge referred he meant the provisions of section 80 of the Indian Evidence Act, he was clearly in error. Even if the alleged deposition of the 4th of August 1898 had been produced in evidence, it would not have been admissible against the accused unless it was proved that it was he who gave the deposition and made the statement [163] which was the subject of the charge. The mere production of the deposition would not, under section 80, have made it admissible. As the deposition was not produced and the identity of the accused with the person who gave the deposition was not proved, the charge of giving false evidence was not established. I may observe that the learned Government Advocate very properly abandoned this part of the case against the applicant.

The result is, that the application is allowed, the conviction and sentence are set aside, and the applicant is acquitted of the offences with which he was charged. I direct that he be at once released.

The learned Government Advocate has asked me to order the trial of the applicant for the offence punishable under section 218 of the Indian Penal Code. I do not deem it desirable to make any such order at present; but I may observe that this decision will not preclude the Magistrate of the District from taking any proceedings justified by law against the accused for any other offence with which the accused may be lawfully charged.

NOTES.

[See also (1905) 2 C. L. J., 46; (1913) 23 I. C., 696 (Punjab), in which the decisions were similar.]

[21 All. 163]

The 22nd December, 1898.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Kalian Mal.....Plaintiff

versus

Ram Kishen and others.....Defendants.*

Regulation No. I of 1877 (Ajmere Courts), section 18 et seqq.—Reference by Commissioner of Ajmere—Powers of High Court—Jurisdiction.

Held that where a point of law or a question as to the construction of a document is referred to the High Court by an order purporting to be made under s. 18 of the Ajmere Courts Regulation, the High Court cannot consider whether the point referred arises in the case in which the reference before it has been made or not ; but its functions are limited to pronouncing an opinion on any point which may be so referred to it.

THE facts of this case sufficiently appear from the order the Court.

Pandit *Sundar Lal*, for the Appellant.

Mr. *W. R. Porter* and *Babu Devendro Nath Ohdedar*, for the Opposite Party.

[164] **Blair and Burkitt, JJ.**—This matter comes before us upon a reference by the Commissioner and District Judge of Ajmere under the provisions of section 18 of Regulation No. I of 1877. By that Regulation the Commissioner is empowered to ask from this Court a ruling upon a question of law, or, amongst other things, upon the construction of any document. The point at issue is a narrow one. The plaintiff in the suit is the representative of a mortgagor who mortgaged with possession a house and its appurtenances in suit in 1828. Several documents purporting to be sub-mortgages with possession were executed. In the series of mortgagees and sub-mortgagees and assignees the defendants in the suit are the last. Their names are Ram Kishen and Kishori Mal. To the mortgagor's suit for redemption they set up the protection of art. 134, sch. II of Act No. XV of 1877. It was contended on behalf of the plaintiff that the case fell within the operation, not of art. 134, but of the general rule provided for by art. 148† of the same Act. Art. 134 is in the following words :—
"To recover possession of immovable property conveyed or bequeathed in trust, or mortgaged, and afterwards purchased from the trustee or mortgagee for a valuable consideration." The question put to this Court is, whether the transfer made to the present defendants by their predecessor in title, Raj Mal, as

* Miscellaneous No. 37 of 1898.

† [Art. 148 :—

| Description of suit. | Period of limitation. | Time from which period begins to run. |
|--|-----------------------|---|
| Against a mortgagee to redeem or to recover possession of immoveable property mortgaged. | Sixty years ... | When the right to redeem or to recover possession accrues. Provided that all claims to redeem, arising under instruments of mortgage of immoveable property situate in British Burma, which have been executed before the first day of May 1863, shall be governed by the rules of limitation in force in that province immediately before the same day.] |

evidenced by the deed dated the 9th of April 1883, was a sale of proprietary rights, or only an assignment of the limited rights held by the vendor in the property transferred. It is to be observed that the vendees set up a protection limiting the mortgagor's right of suit to 12 years in place of the period provided by art. 148, which is 60 years. It is manifest, and there is abundant authority for the proposition, that it is incumbent upon them to bring themselves strictly within the provision of art. 134. They must first of all show that the document which confers title upon them is one which purports to convey an absolute proprietary right, and they must then show that an absolute proprietary right, and nothing less is what they believed that they were buying. If they fail to establish either of these conditions, they fail to bring themselves within the [168] protection of art. 134. We have had the sale deed translated and have heard arguments upon its terms, and we are unable to discern in that document any single provision or any single expression which would be applicable only to a sale of full proprietary interest. The vendor nowhere asserts that he himself possesses such full proprietary rights. Indeed there are provisions in the document granting in express words the right to inhabit, the right to let to tenants, and the right to alienate, which would be superfluous if the preceding provisions of the document had conveyed an absolute title in full. We are satisfied then that the defendants cannot claim the benefit of art. 134.

We have been invited by Mr. *Porter* to consider the question whether the matter upon which our ruling is sought did really arise in the case. We are of opinion that we should be exceeding our functions if we entered upon such an inquiry. The provisions of the Regulation are, that a certain judicial officer may ask from us a ruling on a specific point or points of law arising out of an appeal which has been heard by him and upon which he has expressed his own opinion. We have no roving commission to enter upon the merits of the case in any other respect.

Our answer to the question put to us is, that the transfer made by Raj Mal, dated the 9th of April 1883, was not a sale of proprietary rights, and can therefore only have been an assignment of the more limited rights possessed by the vendor as sub-mortgagee. The costs of this hearing will be costs in the appeal.

[21 All. 166]
APPELLATE CIVIL.

The 23rd December 1896.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Anwari Begam.....Defendant
versus
 Nizam-ud-din Shah.....Plaintiff.*

*Muhammadian law—Gift—Possession—Gift of property attached by the
 Collector for arrears of revenue—Act No. XIX of 1873 (N.-W. P.
 Land Revenue Act), section 154.*

Held that it was possible to make a gift, which should be valid under the Muhammadan law, of property which had been attached by the Collector for [166] arrears of revenue under section 154 of Act No. XIX of 1873. All that was necessary to a valid gift was that the donor should transfer possession of such interest as he had at the time of the gift : it was not necessary that he should transfer possession of the corpus of the property. *Mullick Abdool Guffoor v. Muleka*, (1884) I. L. R., 10 Cal., 1112 ; *Mahomed Buksh Khan v. Hussein Bibi*, (1888) I. L. R., 15 Cal., 684 ; *Rahim Bakhsh v. Muhammad Hasan*, (1888) I. L. R., 11 All., 1 ; and *Mohinudin v. Manchershah*, (1882) I. L. R., 6 Bom., 650, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. T. Conlan and S. Amiruddin and Pandit Sundar Lal, for the Appellant.

Mr. Abdul Majid and Maulvi Ghulam Muftaba, for the Respondent.

Blair and Aikman, JJ.—This is an appeal arising out of a suit brought by Nizam-ud-din, a minor, through his mother and certified guardian, to set aside a deed of gift which was executed by Ghulam Jilani, the grandfather of the minor, in favour of the appellant, Anwari Begam, daughter of Ghulam Jilani, and to recover possession of one-half of the property covered by the deed, of which, it is said, the donee assumed possession on Ghulam Jilani's death. Mesne profits are also claimed. Two transferees of separate portions of the property from the donee are made defendants to the suit. One of these, Behari Lal, who purchased a portion of the property from Anwari Begam, has filed a separate appeal. The other transferee defendant was a mortgagee of another part of the property and has not appealed.

* * * * *

The deed, which it was sought to set aside, was executed by Ghulam Jilani on the 21st of October 1891, and was registered by him at the office of the Sub-Registrar of Agra on the following day. The deed is printed at page 18 of the appellant's book. In it the executant sets forth that he is the absolute owner of certain property detailed in the deed, situated in the city of Agra and in certain villages of the Agra district ; that " he is about seventy years of age and has now become feeble and weak, and [167] that owing to the death of his three grown-up sons he has become much dejected, and that there is no certainty of this precarious life." The deed goes on:—"Therefore I have of my free will and without any coercion or compulsion, while in a sound state of body and mind, made a gift of the whole of my property detailed below to my daughter, Anwari Begam, and put the donee in possession of the whole of

* First Appeal No. 149 of 1896, from an order of Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 5th February 1896.

the aforesaid property. I have removed and severed my possession and proprietary connection from the said property." The deed goes on to provide that the donee shall pay the executant one hundred and twenty rupees annually for his maintenance, either in monthly or half-yearly instalments as may be convenient to the parties. Failing payment of this annual amount the donor is empowered to recover it through the Court. The property conveyed by the deed consists of a share in the village of Basaiya, in the Agra district, a share in the village of Pingri, in the Muttra district, and certain house property in the city of Agra. As stated above, the deed was executed on the 21st of October 1891. The donor died on the 31st of August 1892, that is upwards of ten months after the execution of the deed. Ghulam Jilani's three sons had died in their father's lifetime. Only one of them had left issue, namely, the present plaintiff. It is admitted that, failing the deed of gift, Ghulam Jilani's property would on his death have been divided equally between his grandson, the plaintiff, and his daughter, the defendant. The learned Subordinate Judge has decreed the plaintiff's claim upon grounds both of fact and law, which are impugned in this appeal. The argument urged upon us on behalf of the appellant divides itself into two main branches. The first disputes the conclusions of fact arrived at by the learned Subordinate Judge, that the donor was not of "disposing mind" at the date of executing the deed, and that he executed it under "undue influence." The second branch of the argument is a mixed one of fact and law. The Subordinate Judge has found that, as a matter of fact, possession had not in the lifetime of the donor been given to, and accepted [168] by, Anwari Begam of the properties purporting to be conveyed to her in the deed of gift.

[After discussing the first of the contentions mentioned above and coming to the conclusion that there was no evidence of mental incapacity or undue influence, the judgment thus continued:—]

We come now to the second branch of the argument which impeaches the finding of the Subordinate Judge upon the question whether, in relation to the several properties purporting to be given by the deed, possession had or had not, in fact and law, been given to the donee. The property conveyed by the deed of gift consisted in the first place of shares in two villages, namely, Pingri in the Muttra district and Basaiya, in the Agra district. The property in the village of Pingri was, prior to and at the date of the deed of gift, and, for all we know, during the remainder of the lifetime of the donor held under attachment by the Collector of the district for arrears of revenue under section 154 of Act No. XIX of 1873. Upon that ground it was contended that the donor had himself no possession of this property, and was therefore, according to Muhammadan law, incapable of making a valid gift of it. The share in Pingri being thus in the hands of the Collector it was possible and legal for him, if the arrears had not up to that time been cleared by the usufruct, to retain possession of it for the maximum period of five years, from the 1st of July next after the attachment—*vide* section 156 of Act No. XIX of 1873. It is clear that, although the donor had not actual possession, the ownership of the village had not passed away from him. It was open to him at any period to pay off the arrears and regain absolute possession of the property, and in any case he could not be kept out of possession for a longer period than five years. It was strenuously argued by the learned counsel for the respondent that under the Muhammadan law a gift could not be made of a share in a village which was the subject of such attachment. The decision of this point brings us to the consideration of the question, what property can form the subject of a gift according to [169] Muhammadan law? In Grady's Hamilton's Hedaya, a work of considerable, but not infallible, authority on Muhammadan law, we find, at

page 482 of the edition of 1870, the following definition under the title of *hiba* or gift:—" *Hiba* in its literal sense signifies the donation of a thing from which the donee may derive a benefit. In the language of the law it means a transfer of property made immediately and without any exchange." Again, in Baillie's Digest of Moohummudan Law, second edition, page 515, gift is defined as "the conferring of a right of property in something specific without any exchange." It is to be noted here that the word *property* is used by these two authorities without any limitation and is conterminous with what, according to the definition which is given of *hiba* in its literal sense, may form the subject of a gift, namely, something from which the donee may derive a benefit. There is nothing, therefore, in that definition to show that a Muhammadan cannot make a valid donation of a reversionary right. In Volume I of Ameer Ali's Muhammadan Law, second edition, page 58, it is said by that learned writer that "anything over which the dominion or the right of property may be exercised, or anything which can be reduced to possession, or which exists as a specific entity, or as an enforceable right, or anything in fact which comes within the meaning of the word *mal*, may form the subject of a gift." It was admitted in argument that property can, under the Muhammadan law, be validly conferred by gift, though it be not in the actual, or what is known as *khas*, possession of the donor, as, for instance, a share in a village in the occupation of tenants or held in farm by a lessee. It was not, however, admitted that property in the possession of a usufructuary mortgagee was capable of such donation. We fail entirely to understand how any distinction can be drawn between the case of a lessee and of a usufructuary mortgagee. It is equally difficult to detect any legal principle upon which a right to property held under attachment by the Collector differs from a right to property held by a lessee or usufructuary mortgagee.

[170] From page 31 of Baillie's Digest it appears that a valid gift may be made of a debt in favour of a person other than the debtor. In the case of *Mulick Abdool Guffoor v. Muleku*, (1884) I.L.R., 10 Cal., 1112, a gift of *malkana* rights, i.e., the right to receive an annual allowance, was upheld. In the case of *Mahomed Buksh Khan v. Hosseini Bibi*, (1888) I. L. R., 15 Cal., 684, the Privy Council upheld a gift of property which was not at the time of the gift in the donor's possession. It was held in that case that as the donor "had done all that she could to perfect a complete gift which was attended with complete publicity, and as the donee had afterwards obtained possession, the fact that the donor had been out of possession and therefore had not delivered possession did not of itself invalidate the gift in favour of the respondent." There is a decision of the Bombay High Court in the case of *Mohinudin v. Manchershah*, (1882) I. L. R., 6 Bom., 650, in which two Judges held that the owner of property which was in the possession of a mortgagee could not, under the Muhammadan law, make a gift of it. KEMBALL, J. dissented from this view. With reference to this case it was remarked by MAHMOOD, J., in the case of *Rahim Bakhsh v. Muhammad Hasan*, (1888) I.L.R., 11 All., at p. 10:—"I may respectfully say that it probably carries the rule as to seisin too far." Mr. Ameer Ali, at page 61 of the aforesaid volume, says, with reference to the case of *Mohinudin v. Manchershah*:—"The view taken by the majority of the Judges is founded upon an erroneous impression of Hanafi law, under which seisin is requisite for hypothecation. According to the correct view of the Hanafi doctrine on the subject, there is nothing to preclude the mortgagor from granting his equity of redemption to another."

There is no doubt that the principle of Muhammadan law is that possession is necessary to make a good gift, but the question is, possession of what? If a

donor does not transfer to the donee, so far as he can, all the possession which he can transfer, the gift is not a good one. As we have said above, there is, in our [171] judgment, nothing in the Muhammadan law to prevent the gift of a right to property. The donor must, so far as it is possible for him, transfer to the donee that which he gives, namely, such rights as he himself has; but this does not imply that where a right to property forms the subject of a gift, the gift will be invalid unless the donor transfers, what he himself does not possess, namely, the *corpus* of the property. He must evidence the reality of the gift by divesting himself, so far as he can, of the whole of what he gives. Now as to the village Pingri, we find that within a fortnight after the gift the donor went to Muttra, in which district the village of Pingri is situated, and stated on oath before the Assistant Collector as follows :—“ I have transferred my share in the village Pingri to Musammât Anwari Begam, under a deed of gift dated the 21st of October 1891, and have put her in possession of the said property like myself. I wish that by removal of the name of me, the donor, the name of the donee may be entered in the Government papers.” The usual proclamation and inquiry followed, and it is admitted that in January 1892, the donor's name was removed and the donee's name entered in the Government records as proprietor of the share in Pingri. The donor could not give actual possession of the share, as it was at the time held under attachment by the Collector. But it appears to us that, so far as he could, he took the steps necessary to put Anwari Begam in his shoes, and she, in point of fact, took his place.

We now come to consider the case as it relates to the giving of possession of the share in the village Basaiya. The learned counsel for the respondent laid stress upon the fact that proceedings were not taken to obtain mutation of names in respect of this share until the 14th of April 1892. The fact, however, remains that those proceedings were taken at the instance of the donor, and in order expressly to give effect to his gift, and were completed in his lifetime. We consider that where possession is transferred by a donor to a donee in pursuance of the deed of gift previously executed, the provisions of the Muhammadan law are [172] satisfied and delay is immaterial. The delay which took place was explained by the learned counsel for the appellant as to some extent referable to the fact that the deed of gift had been filed in the Muttra proceedings which did not terminate until January 1892, and there was consequently, a delay in getting the document from that district for the initiation of proceedings in relation to the village in the Agra district. It is not to be forgotten that the decision of the Revenue Court in mutation proceedings is based upon a transfer of possession effected before mutation takes place. Upon the weight to be attached to the decision of the Revenue Courts in such proceedings, the following observations of the Privy Council in the case of *Muhammad Mumtaz Ahmad v. Zubaida Jan*, (1889) I. L. R., 11 All., 460; at p. 477, may be quoted :—“ But the order for mutation is important as showing that no objection was made to the mutation, and that the report of the patwari, made during the lifetime of Zahur, as to the execution of the deed of gift and of the transfer of possession under it, which had been adopted by the tahsildar, was also adopted and acted upon by the Deputy Collector.”

We will now consider the documentary evidence relied on by the plaintiff as showing that, notwithstanding the deed of gift and the assertions contained in it as to the donor having put the donee in possession of the property, the donor himself continued in possession, exercising all the rights of ownership. In the first place copies are filed of plaints and decrees in suits brought by Ghulam Jilani against tenants in the village of Basaiya for arrears of rent.

All these plaints were filed on the 1st of February 1892, and were for the recovery of the arrears of rent for the kharif instalment of the year 1299F. In them the cause of action is described as arising on dates ranging from the first to the 10th of November, that is, by far the major portion of the rent had accrued before the date of execution of the deed of gift. We note also that in all the plaints Ghulam Jilani describes himself, not as zamindar but as lambardar, and we have no [173] information as to the date upon which he ceased to be lambardar. Another circumstance is, that all these suits were instituted before the mutation of names had been made, at a time when Ghulam Jilani's name still appeared in the revenue record. The same observation applies to certain ejectment proceedings taken by Ghulam Jilani against tenants in Basaiya. In this connection we may quote another passage from the judgment of their Lordships of the Privy Council in the case of *Muhammad Mumtaz Ahmad v. Zubaida Jan*, referred to above, most of the incidents of which bear a remarkable resemblance to those of the case now before us. At page 477 of the judgment their Lordships say:—"The reasons of the Subordinate Judge in support of his finding that the donee died before she obtained possession are weak and unavailing. First, he relies upon five decrees in suits brought in the name of Himayat Fatima for rent which accrued after the date of the deed of gift, and also upon one payment of revenue made in her name on the 26th November 1879, but the suits were commenced and the revenue paid before the mutation of names in the Collector's office, at a time when actions for rent and payment of revenue would in all probability be brought and made in the name of the person entered as the proprietor in the Collector's book." In this case also two receipts for revenue paid in the name of Ghulam Jilani are relied on. One of these for Rs. 200 is dated the 4th of May 1892. The sum purports to have been received from Ghulam Jilani as lambardar and on account of the rabi instalment of 1291 F. At the time of that payment Ghulam Jilani's name stood in the Government books as the proprietor of the share and also as lambardar. The second receipt is dated the 18th of July 1892, and is for Rs. 24-14-3. The money purports to have been received from Ghulam Jilani, lambardar, on account of revenue, miscellaneous items. At the date of this payment mutation proceedings had terminated, Anwari Begam's name having been substituted for Ghulam Jilani's on the 23rd of June 1892; but the receipt does not show on account of what instalment the money was paid, and from the amount of the payment and its date we have little [174] doubt that it was on account of a balance due in respect of some instalment previous to the mutation of names.

Applying the criticisms of the Privy Council in the above case, we think that the above evidence does not negative the abandonment by the donor to the donee of his possession in the village of Basaiya. As to the positive evidence to prove the donee's possession of the above share in the lifetime of the donor, we attach great weight to entries in the diary of a deceased patwari, produced by his successor, one of which is dated the 28th of June 1892. These show that the agent of the donee was on her behalf exercising proprietary rights in the village prior to the decease of the donor.

The above entries strongly corroborate the genuineness of certain leases granted by the donee's agent, on which doubts have been thrown—it appears to us on insufficient grounds—by the lower Court. We have examined these documents and are unable to agree with the opinion expressed by the learned Subordinate Judge regarding them. We find that transfer of possession of the share in Basaiya did take place in the donor's lifetime.

The third property, the subject of the deed of gift, is the house property in the city of Agra. It is contended on behalf of the respondent, that a part of the

property purporting to be conveyed by the deed of gift had been the subject of a suit brought by Ghulam Jilani upon the 19th of April 1892, in which he claimed to be the owner in possession of the property sued for. We have examined all details and descriptions by metes and bounds, and a map of the house property in question, and the respondent has failed to satisfy us as to the identity of the property sued for in the plaint abovementioned with any part of the property covered by the deed of gift. A tenant of this property was called as a witness, and a number of endorsements upon the back of the lease to this tenant, purporting to be acknowledgments of receipts by the lessor of rent from him, were relied on. It is contended, and is no doubt true, that the oral statements made by the witness do not correspond therewith in relation to the amounts [175] due and payable by him in respect of this house property. We think there is possibly an explanation of the discrepancy, but we find it unnecessary to arrive at a conclusion upon that matter. In our opinion, if the receipts for rent had been forgeries or interpolations for the purposes of this case, they would have purported to be signed by some person on behalf of the lessor. We are also satisfied that if the story of the witness had been a concocted story, it would have been made to coincide accurately with the documentary evidence in possession of the party who called him. We therefore find that the gift of the house property is not invalid for lack of possession by the appellant here. The result is that the appeal is allowed, the decree of the lower Court is set aside, and the plaintiff's suit is dismissed with costs. The appellant will have her costs of this appeal.

Appeal decreed.

NOTES.

[See also (1902) P. L. R., 36, where this was distinguished.]

[21 All. 175]

APPELLATE CRIMINAL.

The 3rd January, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KT., CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Queen-Empress
versus
Soneju and others.*

Criminal Procedure Code, section 288—Admissibility of evidence—Statement of approver made before committing Magistrate and afterwards retracted in the Court of Session.

Pardon was tendered by a Magistrate to one of several persons who were being tried before him for dacoity. The pardon was accepted, and the person to whom it was tendered made a statement as a witness before the Magistrate. The case having been committed to the Court of Session, the approver in that Court totally repudiated his statement made before the Magistrate. *Held* that this repudiation did not prevent the Sessions Court from considering the evidence of the approver under the provisions of section 288 of the Code of Criminal Procedure.

* Criminal Appeal, No. 1059 of 1898.

IN this case twenty persons were committed for trial to the Court of the Sessions Judge of Jhansi charged with dacoity under section 395 of the Indian Penal Code. Out of these, twelve were convicted, of whom two were sentenced to transportation for life, and the remainder to rigorous imprisonment for ten years.

[176] In the course of the inquiry preceding the Sessions trial one of the accused, Jujhar Singh, was offered a pardon by the committing Magistrate. He accepted the offer, and made a statement at considerable length, naming all the accused, and giving a minute account of the manner in which the dacoity was carried out. This statement was repeated a few days later. In the Court of Session, however, Jujhar Singh absolutely denied his previous statements. He asserted that he had been induced to make them by torture practised upon him by the Police, and that even while he was in the midst of making his second statement before the committing Magistrate, a Police officer had taken him outside the Court-room and threatened him with a renewal of the treatment to which he had been formerly subjected

Concerning the evidence of this witness the Sessions Judge recorded the following opinion:—"Although, however, the above testimony corroborates the statements made by Jujhar Singh and the confessions made by Mazbut Singh and Jaggat Singh in the committing Magistrate's Court, yet I am afraid that the former statements cannot be used as evidence against the accused in this Court. The ruling *Queen-Empress v. Nagn*, Weekly Notes, 1891, p. 184, very clearly lays down that where, in the Sessions Court, a person to whom a pardon has been tendered in the committing Court, in consequence of which he made a full confession implicating himself and another person of murder, retracts and disavows that confession, the latter is no evidence in the trial. STRAIGHT, J., in *Empress v. Nazzara*, (1881) 2 Leg. Rem., 170, says that he entertains the gravest doubts whether section 288 of the Criminal Procedure Code was ever intended to apply to the case of an approver who has made a deposition before the Magistrate, but in the Sessions Court withdraws it *in toto* upon the allegation that it was not a voluntary but an enforced statement. In the light of those rulings I am unable to take upon myself the responsibility of admitting in evidence, under section 288 of the Criminal **[177]** Procedure Code, the depositions made by Jujhar Singh in the preliminary inquiry, whatever my own opinion may be of their truth."

On appeal from the convictions under section 395 of the Indian Penal Code the question of the admissibility of the statement of the accomplice Jujhar was discussed.

The Officiating Government Advocate (Mr. A. E. Ryves), for the Crown.

The Court (STRACHEY, C. J., and KNOX, J.) held that there was nothing in the previous rulings of the Court which would make inadmissible, under section 288 of the Code of Criminal Procedure, the statement of the approver made before the Magistrate.

NOTES.

[See also (1904) P. R., 3, which is to the same effect.]

[21 All. 177]
REVISIONAL CRIMINAL.

The 4th January, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KT., CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Queen-Empress
versus
Lalit Tiwari and others.*

Rules of Court of the 18th January 1898, rule 83—Finality of judgment or order of the High Court—Judgment or order not complete until sealed.

Held that a judgment or order of the High Court is not complete until it is sealed in accordance with Rule 83 of the Rules of Court of the 18th January 1898, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken.

A REFERENCE asking for an enhancement of sentence being before a Judge of the High Court, the Judge wrote an order declining to interfere, and signed and dated it. Subsequently, on the same day, the Judge reconsidered that order and erased it, substituting therefor an order calling upon certain convicts to show cause why the sentences passed upon them should not be enhanced. When the case came up for disposal on the return of the notice to show cause, Mr. *Amiruddin*, for the persons called upon, contended that the Judge had no power to change the order which had been originally written and signed by him, except on [178] application for review of such order. On this point the Court (STRACHEY, C. J., and KNOX, J.), held that, having regard to the rules of the Court, a judgment was not complete until it was sealed, and that until a judgment was sealed it might be altered by the Judge concerned without the necessity of having recourse to any formal procedure by way of review of judgment.

NOTES.

[This was followed in 27 All., 92, see also 38 Cal., 828.]

[21 All. 178]

APPELLATE CIVIL.

The 5th January, 1899.

PRESENT :

MR. JUSTICE BURKITT.

Balli Rai and others.....Defendants

versus

Mahabir Rai.....Plaintiff.*

*Court fee—Act No. VII of 1870 (Court Fees Act), section 5 ; Sch. ii, Art. 11—
Letters Patent, section 10—Appeal from an order of remand under
section 562 of the Code of Civil Procedure.*

Held that in an appeal under section 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under section 562 of the Code of Civil Procedure the proper Court fee is Rs. 2.

THIS was a reference to the Taxing Judge of the Court under section 5 of the Court Fees Act, 1870. An appeal had been filed under section 10 of the Letters Patent from an order of a single Judge of the Court remanding a case under section 562 of the Code of Civil Procedure, and the memorandum of appeal was stamped with a Court fee stamp of Rs. 2. On this memorandum of appeal being laid before the stamp reporter of the Court, the following report was made :—

" 1 stamp Rs. 2.

" In time up to 15th September 1898.

" This is an appeal under section 10 of the Letters Patent from the judgment of the Hon'ble Mr. Justice BANERJI remanding the Second Appeal No. 531 of 1897, under section 562 of the Code of Civil Procedure.

" The appellants pay Rs. 2 only as Court fee. The question is, whether a Court fee of Rs. 2 paid is sufficient. The valuation of this appeal is Rs. 240, so also was that of the Second Appeal, on which an *ad valorem* fee of Rs. 18 was paid.

[179] " There have been similar appeals under section 10 of the Letters Patent from the judgments remanding cases under section 562 of the Code of Civil Procedure, on which an *ad valorem* fee has always been paid. A new question has arisen now. Mr. Haribans Sahai, vakil for the appellant, contends that as Rs. 2 is paid on an appeal to this Court from an order passed by lower Courts under section 562 of the Code of Civil Procedure, the fee of Rs. 2 paid on the same principle is sufficient.

" I am really in doubt, but beg to submit the following two points for the consideration of the Taxing Officer :—

" (1) That the Civil Procedure Code makes a distinction between orders and decrees, and hence when appeals are filed from orders under section 588 of the Code of Civil Procedure, Rs. 2 is paid, but under the Letters Patent appeals are filed from judgments and not from orders or decrees.

" (2) That since the establishment of the High Court, the same amount of fee as paid in Second Appeals has hitherto been paid on appeals under the Letters Patent, whether the judgments appealed from dismissed the Second

* Appeal No. 25 of 1898 under section 10 of the Letters Patent.

Appeals in default or remanded them under section 562 of the Code of Civil Procedure."

On this report the Taxing Officer made the following reference to the Taxing Judge:—

"In this case an appeal under section 10 of the Letters Patent has been filed against the judgment of Mr. Justice BANERJI in Second Appeal No. 531 of 1897. For the purposes of this reference I quote the words of the judgment which appear necessary:—'I set aside the decrees of the Court below and remand the case under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number on the register, and try it according to law on the merits.'

"The appeal against this judgment has been filed on a Rs. 2 stamp, and the stamp reporter brings to notice that hitherto appeals such as these have always been presented on an *ad valorem* fee. The appellant's counsel contends that a court fee [180] of Rs. 2 is sufficient, and that an appeal to this Court from an order passed under section 562 of the Civil Procedure Code by a Lower Appellate Court can be filed on a Rs. 2 stamp. I am of opinion that the stamp of Rs. 2 is sufficient, and that the practice hitherto prevailing of realizing court fees *ad valorem* in Letters Patent appeals against a judgment formulating an order under section 562, Civil Procedure Code, is wrong.

"Under section 588, Civil Procedure Code, clause 28, the directing of a lower Court to re-admit a case under section 562 is an 'order.' It is not a decree (*vide* section 2 of the Civil Procedure Code). According therefore to Sch. ii, Art. 11 of the Court Fees Act, the present appeal being one not 'from an order rejecting a plaint, or from a decree or order having the force of a decree' a fee of Rs. 2 is sufficient.

"The language of section 10 of the Letters Patent does not affect the matter in issue. It is provided in that section that an appeal shall lie against the 'judgment' of one Judge (etc., etc.). A 'judgment' means the statement given by the Judge of the grounds of a decree or order, and in appeals for the purpose of determining jurisdiction, or the amount of court fee payable, regard is had, not to the judgment as a judgment, but as to whether it embodies a decree or an order.

"I consider the matter one of general importance, and particularly so as the practice which has obtained hitherto seems to me to be wrong in law. I accordingly refer the case to the Taxing Judge under section 5, Act VII of 1870."

On which this order was passed:—

Burkitt, J.—I think a court fee of Rs. 2 is sufficient. That is the fee leviable on an appeal against an order of a District Court remanding a case under section 562 of the Code of Civil Procedure. I know of no reason why a higher fee should be leviable on a memorandum of appeal against an order of a similar nature passed by a Judge of this Court. The wording of the Letters Patent does not affect the question.

[181] REVISIONAL CRIMINAL.

The 6th January, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

In the matter of the Petition of Madho Ram.*

Act No. XVIII of 1879 (Legal Practitioners' Act), section 36—Order including a person's name in the list of touts—Revision—Statute 24 and 25 Vic., Cap. LIV, section 15— Powers of superintendence of the High Court.

Held that in the case of an order passed under section 36 of Act No. XVIII of 1879, the High Court could only interfere in the exercise of the powers of superintendence conferred upon it by section 15 of the Indian High Courts Act, 1861, and that it would not interfere even then, where the sole ground upon which its interference was asked for was that the decision of the District Judge was against the weight of the evidence.

IN this case, the committee of the local Bar Association at Saharanpur having represented to the District Judge that certain persons named by them were persons against whom action ought to be taken under section 36 of the Legal Practitioners' Act, the Judge took evidence and heard such of the persons proceeded against as appeared and tendered evidence in their own exculpation, and finally recorded an order, the substance of which, so far as the present report is concerned, is as follows :—" As to the other four men, against Madho, Sri Ram, and Sajjad Husen, there is ample ground for concluding that they are touts. This would appear from the evidence of their own witnesses almost as clearly as from their general reputation as evidenced by members of the local Bar."

"The result is that I order that the following men be proclaimed as touts, viz. :—

" Bhura, age 35, Gujar, residence Chandanpur.

" Madho, age 35, son of Ganpat Rai, mahajan, of Saharanpur.

" Sri Ram, age 34, son of Parbhu Lal, mahajan, of Saharanpur.

" Sajjad Husen, age 28, son of Zulfikar Ali, Syed, of Saharanpur.

[182] "The names of these men will be posted in my Court and in every Court subordinate to mine in the Judicial Division, and I hereby order, under section 36 (4), Legal Practitioners' Act, (Act No. XVIII of 1879 as amended by Act XI of 1896), that the above-mentioned men be excluded from the precincts of each of the Courts above-mentioned."

Against this order Madho Ram applied in revision to the High Court.

Mr. G. P. Boys, for the Applicant.

Strachey, C. J. :—This is an application to the Court to set aside an order passed by the District Judge of Saharanpur under section 36 of the Legal Practitioners' Act, XVIII of 1879, as amended by section 4 of Act No. XI of 1896. That order of the District Judge was an order including the name of this petitioner in the list of persons proved to the satisfaction of the Judge habitually to act as touts. The only ground stated in the petition to us is :—" Because the finding is against the weight of the evidence." We are of opinion that this Court ought not to interfere, on any such ground as that, with an order passed by a subordinate Court under section 36 of the Legal Practitioners'

* Miscellaneous No. 218 of 1898.

Act. The law gives no right of appeal to this Court from any such order. As regards revision, such cases are clearly not criminal proceedings to which the revisional powers of the High Court under section 439 of the Code of Criminal Procedure would apply. They do not fall within the powers of civil revision conferred by section 622 of the Code of Civil Procedure. There remain only the powers of superintendence conferred by section 15 of the High Courts Act. Under that section this Court has, no doubt, very wide powers of superintendence over the proceedings of subordinate Courts; and it is possible to imagine cases in which, in the exercise of those powers, it might be the Court's duty to interfere with an order passed under section 36 of the Legal Practitioners' Act. Although under section 36 the Courts have an extremely large discretion in framing lists of touts and including the [183] names of particular individuals in such lists, the conditions prescribed by the section must of course be observed: for instance, no person's name is to be included unless he has had an opportunity of showing cause against such inclusion, and in all cases the person must be proved to the Court's satisfaction habitually to act as a tout, and must be so proved by evidence, whether of general repute or otherwise. But in considering whether this Court should interfere in the exercise of its powers of superintendence, one must bear in mind, first, that the test prescribed by section 36 is proof to the satisfaction of the Court framing the list and of no other tribunal; and, secondly, that it is settled that this Court is not competent, under section 15 of the High Courts' Act, to interfere with the order of a Subordinate Court, merely on the ground of error in law or error in fact. Its powers of superintendence are not applicable where the only question is whether the decision of the lower Court is against the weight of evidence. That is the only question raised by the present petition. It is admitted that there is evidence upon which the lower Court has acted—evidence on the one side and on the other. We must, therefore, decline to interfere and must dismiss the application.

NOTES.

[See also (1908) 6 A. L. J. 22 to the same effect; also (1909) P. L. R. 115; (1904) P. R. Cr. 22.]

[21 All. 183]

APPELLATE CIVIL.

The 11th January, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Raghubans Kunwar* and another.....Defendants

versus

Bhagwant Kunwar.....Plaintiff.¹

Hindu law—Hindu widow—Maintenance—Suit for arrears of maintenance—Discretion of Court in allowing arrears.

Where a Hindu widow sues for maintenance from the family and estate of her deceased husband, with arrears of such maintenance, the allowance of arrears of maintenance is a question for the discretion of the Court, and the Court, if it allows arrears of maintenance

* First Appeal No. 206 of 1896, from a decree of Babu Prag Das, Officiating Subordinate Judge of Meerut, dated the 26th June 1896.

at all, will not necessarily allow arrears at the same rate as it may allow future maintenance, especially where the plaintiff has made serious delay in bringing her suit for maintenance.

[184] THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. Conlan and Munshi Ram Prasad, for the Appellants.

Pandit Bishambar Nath, Pandit Moti Lal Nehru and Pandit Baldeo Ram Dave, for the Respondent.

Banerji and Aikman, JJ.—The plaintiff respondent, who claimed to be the widow of Rao Partab Singh, brought the suit, which has given rise to this appeal, for a declaration of her right to maintenance out of the estate of the deceased, and for recovery of Rs. 10,480 as arrears of maintenance, and Rs. 7,016-6-6 as interest on those arrears. She prayed that her maintenance should be declared to be a charge upon the estate of Rao Partab Singh, which at the time of the suit was in the possession of the defendants appellants, who are the daughters of his adopted son, Rao Maharaj Singh. The plaint alleged that the plaintiff obtained her maintenance from Rao Maharaj Singh, and after him from his widow, up to 8th July 1883; that subsequently to that date the payment of her maintenance was stopped by Raja Ghansham Singh, who was appointed guardian of the minor daughters of Maharaj Singh and manager of the estate, and that in 1893 her right of maintenance was denied.

The suit was defended upon various grounds, the principal of which was that the plaintiff was not the widow of Rao Partab Singh. The defendants denied the right of the plaintiff, not only to future maintenance, but also to the arrears claimed by her, and they further disputed the rate at which maintenance had been claimed. The Court below held it established that the plaintiff was the widow of Rao Partab Singh, and granted a decree in her favour for future maintenance at the rate of Rs. 80 a month, and for the arrears of maintenance claimed by her. It dismissed the claim for interest upon the arrears. It also granted the prayer that the maintenance should be a charge upon the estate.

[185] The defendants have preferred this appeal, and the plaintiff has taken objection under section 561 of the Code of Civil Procedure in regard to the dismissal of the claim for interest. In the memorandum of appeal to this Court the pleas taken in the Court below were reiterated, but the learned counsel for the appellants has conceded that upon the evidence on the record he cannot substantiate the first two pleas, which are to the effect that the plaintiff was not the wife, but was the concubine, of Rao Partab Singh. The learned counsel has not also disputed the rate at which future maintenance has been decreed to the plaintiff.

The principal contention before us was, that the Court below should not have decreed arrears of maintenance to the plaintiff. The main ground upon which this contention was based was that the plaintiff had advanced no claim in regard to the arrears for nearly eleven years, and that she had been living apart from her husband's relations, and was being maintained by her own relations. The learned counsel further contended that, even if the plaintiff was entitled to arrears of maintenance, those arrears should not be awarded at the rate decreed by the Court below.

There can be no doubt that a Hindu widow is entitled to maintenance out of her husband's estate, and is also entitled to claim arrears of such maintenance, even if she lives apart from her husband's relations. The grant of arrears is, however, a matter within the discretion of the Court, and the Court may, for sufficient reasons, be justified in refusing to grant any arrear or arrears at the rate claimed. As authorities for this view we may refer to paragraph 417 of Mayne's Hindu Law, and page 466 of the Tagore Law Lectures for

1879, and the authorities therein cited. In this case we find from the evidence of the brother of the plaintiff that she was residing since 1883 with him, and occasionally with Rao Umrao Singh, who, according to the Subordinate Judge, has been promoting this litigation. From the evidence of the brother of the plaintiff it appears that the [186] additional expense entailed on him by reason of his supporting the plaintiff was about Rs. 10 a month, so that the amount which has been decreed is far in excess of the sum which was necessary to meet the charges incurred for her support. Having regard to this fact, and to the fact that for nearly eleven years the plaintiff made no claim whatever for her maintenance, leaving probably the defendants under the impression that she had waived her claim for maintenance, we think that she is not entitled to be allowed arrears of maintenance at the rate at which maintenance has been fixed for her for the future. Having regard to the expense incurred by her brother in maintaining her, we think that if we allow arrears at the rate of Rs. 16 a month, that will be sufficient to meet the justice of the case. It has not been proved that the plaintiff incurred any debts for her maintenance, and we see no valid reason for awarding to her the large sum she claims. We entirely agree with the learned Subordinate Judge that the plaintiff is not entitled to any interest on the arrears. We accordingly vary the decree of the Court below by reducing the sum allowed for arrears from Rs. 10,480 to Rs. 2,096, and we declare the plaintiff entitled to maintenance at the rate of Rs. 80 a month, with effect from the 8th of June 1893, the said maintenance being a charge upon the estate. As for the costs of the suit, we are of opinion that as the defendants improperly denied the plaintiff's status as the widow of Rao Partab Singh, the defendants should bear their own costs and pay to the plaintiff her costs in the Court below in proportion to her success as now decreed. The defendants will bear their own costs of this appeal. We dismiss the objection under section 561 with costs.

Decree modified.

NOTES.

[See also (1901) 16 C. P. L. R., 30 ; (1904) 1 N. L. R., 33.]

[187] *The 12th January, 1899.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Muhammad Abdullah Khan and another.....Plaintiffs
versus

Kallu and another.....Defendants.*

Civil Procedure Code, section 539—Suit for a declaration that a certain piece of land is a grave-yard—Jurisdiction.

Held, that a suit for a declaration that a certain piece of land was a grave-yard dedicated to the use of such persons as had no grave-yards of their own, and asking the Court to appoint a mutawalli and settle a scheme for the management of the grave-yard, was not such a suit as fell within the purview of section 539 of the Code of Civil Procedure. *Lakshmandas Parashram v. Ganputrav Krishna* (1884) I. L. R., 8 Bom., 365, and *Strinivasa Ayyangar v. Strinivasa Swami* (1892) I. L. R., 16 Mad., 31, referred to.

* First Appeal No. 237 of 1896, from a decree of A. M. Markham, Esq., District Judge of Meerut, dated the 19th August 1896.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Ghulam Mujtaba, for the Appellants.

Pandit Moti Lal, for the Respondents.

Banerji and Aikman, JJ.—This is an appeal by the plaintiffs to a suit which purported to have been brought under section 539 of the Code of Civil Procedure, and was instituted in the Court of the District Judge of Meerut. The allegation was that a certain piece of land was wakf property, being a grave-yard dedicated to the use of persons who had no grave-yards of their own, that the defendants had taken wrongful possession of the land, and that one of the defendants had sold it to the other. The plaintiffs asked for a declaration that the land was endowed property, for the appointment of one of the plaintiffs or some other person as mutawalli of the property, for the framing of a scheme for the management of the property, for the ejectment of the defendant No. 1 from the land and for the making over of the land to the person who might be appointed mutawalli. The Court below has dismissed the suit on the ground that this was not a case to which section 539 of the Code of Civil Procedure applied.

In our opinion the learned Judge was right in holding that this suit did not come within the purview of section 539. [188] That section contemplates the existence of an express or constructive trust created for public, charitable, or religious purposes. In this case all that is alleged is that the land in question is endowed property, and it is not alleged that there was any express or constructive trust in favour of any one. Section 539 cannot, in our opinion, apply to the case of property from which it is sought to remove a trespasser. This view is supported by the ruling of the Bombay High Court in *Lakhsmandas Parashram v. Ganpatrav Krishna*, (1894) I. L. R., 8 Bom., 365, and of the Madras High Court in *Strinivasa Ayyangar v. Strinivasa Swami*, (1892) I. L. R., 16 Mad., 31. It is clear therefore that the suit could not have been instituted in the Court of the District Judge under section 539 of the Code of Civil Procedure.

The learned vakil for the appellants has contended that even in the view which we have taken of the case, and which was taken by the learned Judge of the Court below, the plaint ought to have been returned for presentation in the proper Court, and the suit should not have been dismissed. It may be that some of the reliefs claimed are such that an ordinary Civil Court may not be competent to grant; we do not decide this point; but there are certainly other reliefs claimed which are clearly within the cognizance of an ordinary Civil Court, and for this reason we are of opinion that the learned Judge of the Court below should, instead of dismissing the suit, have dealt with it under section 57, cl. (a) of the Code of Civil Procedure, and returned the plaint to be presented to the proper Court. We therefore set aside the decree of the Court below dismissing the suit, and remand the case to that Court with directions to deal with the plaint in the manner which we have indicated above. The respondents will get their costs in this Court and in the Court below, as the appellants have substantially failed.

Appeal decreed.

NOTES.

[This was followed in (1906) 33 Cal., 789; (1905) 2 C.L.J., 431; (1911) 33 All., 660; (1913) 19 I.C., 973.]

[189] REVISIONAL CRIMINAL.

The 20th January, 1899.

PRESENT :

MR. JUSTICE KNOX.

Queen-Empress

versus

Mukundi Lal. *

Criminal Procedure Code, section 263—Summary trial—Matters necessary to be stated in the record of a summary trial.

Where a Magistrate, invested with powers under section 260 of the Code of Criminal Procedure, is trying a case summarily, it is desirable that he should set out under the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that while this should be recorded with brevity, the brevity should not be such as to tend to obscurity.

The record of a summary trial contained in the column corresponding to cl. (h) of section 263 of the Code of Criminal Procedure the following entry :—“ The Police made a raid on information received and caught all the accused gambling. The defence of Mukundi, Mannu, Kali Charan, Ballan and Gulzari Lal involves the absurdity that the Police obtained a warrant to raid a house in which they could have no reason to suppose they would find any one. I convict Mukundi of keeping a common gaming-house,—section 4, Gambling Act. I convict the other six defendants of gaming in a common gaming-house,—section 3, Gambling Act.”

Held, that this entry, though it should have been more explicit, was a sufficient compliance with the requirements of the law.

THE facts of this case are fully stated in the order of the Court.

Mr. W. M. Colvin and Pandit Moti Lal, for the Applicant.

The Government Pleader, (Munshi Ram Prasad), for the Crown.

Knox, J.—This is an appeal presented by one Mukundi Lal. Mukundi Lal has been convicted of keeping a common gambling house, and, so the Magistrate's order runs, sentenced under the provisions of section 4 of the Gambling Act, to rigorous imprisonment for one month. Section 4 of Act No. III of 1867 prescribes no penalty for owning or keeping a gambling house; that offence is provided for by section 3. The grounds on which I am asked to interfere are that the record of the summary trial does not comply with section 263 of the Code of [190] Criminal Procedure, and it is urged that the formalities laid down in that section should be strictly observed for the protection of the public. Reference is here made to the entry required by law under section 263, cl. (h), of the Code of Criminal Procedure under the head in the summary register relating to this case. The entry made is as follows :—“ The Police made a raid on information received and caught all the accused gambling. The defence of Mukundi, Mannu, Kali Charan, Ballan and Gulzari Lal involves the absurdity that the police obtained a warrant to raid a house in which they could have no reason to suppose they would find anyone. I convict Mukundi of keeping a common gaming-house,—section 4, Gambling Act. I convict the other six defendants of gaming in a common gaming house,—section 3, Gambling Act.” Then follows the sentence. The contention is, that there is in the

* Criminal Revision No. 747 of 1898.

above passage no brief statement of the reasons given for the conviction. Certainly the letter of the law has been very scantily complied with, and it would have been well if the learned Magistrate, instead of recording his reasons in this telegraphic form, had expanded them so as to show that the reasons for conviction were founded upon evidence; that the Police had received information as required by the Act, and that acting on the information, they had made a raid and found all the accused gambling with whatever were the instruments found on the spot. I am satisfied, however, that this is what the Magistrate meant by the words he has used, and they show me that he had his mind concentrated upon the evidence so far as it went to the important points of information followed by authority as required by section 5 of the Act, and to the fact there had been gambling with instruments of gambling as laid down in section 4; and that, finding this proved, he had, looked to see whether the presumption thus created by law against the accused had been rebutted. The entry required by cl. (g) of section 263 shows no rebutting plea and no proof of any such plea. At the same time the record made does show signs of want of full care and attention on the [191] part of the learned Magistrate. He would never have convicted Mukundi Lal under section 4 and the other six accused under section 3 if he had observed due care. Even when his attention had been drawn to the fact that his proceedings were impugned, he does not seem to have discovered the error into which he had fallen. Again, the reasons given for the conviction afford no ground for the conclusion that Mukundi Lal was the owner or occupier of the house. The only reference to this very material question is to be found in the prisoner's plea, and that plea, without evidence to the contrary, had to be accepted as it stood. Mukundi Lal said that the house belonged to his father and that he lived in the house opposite. My attention was drawn to the rulings in the case of *The Empress v. Panjab Singh*, (1881) I. L. R., 6 Cal., 579; *Yacoob v. Adamson*, (1886) I. L. R., 13 Cal., 273; *Queen-Empress v. Shidgauda*, (1893) I. L. R., 18 Bom., 97; *The Queen v. Johrie Singh*, (1874) 22 W. R., Cr. R., 28; *Empress v. Chotey Lal*, Weekly Notes, 1882, p. 242; *Empress v. Girwar Dial*, Weekly Notes, 1883, p. 114; *Empress v. Mohan*, Weekly Notes, 1885, p. 213, and *Empress v. Lachman*, Weekly Notes, 1886, p. 181.

The cases of this Court reported in the Weekly Notes for 1883, 1885, and 1886, do not set out the entries made by the Magistrate in the column given for the findings. So far as these cases are concerned, I may take it that there was no statement of the reasons given. The case in the Weekly Notes of 1882 was a case under Act No. X of 1872, and the report given does not show what was the offence of which the accused were convicted. This was certainly a fatal defect, and the reasons given as there stated do not show that any offence under any section whatever had been committed. So far this case is clearly to be distinguished from the other cases of this Court which have been brought to my notice. I think it distinctly desirable that Magistrates should set out under the column reserved for the purpose so much of the reasons that have influenced them as to satisfy the accused that the Magistrate has considered each of the [192] ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that, while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. There is no question in my mind from the language used by the Legislature that the intention was that in cases of this kind the procedure should be summary and the record should contain the barest particulars. I am therefore not prepared, if I find compliance with these requisites, to interfere and to lay down that facts and reasons should be set out at such length as to make the Court of revision more or less also a Court of appeal so far as facts are concerned.

The law intended the procedure to be summary, and it is not for this Court to lay down otherwise than the law has directed. In a previous case, I pointed out that the responsibility thrown on Magistrates entrusted with summary powers is very great, and the responsibility of those who have to entrust them with such powers is equally great. Magistrates who are sufficiently alive to the responsibility entrusted to them will take care that the procedure and the record is not made more summary than the law has laid down. In this case after carefully looking into the whole record I am not satisfied on the Magistrate's own showing that, so far as the applicant is concerned, any offence beyond that provided for by section 4 has been established. I alter the conviction to a conviction for being found in a gambling house gambling, and, under section 4 of Act No. III of 1867, direct that Mukundi Lal pay a fine of Rs. 25, and that the fine be recovered from him in the manner prescribed by section 388 of the Code of Criminal Procedure. The conviction and sentence imposed by the Magistrate are set aside.

[This was followed in (1913) 21 I. C., 466 (Oudh) ; (1915) 30 I.C., 1001 : 9 S.L.R., 89 (Sindh).]

[193] APPELLATE CIVIL.

The 26th January, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KT., CHIEF JUSTICE. AND MR. JUSTICE KNOX.

Ram Nath Rai and others.....Plaintiffs

versus

Lachman Rai and others... ..Defendants.*

*Act No. IV of 1882 (Transfer of Property Act), section 85—Hindu law—
Joint Hindu family—Suit on a mortgage executed by a Hindu father—
Sons not made parties—Notice—Burden of Proof.*

Where the sons in a joint Hindu family come into Court seeking to get rid of the effect, as against their interests in the joint family property, of a decree on a mortgage executed by their father obtained in a suit to which they were not made parties, the burden of proof lies on them to establish that the mortgagee when he brought his suit had notice of their interests in the mortgaged property.

THIS was a suit brought by the sons in a joint Hindu family against their father and his mortgagee to obtain a declaration that their interests in certain property which they alleged to be ancestral property were not liable to sale in execution of a decree obtained in a suit for sale on a mortgage against the father. The plaintiffs had not been made parties to the suit for sale against their father.

The defendant mortgagee pleaded that the property in suit was not ancestral, but the personal property of the father, to whom he advanced the loan in good faith.

* Second Appeal No. 883 of 1896, from a decree of H. D. Griffin, Esq., Officiating District Judge of Azamgarh, dated the 6th June 1896, confirming a decree of Pandit Guru Prasad Dube, Munsif of Muhammadabad Gohna, dated the 24th March 1896.

The Court of First Instance (Munsif of Muhammadabad) found that the defendant mortgagee had no notice of the property in question being ancestral or of the plaintiff's interest therein, and accordingly dismissed the suit.

The plaintiffs appealed. The Lower Appellate Court (District Judge of Azamgarh) found that the property was ancestral; but that the plaintiffs had failed to discharge the burden, which lay on them, of proving that the defendant mortgagee had notice of their interests in the property at the time when he brought his suit on the mortgage. That Court accordingly dismissed the appeal.

[194] The plaintiffs appealed to the High Court.

Mr. A. H. C. Hamilton, for the Appellants.

Pandit Sundar Lal, for the Respondents.

Strachey, C. J.—We have come to the conclusion that the judgment of the Lower Appellate Court is correct. There is undoubtedly a clear finding of fact that the mortgagee had no notice of the interests of the present plaintiffs in the suit in which the mortgage decree was passed. There are, however, expressions in the judgment which indicate that in coming to that conclusion the learned Judge was influenced by his view that it was for the plaintiffs in this suit to establish that the mortgagee, when suing upon his mortgage, had notice of their interests, and that, as they were not made parties to that suit, the decree obtained under section 88 of the Transfer of Property Act would not affect them. We think that the learned Judge was right.

We think that it was for the plaintiffs—Hindu sons trying to prevent, so far as their interests were concerned, a sale of an ancestral property in execution of a mortgage decree against their father only—to prove that the sale would not under the circumstances affect their interests. The property was undoubtedly ancestral property. It is found as a fact that no evidence was given by the plaintiffs in support of their allegation that the mortgage was executed for immoral purposes. The only ground which remained for them to show that their shares were not liable to sale under the mortgage decree was that there had been a neglect to comply with the provisions of section 85 of the Transfer of Property Act, and that in consequence of such neglect, under the ruling in *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, the sale could not affect their rights and interests. We think that, just as in the case of an allegation that the mortgage was executed for a debt tainted with immorality, the burden of proving that allegation and of showing that their interests were not liable to sale would rest on the plaintiffs, so the burden of proof [195] lies on them to establish the only other ground on which the effect of the sale against their rights and interests could be avoided. It was therefore for the plaintiffs to prove that the mortgagee had notice of their interests, and that his omission to make them parties to the former suit exempted their interests from liability to sale under the decree. This view is in keeping with the judgment of BANERJI and AIKMAN, JJ., in F. A. No. 213 of 1896, decided upon the 12th January 1899.* That decision seems exactly in point, and we agree with it. We dismiss this appeal with costs.

Appeal dismissed.

* The judgment in this case was as follows:—

Banerji and Aikman, JJ.—The respondents, Mewa Lal and Lachmi Narain, obtained a decree upon a mortgage, dated the 8th of February 1886, executed by Ranbahadur Singh, the father of Bijai Bahadur Singh, Plaintiff, Randhir Singh, the father of the other plaintiffs, and Hanwant Singh, a brother of Ranbahadur Singh and Randhir Singh. At the time of the suit Hanwant Singh was dead and his widow was made a defendant to the suit. The other defendants were Ranbahadur Singh and Randhir Singh. In execution

NOTES.

[This was followed in (1907) 11 C.W.N., 1078 ; 6 C.L.J. 719 ; (1903) 16 C.P.L. R., 169 ; (1909) 5 N. L. R., 117 ; (1911) 9 I. C., 476 (All.). See also the Privy Council decision in (1914) 36 All., 383.]

[196] *The 28th January, 1899.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Sibta Kunwar.....Plaintiff

versus

Bhagoli.....Defendant.*

Civil Procedure Code, section 317—Benami transaction—Suit against heir of certified purchaser—Interpretation of Statutes.

Held that s. 317 of the Code of Civil Procedure would not preclude a suit against a person who claimed title through the certified purchaser based on the allegation that the certified purchaser was not the real purchaser, but only purchased benami for the person through whom the plaintiff claimed. *Mussumat Buhuns Kowur v. Lalla Buhoree Lall*, (1872) 14 Moo. I. A., 496, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, for the Appellant.

Messrs. C. Dillon and Roshan Lal, for the Respondent.

Banerji and Aikman, JJ.—This was a suit for the possession of certain shares in two villages, namely, Amirta and Nadeli, and of a share in a house in the village Amirta, which belonged originally to one Kishan Lal. The plaintiff is one of two daughters of Kishan Lal. The defendant is the daughter of a pre-deceased son of Kishan Lal, named Lokman. Lokman's widow was Musammat Natholi, who survived Kishan Lal, but is now dead. On the 19th of February 1884, Kishan Lal executed a deed of gift in favour of Musammat Natholi in respect of the village Nadeli and a house. In execution

of that decree, which is dated the 7th of December 1892, Mewa Lal and Lachmi Narain caused the mortgaged property to be advertised for sale. Thereupon the present suit was brought on the 1st of February 1896, for a declaration that the interests of the plaintiffs in the mortgaged property were not liable to sale. The sole ground upon which the suit was brought was that the plaintiffs had not been made parties to the mortgagees' suit. If the property was ancestral and the mortgagees had notice of the interests of the plaintiffs in the mortgaged property at the time they brought their suit upon the mortgage, the plaintiffs would, under the ruling of the majority of the Full Bench in *Bhawani Prasad v. Kallu*, (I. L. R., 17 All., 537) be entitled to succeed. The Court below, however, has dismissed the suit upon the ground that it had not been established that the mortgagees had express or constructive notice of the interests which the plaintiffs claimed in the property. The learned Subordinate Judge, who has recorded a careful judgment in the case, was of opinion that it had not been proved that the mortgagees had any knowledge of the existence of the plaintiffs and that there had not been on the part of the mortgagees either wilful abstention from inquiry or gross negligence such as would bring the case within the definition of notice as given in section 3 of Act No. IV of 1882. The learned counsel who has appeared for the plaintiffs appellants has conceded that there was no express notice. He contends, however, that the mortgagees must be taken to have had constructive notice of the existence of the plaintiffs. We are of opinion that the reasons given by the learned Subordinate Judge for holding the contrary view are cogent. It has not been shown that any circumstances existed which ought to have put the mortgagees upon inquiry. The appeal is, in our opinion, untenable. We dismiss it with costs.

* First Appeal No. 250 of 1896, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 21st September 1896.

of a decree which a creditor of Kishan Lal had obtained against him the share in the zamindari of Amirta was sold by auction on the 20th of June 1884, and was purchased in the name of Musammat Natholi. Upon the death of Musammat Natholi the property now in suit was taken possession of by her daughter, Musammat Bhagoli. Hence the present suit.

The plaintiff asserts that the deed of gift relating to the village Nadeli and the house property was a colourable transaction; that Kishan Lal purchased the share in the village Amirta with his own funds benami in the name of Musammat Natholi; that he continued in possession as owner of the whole property till his [197] death; that upon his death the plaintiff and her sister have succeeded to that property by right of inheritance, and that the plaintiff is thus entitled to a half share of it.

As regards the village Amirta, the suit was defended upon two grounds: first, that section 317 of the Code of Civil Procedure bars the suit; and, secondly, that the share was purchased by Natholi with her own funds. As for the property covered by the deed of gift, the contention was that the gift was a real transaction, and that by it Kishan Lal intended to, and did actually, transfer his interest in the property to Musammat Natholi.

As regards the property covered by the deed of gift, we are of opinion that the appeal must fail. The deed itself affords internal evidence of the fact that the intention was that the property should go to Natholi. It is stated in it, as a condition attached to the gift, that Musammat Natholi would have power to transfer it to her daughters, Bhagoli and Jika, but that she would have no power to transfer it to any other person. It further provides that after Natholi's death the property should go to her daughters. If the gift was a mere paper transaction, we should not have expected clauses, like those to which we have referred, carefully limiting the right of the donee. We further find that on the date on which the deed of gift was executed Kishan Lal obtained a power of attorney from Musammat Natholi, evidently for the purpose of managing the property on her behalf. It is natural to expect that he would wish to make some provision for his widowed daughter-in-law and her children, and it seems to us in the highest degree probable that it was with that intention that he executed the deed of gift. The plaintiff's own witness, Ram Dial, said that "Kishan Lal made the gift for the maintenance of his daughter-in-law, Natholi. He made the gift for the maintenance of his son's widow, thinking that she might be put to trouble after him." We agree with the Court below in thinking that the plaintiff has failed to show that the gift was a nominal transaction and did not convey to Musammat Natholi the property to which it relates. So far the appeal must fail.

[198] As for the village Amirta, the learned Subordinate Judge has held that section 317 of the Code of Civil Procedure precludes the plaintiff from maintaining the present suit, as Musammat Natholi was the certified purchaser of that village at auction. Had Natholi herself been the defendant to the suit, we should have seen no reason to differ from the conclusion of the learned Subordinate Judge; but the suit was not brought against the certified purchaser but against a person who derives title from her. Section 317 forbids the maintenance of a suit "against the certified purchaser," which the defendant in this case is not. Why the Legislature stopped here and did not bar a suit against persons claiming through a certified purchaser, we are unable to say; but, as was observed by their Lordships of the Privy Council in *Mussumat Buhuns Kowur v. Lalla Buhoree Lall and Jokhee Lall*, (1872) 14 Moo. I. A., 496, "where the Legislature has stopped the Court must stop." As the provisions of section 317, as they now stand, are in restraint of an ordinary right

of suit and preclude a suit against a certified purchaser only, we do not think we should be justified in extending the scope of the section beyond what the language of the section warrants. We are therefore unable to agree with the learned Subordinate Judge in holding that that section bars the maintenance of the present suit.

* We have now to consider whether the village Amirta was purchased at auction by Kishan Lal with his own funds, or, as alleged on behalf of the defendants, with the funds of Musammatt Natholi. This was an issue which the pleadings in the case raised. The evidence conclusively proves that the purchase-money was paid by Kishan Lal, and there is not a particle of evidence before us to rebut the evidence to that effect. We have further the fact that mutation of names did not take place after auction purchase in favour of Musammatt Natholi, and that up to the time of his death Kishan Lal continued to be the recorded owner of the share in question and in possession thereof. The learned Subordinate Judge has found that it was the intention of [199] Kishan Lal to give this property also to Natholi. In the first place, this view is opposed to the pleadings. It is certainly not borne out by the evidence of the witness Brij Lal, to which the learned Subordinate Judge refers, and it is not supported by any other evidence upon which we can rely. If it was the intention of Kishan Lal that this property also should go to Natholi, we should have expected to find that he had given expression to that intention by a proper deed, as he did in the case of the other village. If such was ever his intention, he died without giving effect to it. We therefore hold that, so far as the suit relates to the share in the village Amirta, the plaintiff is entitled to a decree; but as regards that portion of the claim which relates to the property covered by the deed of gift, her suit has been rightly dismissed.

The plaintiff also claimed a moiety of 214 bighas 18 biswas of khudkasht land in Amirta and some sir land in the same village. The Court below has granted her a decree in respect of the sir as an exproprietary tenant. In the view which we have taken of the case the plaintiff is entitled to a decree for possession of the sir land as such. Her father could not be regarded as an exproprietary tenant of the sir land, inasmuch as we have held that he was the purchaser and proprietor of the zamindari to which the sir appertained down to the date of his death. As for the khudkasht land, we hold that Kishan Lal held it *qua* zamindar, and it must go to his heirs along with the zamindari to which it appertained. The defendant has no title in respect of that land superior to that of the plaintiff.

The result is that we allow the appeal and vary the decree below by making a decree in favour of the plaintiff for possession of 3 biswas 6 $\frac{3}{4}$ biswansis share in mauza Amirta, and a moiety of 214 bighas 18 biswas of khudkasht land, and of 12 bighas of sir land and mesne profits in respect of the said share and lands for three years preceding the date of the suit, with future mesne profits up to the date of delivery of possession, or the expiry of three years from this date, whichever event first occurs, such mesne profits to [200] be determined in execution. *Quoad ultra* we affirm the decree of the Court below. The parties will pay and receive costs both here and in the Court below in proportion to their failure and success.

Decree modified.

NOTES.

[There was a conflict of case-law on this subject, the Bombay High Court in (1907) 31 Bom., 61, taking a view different from that of the other High Courts in (1898) 21 Mad., 7; (1899) 21 All., 196; (1899) 26 Cal., 950; (1913) 19 I. C., 909 (Cal.); see the legislative provision in the C. P. C., 1908, section 66, in favour of the Bombay view; see also (1910) 35 Bom., 342 at 347.]

[21 All. 200]

The 30th January, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Girdhari Lal and another.....Plaintiffs
versus

Ram Lal and another.....Defendants.*

*Civil Procedure Code, section 539—Trust—Suit to compel trustees to account—**Court fee—Act No. VII of 1870 (Court Fees Act), sch. ii, art. 17,**cl. (vi)—Suit for removal of trustees.*

The mere fact that the plaintiffs in a suit under section 539 of the Code of Civil Procedure may ask for an account to be taken from the trustees and that the trustees may be compelled to refund moneys alleged to have been misappropriated by them, does not take the case out of the purview of art. 17, cl. (vi) of the second schedule to the Court Fees Act 1870, and render the plaintiffs liable to pay an *ad valorem* Court fee on that part of their plaint. *Thakuri v. Bramha Narain*, (1896) 1 L. R., 19 All., 60, referred to.

A suit for the removal of an old trustee who has committed a breach of trust and for the appointment of new trustees may properly be brought under section 539 of the Code of Civil Procedure. *Huseni Begam v. The Collector of Moradabad*, (1897) 1 L. R., 20 All., 46, approved. *Rangasami Naickan v. Varadappa Naickan*, (1894) 1 L. R., 17 Mad., 462, dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal and Pandit Moti Lal, for the Appellants.

Mr. W. M. Colvin and Munshi Gokul Prasad, for the Respondents.

Banerji and Aikman, JJ.—A preliminary objection was raised on behalf of the respondents to the hearing of this appeal, on the ground that the plaint in the Court below and the memorandum of appeal in this Court were not sufficiently stamped. The principal ground of this contention is that the claim embraces a prayer for an account, and that the Court fees ought to have [201] been paid with reference to that prayer under clause (f) of sub-section 4 of section 7 of Act No. VII of 1870.

The facts are these :—The plaintiffs, who are two in number, brought the suit under section 539 of the Code of Civil Procedure, on the allegations that one Maharaj Kallu Mal had created a trust for the maintenance of a school and a charitable institution ; that the first defendant was appointed superintendent of the trust, and that the other trustees had not performed the duties which lay upon them in connection with the trust. The following reliefs were asked for in the plaint :—

(a) that for the purpose of the management of the endowed property and fulfilment of the object of the endowment, new superintendents may be appointed, and the whole of the endowed property, detailed at the foot of the plaint, may be taken out of the possession of the defendants and placed in that of the new superintendents ;

(b) that the defendants may be made to render an account of the income and expenditure from Sambat 1940, when Kallu Mal died, up to the present time, and all the money which the defendant No. 1 should fail to prove had been spent for the purposes of the endowment, according to the terms of the

* First Appeal No. 251 of 1896, from a decree of J. E. Gill, Esq., District Judge of Cawnpore, dated the 7th October 1896.

deed of endowment, may be awarded against him to the superintendents appointed by the Court, and added to the funds of the endowment ;

(c) that proper and necessary instructions and rules regarding the management of the endowment and its income and expenditure may be issued.

The plaintiffs paid a Court fee of ten rupees in the Court below, alleging that the subject-matter in dispute was not capable of valuation, and that the case came under clause (vi) of article 17 of schedule ii of Act No. VII of 1870. In this Court a further sum of ten rupees was received on the plaint and also on the memorandum of appeal, on the report of the office, the report being to the effect that ten rupees were payable for each of the two reliefs (a) and (b) claimed in the plaint. It is not stated, [202] and we do not understand, under what provision of the Court Fees Act the second fee of ten rupees was realized in this Court.

Are the plaint and the memorandum of appeal insufficiently stamped ?

If it is not possible "to estimate at a money value the subject-matter in dispute, and if there is no other provision in the Court Fees Act for a suit of this description," the plaintiffs were right in paying a Court fee of ten rupees under clause vi of article 17 of schedule ii of Act No. VII of 1870. We have therefore to consider what the subject-matter in dispute is. The plaintiffs claim nothing for themselves personally. As persons interested in a trust for charitable purposes, they come into Court asking for the removal of a trustee who, they allege, has committed a breach of trust, and who has in his hands funds belonging to the trust. They also ask for the appointment of new trustees and for the vesting of the trust property in the new trustees. That is the real relief which the plaintiffs seek in this case. Such a relief is not capable of being estimated at a money value. It is true that the value of the property, which is the subject-matter of the trust, is stated in the plaint, but that is not the value of the subject-matter in dispute. We think that this case cannot be distinguished from the principle of the judgment in *Thakuri v. Bramha Narain*, (1896) I. L. R., 19 All., 60. We pointed out in that judgment the difficulties which would arise if it were held that a suit for the removal of a trustee and the appointment of new trustees were to be looked upon as a suit in which Court fees had to be paid with reference to the value of the trust property. Mr. Colvin, on behalf of the respondents, does not contend that this suit should be regarded as a suit for possession of the trust property. He frankly conceded that if the plaintiff had not asked for an account he would be unable to distinguish this case from the ruling to which we have referred. He argues that the plaintiffs having in their plaint asked for the taking of an account; they were bound to pay Court fees on that portion of their plaint. [203] We are unable to agree with this contention. The prayer for an account is only ancillary to the substantive prayer in the plaint for the removal of the trustee-defendant, the appointment of new trustees, and the vesting of the trust property, now in the possession of the old trustee, in the trustees to be appointed by the Court. Reading clause (f) of sub-section 4 of section 7 of Act No. VII of 1870 with section 11 of the same Act and the penultimate paragraph of section 50 of the Code of Civil Procedure, it is quite clear to what that clause refers. We therefore overrule the preliminary objection taken on behalf of the respondents.

As regards the appeal, we are of opinion that it must prevail. The Court below has dismissed the suit on the ground that it is one for the removal of a trustee, and is not therefore a suit to which section 539 of the Code of Civil Procedure applies. If this were so the learned Judge erred in dismissing the suit; he ought to have returned the plaint for presentation to the proper

Court. We are of opinion, however, that the learned Judge was wrong in the view he took of the case. That view is, it is true, supported by the ruling of the Madras High Court in *Rangasami Naickan v. Varadappa Naickan*, (1894) I. L. R., 17 Mad., 462, but that ruling has been dissented from in this Court in *Huseni Begam v. The Collector of Moradabad*, (1897) I. L. R., 20 All., 46. The High Courts of Calcutta and Bombay have taken the same view of the question as was adopted by this Court, and even the Judges of the Madras High Court have held divergent opinions. We have no hesitation in concurring with the ruling of this Court to which we have referred above. Section 539 of the Code of Civil Procedure provides for cases of an alleged breach of trust for public charitable or religious purposes, and enables two or more persons having an interest in the trust to institute a suit to obtain a decree "appointing new trustees under the trust." Those words are, in our opinion, wide enough to include a claim for the removal of an old trustee who has committed a breach of trust, and for the appointment of new trustees. The ruling of [204] the Madras High Court based on decisions of English cases on Lord Romilly's Act does not commend itself to us. That Act provides a summary procedure for obtaining relief by petition and not by suit as provided in section 539 of the Code of Civil Procedure, and the provisions of the English Statute differ materially from those of section 539.

We allow this appeal, and setting aside the decree of the Court below, remand the case under section 562 of the Code of Civil Procedure with directions to re-admit it under its original number in the register and to try it on the merits. The appellants will get their costs of this appeal. Other costs hitherto incurred will abide the result.

Appeal decreed and cause remanded.

[21 All. 204]

The 31st January, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KT., CHIEF JUSTICE, AND MR. JUSTICE KNOX .

Dalip Rai.....Defendant
versus

Deoki Rai.....Plaintiff.*

Act No. XII of 1881 (N.-W. P. Rent Act), section 95 (n)—Land-holder and tenant—Dispossession of tenant—Effect on tenant's right of his neglecting to apply under section 95 to be restored to possession.

Held that the failure of a tenant to apply under section 95 (n) of the North-Western Provinces Rent Act, 1881, for the recovery of the occupancy of land, of which he has been wrongfully dispossessed, within the period of six months after the date of dispossession prescribed for such applications by section 96 (e) has the effect not only of barring the tenant's remedy, but of extinguishing the tenant's right to the occupancy of the land.

THE facts of this case sufficiently appear from the judgment of the Court.

* Appeal No. 27 of 1898 under section 10 of the Letters Patent.

Munshi *Haribans Sahai*, for the Appellant.

Munshi *Gobind Prasad*, for the Respondent.

Strachey, C. J.—The question raised by this appeal is whether the failure of a tenant to apply under section 95(n) of the North-Western Provinces Rent Act, 1881, for the recovery of the occupancy of land, of which he has been wrongfully dispossessed, within the period of six months after the date of the dispossession prescribed for such applications by section 96(c) has the effect of [205] extinguishing his title or only of barring his remedy. The facts as found by the Lower Appellate Court are these. The plaintiffs are zamindars, and the land in suit forms part of their sir. Previous to the year 1832 the defendant was in possession of the land as the plaintiff's tenant-at-will. In that year the plaintiffs, without taking any of the steps necessary under the Rent Act for the defendant's ejectment, wrongfully dispossessed him of the occupancy of the land and assumed the cultivation of it by a shikmi tenant whom they put in possession and whose name was entered in the settlement papers. The defendant made no application under section 95(n) for the recovery of the occupancy of the land. In 1895 he forcibly entered upon the land and resumed possession. In 1898 the plaintiffs brought the present suit in the civil Court, claiming his ejectment from the land as a trespasser, and damages. The defendant pleaded that he had never ceased to have the rights of a tenant in respect of the land, and that the suit was not cognizable by a civil Court. The Court of First Instance dismissed the suit, but the Lower Appellate Court decreed the appeal and the suit, holding that the defendant's tenancy became extinguished on his failure to apply under section 95 (n) within six months from the date of the wrongful dispossession, and that when, in 1895, he obtained possession, he did so as a trespasser. On appeal by the defendant to this Court Mr. Justice BLAIR took the same view, (see I. L. R., 20 All., 471) and in this further appeal under the Letters Patent we have to consider whether it is correct.

The question is not altogether free from difficulty. There appears to be no reported case in point. The position of the defendant, when he obtained possession in 1895, was this. On the one hand, he had clearly no remedy by legal proceedings. By virtue of the opening words of section 95 of the Rent Act he never had any remedy in a civil Court. His only remedy in a revenue Court, namely, an application under section 95(n), was barred by section 96(e). On the other [206] hand, section 96(e) in terms enacts only that an application under section 95(n) shall not be brought after six months from the date of the wrongful dispossession; it contains no provision similar to section 28 of the Limitation Act, to the effect that at the determination of the prescribed period the tenant's right to the occupancy of the land shall be extinguished. Section 28 of the Limitation Act itself obviously does not affect applications under the Rent Act. The view expressed in *Mazhar Rai v. Ramgat Singh*, (1896) I. L. R., 18 All., 290, at p. 294, that the tenancy of a tenant of agricultural land can only be determined in one or other of the manners mentioned in the Rent Act, applies to tenants-at-will, who, like other tenants, are protected by section 34 from ejectment otherwise than in execution of a decree or order under the Act; and among the manners specially mentioned, extinction by lapse of the period prescribed by section 96(e) is not one. If within the six months period the defendant had, without the assistance of the revenue Court, regained possession of the land, there can be no doubt that he would have held it under his original tenancy, which, in that case, would have undergone no legal determination or interruption. The pleader for the appellant contended that it is a general

principle of law that in the absence of express words to the contrary a statute of limitation only bars the remedy and does not extinguish the right, and that, as the Rent Act contains no such express words, the defendant's title, notwithstanding the lapse of the prescribed period, still existed at the time when he regained possession.

The nearest analogy available upon the question is afforded by the Indian enactments relating to limitation prior to Act No. IX of 1871, section 29 of which first introduced the rule now contained in section 28 of the present Act. The old Bengal Regulations of Limitation, III of 1793 and II of 1805, in reference to suits for the recovery of immovable property, in terms limited the remedy only and did not on the lapse of [207] the prescribed period expressly extinguish the title. Again, section 1 of Act. No. XIV of 1859 only provided that no suit should be maintained in any Court of Judicature unless the same were instituted within the period of limitation made applicable to a suit of that nature, and of such suits clause 12 of the section specified suits for the recovery of immovable property, or of any interest in immovable property. Notwithstanding the terms of these enactments it was clearly settled that upon the expiry of the prescribed period for such a suit, not only was the claimant's remedy barred, but his title extinguished in favour of the party in possession, however wrongfully that possession might have originated; see *Ganga Gobind Mundul v. The Collector of the Twenty-four Pergunnahs*, (1867) 11 Moo. I. A., 345, and the other cases mentioned by WESTROPP, C. J., in *Sitaram Vasudev v. Khanderav Balkrishna*, (1876) I. L. R., 1 Bom., 286. In *Bindrabhn Chunder Roy v. Tarachund Bundopadhya*, (1873) 11 B. L. R., 237, decided under Act No. XIV of 1859, Mr. Justice MARKBY said that it was "an accepted doctrine in our Courts that if a party who has been twelve years out of possession and whose suit is therefore barred should again get into possession, he is not (to use an English phrase) remitted to his old title; our Courts adopting, as pointed out by Sir LAWRENCE PEEL in *Sibchunder Doss v. Sibkissen Banerjee*, (1854) 1 Boul., 70, the English rule that there is no remitter to a right for which the party had no remedy by action at all." In the same case Mr. Justice BIRCH said:—"I apprehend it to be now well established that, when his remedy is barred, the right and title of the claimant is extinguished and transferred to the person in possession." The only authorities for the contrary view which have been cited to us are two Madras cases, in one of which, *Doe d. Kullam-mal v. Kuppu Pillai*, (1862) 1 Mad. H. C. Rep., 85, decided in 1862, it was held that "the Indian Law of Limitation bars the remedy only, but does not extinguish the right," and in the other, *Govindan [208] Pillai v. Chidambara Pillai*, (1866) 3 Mad. H. C. Rep., 99, decided in 1862, it was held that section 12 of Act No. XIV of 1859 did not extinguish the right at the lapse of the statutory period. Both these cases, however, were decided before the decision of the Privy Council in the case reported in 11 Moo. I. A., 345, upon which the Bengal judgments were chiefly based. The later cases support, we think, the view expressed by Mr. Mitra that where a law of limitation regarding the possession and dispossession of immovable property in terms limits the suit only, its effect is nevertheless generally to extinguish the title, unless there co-exists with it a statute such as Bombay Regulation V of 1827, fixing a longer period for the acquisition of title by positive prescription: see *Mitra's Law of Limitation and Prescription in British India* (3rd ed.), pp. 3, 13, 35, 36, 52, 325, and *Rambhat Agnihotri v. The Collector of Puna*, I. L. R., 1 Bom., 592, at p. 599. It is true that in all these cases there was no question of landholder and tenant. The question was not whether, under a special law prescribing

a period of limitation, a tenant's right was extinguished in favour of a landholder wrongfully dispossessing him, but whether, under the general limitation law, an original owner's right was extinguished in favour of a wrongful occupant holding adversely for the prescribed period. The cases, however, so far assist us that they establish, first, that a provision as to limitation which in terms merely bars the remedy may have the further effect of extinguishing the right, and, secondly, that as regards the possession and dispossession of immovable property or an interest therein, the latter effect generally follows. If this view is correct, the presumption appears to be that, on the lapse of the six months' period prescribed by section 96 (e) of the Rent Act, the defendant's right to the occupancy of the land in suit was extinguished, and that the possession which he afterwards forcibly obtained was not that of a tenant who could only be ejected through a revenue Court, but that of a trespasser who might be ejected through a [209] civil Court. If, on the other hand, this view is not correct, the result would seem to be that there is no limit of time within which the defendant might not forcibly re-occupy the land and assert the continuance of his tenancy. Such a state of things would lead to great insecurity in the occupancy of land by tenants holding under the landholder in good faith and in ignorance of the dispossessed tenant's claim, and to the substitution of irregular and violent methods of recovering possession for the methods which the Legislature has provided for a dispossessed tenant's benefit. We do not think that a construction of section 96 (e) of the Rent Act which involves these consequences can be correct. We think that the Lower Appellate Court and Mr. Justice BLAIR have rightly construed the section, and we dismiss this appeal with costs.

Appeal dismissed.

NOTES

[See also (1904) 27 All., 372; (1909) 2 I.C., 456; 848; (1910) 9 I.C., 51 (All.); (1907) 6 C.L.J., 621, where similar decisions were given.]

[21 All. 209]

PRIVY COUNCIL.

The 17th, 21st and 22nd June, and 26th November, 1898.

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVEY, AND SIR R. COUCH.

Michael Macauliffe.....(Plaintiff) Appellant
and

Charles Wilson.....(Defendant) Respondent.

[On Appeal from the High Court for the North-Western Provinces].

False representation alleged against vendor by purchaser. Inducement not proved. Shareholder buying shares from a Director of the Company.

To maintain a suit for damages upon a false representation alleged by purchaser against vendor, it must be established that the plaintiff was induced by the misrepresentation to enter into the contract.

Shares in a Banking Company which shortly afterwards went into liquidation, were sold by a Director to the plaintiff, a shareholder. The latter now sued the vendor, alleging inducement to buy the shares by the vendor's false representations as to the state of the Bank's affairs.

Both the Courts below concurred in finding that oral representations as to the latter alleged to have been made by the defendant to the plaintiff were not proved. Those Courts, however, had concurred in finding that the defendant, though he was not responsible for false balance-sheets issued before 1890, [210] was well aware of the falseness of the one issued for the half-year ending on the 30th June 1890. The Judicial Committee saw no reason for interfering with these concurrent findings.

The plaintiff, in this appeal, relied on the issue of the false balance-sheet of 1890, the issue of a false report by the Directors, and a wrongful payment of dividend, for the period above mentioned, acts in which the defendant had taken part; these acts, as a series, constituting false representations, the Bank having in fact been insolvent at the time.

But it was not shown by the evidence that the plaintiff had been induced to buy the shares, which he had contracted to buy in two sets, one in September, the other later on in 1890, by any of the representations so made; regard being had to the dates, respectively, and to his own knowledge. The dismissal of the suit was, therefore, maintained.

APPEAL from a decree *C. Wilson v. M. Macauliffe*, (1895) I. L. R., 18 All., 56, (1st August 1895) of the High Court, reversing a decree (31st July 1893) of the Subordinate Judge of Dehra Dun.

The plaintiff-appellant sued the defendant-respondent on the 15th April 1893 for damages, the alleged consequence of the defendant's false representations. The claim was for Rs. 20,950; the price of shares, with Rs. 1,670, interest thereon, in the Himalaya Bank, a bank limited by shares, registered and carrying on business until 1891, when it failed, at Masuri. In 1890 the plaintiff, who already held shares in the Bank, purchased one hundred shares, at Rs. 110 a share, on the 10th September in that year, and forty-seven more on the 27th November following. The bank stopped payment on the 8th July 1891 and went into liquidation.

The plaintiff alleged that he had been induced to buy by the false representations of the vendor, who was then a Director of the Company, and had misrepresented to him the state of the bank's affairs.

The question raised, and decided on this appeal in the negative was, whether the plaintiff had been induced to buy by the defendant's falsely representing to him that the bank was sound.

The facts are stated in their Lordships' judgment.

[211] The plaintiff's grounds were that he had been induced to buy the defendant's shares, on the faith in his statements, made both as a director and as a private person, to the purport that the bank was earning profits and had a large reserve fund. The plaintiff alleged that the defendant, having with his co-directors issued half-yearly reports and balance-sheets, had with them issued a balance-sheet and report for the half-year ending on June 30th, 1890, which he knew to be false, and that on the strength of these last, when laid before the shareholders, a dividend was declared and paid, though the bank was insolvent.

The defendant denied the representations attributed to him personally by the plaintiff. But did not deny that he knew that the last-mentioned balance-sheet was false. He asserted that, before the period to which it related, the accounts had been made up by a manager whom he and his co-directors trusted; *Queen-Empress v. Moss and others*, (1893) I. L. R., 16 All., 88. The plaintiff had known, he urged, that there were rumours current as to the real state of the bank at the time when he bought; and that he had bought the shares at his own risk, after making enquiries. The issues were whether the defendant by fraud or false representation, induced the plaintiff to enter into the contract in question, and to what damages he was entitled.

The Subordinate Judge found as a fact that false balance-sheets had been issued since 1886; but he found that there was no evidence to show that the defendant had been a party to the fraud and misrepresentation prior to the issue of the balance-sheet relating to half-year ending on June 30th, 1890. The judge doubted not that the latter was known by the defendant to be false at the time, and that he well knew of the unsecured debts due to the bank, and knew that the liabilities exceeded the assets. It was necessary for the plaintiff to establish fraud, and nothing short of it; *Derry v. Peak*, (1889) L. R., 14 Ap. Ca., 337. But, in dealing with his shares, a Director of a Company was in a position not, in itself, different from that of other shareholders as regarded sales. *Gilbert, in re: [212] The National Provincial Marine Insurance Company*, (1870) L. R., Sch. Ap., 559. The oral misrepresentations charged had not been proved. The judgment concluded in favour of the plaintiff for a reason apart from the fraud on which the case was founded. The reason was that the defendant had, when asked about the purchase of shares, mentioned a person whom he believed to be willing to sell some. This the Judge regarded as a fiction to bring on the sale of his own shares, and thereupon decreed the claim for Rs. 18,055.

The High Court (KNOX, Officiating C. J., and AIKMAN, J.) reversed the decision of the Subordinate Judge, and dismissed the suit. The ground of decision below had been taken in contravention of the well known rule, referred to in *Abdul Hossein Zenail Abadin v. Turner*, (1887) I. L. R., 11 Bom., 620, that a charge of fraud must be substantially proved as laid; and that ground was also insufficient in itself. On the findings of the Subordinate Judge the suit should have been dismissed.

There was the authority of *Le Lievre v. Gould*, (1893) L. R., 1 Q. B., 491, for holding that negligence does not of itself constitute fraud. Distinguishing the present case from the *Leeds Building and Investment Company v. Shepherd*, (1887) L. R., 36 Ch. D., 787, the O. C. J. added:—"I have most carefully and anxiously considered all the evidence bearing on the question, and in my opinion there is no warrant for a finding that the negligence, great as it was, amounted to evidence of fraud. There remains the balance-sheet for the half-year ending 30th June 1890, which we have found was false to appellant's knowledge, and was directly issued by him. The question which arises for consideration in connection with this balance-sheet is whether it was in any way a material inducement which led to the purchase of the shares by the respondent. It could not have led to the purchase made by him of 100 shares on the 10th September 1890, for, according to his own statement, it was not till October 1890 that he received it, and he himself allows, that it in no way induced him to make the [213] purchase. But he alleges that the publication of the balance-sheet of the half-year ending the 30th June 1890, was one of the considerations that led him to purchase the remaining 47 shares. It becomes therefore necessary to look at the evidence which bears on the sale of these 47 shares. In a letter dated 3rd October 1890, we find the proposal made by the respondent to buy 47 more shares in the bank from the appellant at the same price, provided that money could be lent him by the Himalaya Bank at 8 per cent. On the 3rd November 1890, the transaction reached a further stage, and respondent asked the appellant to deposit with the Manager of the Mussoorie Bank the scrip for these 47 shares. From this it is evident that the negotiations for the purchase of the 47 shares had been completed by the time the letter was written."

The O. C. J. added that, although the plaintiff had said that in purchasing these shares he was influenced by the report for the half-year ending on the 30th June 1890, it was impossible to accept his statement. The proposal to buy

the shares, and the acceptance of the proposal, must have taken place before the 31st October 1890, although payment was delayed. The issue of the balance-sheet could in no way have operated on the defendant's mind to induce him to make the purchase.

The judgment then dealt with the payment of the dividend at 10 per cent. advertised in a newspaper of the 24th July 1890, and showed that this also could not have had effect to lead the plaintiff to enter into the transaction.

After referring to the principles stated in *Smith v. Chadwick*, (1882) L. R., 20 Ch. D., 27, and in *Gerhardt v. Bates*, (1853) 2 El. and B., 476: L. J., 22 Q. B., 364, the O. C. J. added:—"All this admits of no question; but my difficulty is in believing that the issue of the balance-sheets, reports, and advertisement of dividend did, or any one of them did, induce the plaintiff to purchase the shares. In fact my finding is that it did not. After fully considering all the evidence, I am satisfied that the [214] respondent purchased the shares as being in his eyes a speculation which would probably be a profitable one. While it is our duty to relieve persons who have been deceived by false representations, it is equally our duty, as pointed out by Lord Justice TURNER in *Jennings v. Broughton*, (1854) 5 DeG. Mac. and G., 126, to be careful that in 'our anxiety to correct frauds,' we do not enable persons who have joined with others in speculation 'to convert their speculations into certainties at the expense of those with whom they have joined.' This would, in my opinion, be the effect of giving the relief for which he asks."

The rest of the judgment dealt with an argument of counsel that in the present case the appellant stood to the plaintiff, in a confidential relation, as a director, having special knowledge. A full report of that part of the judgment is given in the I. L. R., 18 All., 56.

AIKMAN, J., in concurring, after referring to *Scott v. Dixon*, (1859) 29 L. J., Exch., 62; in note, Q. B. Hil. T., 1859, said:—"It appears that a balance-sheet and report for the half-year ending 30th June 1890, were published, and to this publication the defendant was a party. There is no doubt that that balance-sheet and report were false and misleading, and had it been shown that this balance-sheet and report were inducements which led the plaintiff to purchase the shares from the defendant, I think plaintiff would have been entitled to recover. But this balance-sheet and report did not reach the plaintiff until he had bought the first parcel of 100 shares, and engaged to buy the remaining 47 shares; he cannot therefore rely on any misrepresentations therein contained; as to previous balance-sheets, it has not been proved that the appellant Wilson had any part in publishing them. It is true that he was a Director from 1885, but up to 1890, when the Manager Moss went away on leave, the Directors appear to have taken no active part in the management of the bank, everything being left to Moss. In thus acting Wilson and his fellow-Directors were most culpably [215] negligent; but as is shown in the case of *Le Lievre v. Gould*, (1893) L. R., 1 Q. B., 491, mere negligence is not sufficient to establish fraud. Although it is not set forth in his plaint, the plaintiff in his evidence refers to a copy of *The Pioneer* which was received by him on the 25th or 26th July 1890, that is, before the purchase of his shares. In that *Pioneer* the payment of a 10 per cent. dividend on the bank shares was advertised. I do not, however, think that this would entitle the plaintiff to recover in an action for deceit, unless it was shown that the defendant intended by this advertisement to get his shares sold. That has not been made out to my satisfaction. The defendant is not shown to have advertised his shares for sale, or to have taken any active steps to dispose of them, and when the bank failed he owned 98. The impression which I derive from the perusal of the evidence is, that it was

Macauliffe who expressed a wish to purchase the shares, not the defendant who offered them for sale. Much argument was addressed to us with a view of showing that the defendant as Director of the Bank stood in a fiduciary relation to the plaintiff, and that his mere silence as to the state of the Bank was sufficient to render him liable in an action for deceit. As to this I think the conclusion arrived at by the learned Subordinate Judge is correct, and that the case he refers to, *i.e.*, *Gilbert's case*, (1870) L. R., 5 Sch. Ap., 559, is an authority for the view which he took."

On this appeal, Mr. *J. D. Mayne* for the appellant, argued that there was error in the judgments below, both in fact and in law. The judges had regarded the contract to buy the forty-seven shares as concluded before the balance-sheet for the half-year ending on June 30th, 1890, was issued in the October following. But in fact the contract was not completed until December 1890. The High Court had also erred in its inference as to the false representation, and had not given due weight and effect to the cumulative statements in the false documents, followed by the dividend paid though not earned. Regarding the balance-sheets issued [216] before 1890, there had been a fraudulent use of them as a basis for the later misrepresentation in the issue of the balance-sheet above specified. However, there having been actual false representation found against the defendant, there was also error in the High Court's not having held him responsible for it to the plaintiff, who in buying more shares, had acted upon it:—this act, the buying more shares, having been the natural and proximate result of the belief which the defendant had brought about. The true view was that the defendant had made a fraudulent representation with intent to make the plaintiff believe in the soundness of the bank, with the result of his having been induced to buy the defendants' shares;—no remote result from what he was led to believe. This should have been held to support the suit. Where a fraudulent representation was made, though not made solely to the person who had acted upon it to his detriment, if made with intent to produce the false impression acted upon in a way that was reasonable, probable, and natural, then the author of that misrepresentation should be held responsible in damages to the person deceived. Therefore, there was error in the judgment in its absolving the defendant from liability on the ground that the aim, or object, of the false representation was not so much to induce any purchase of shares as to keep up the bank. And it was another mistake in the judgment to relieve the defendant from liability on the ground that the plaintiff had chosen the investment as a speculation of his own, voluntarily undertaking the risk, with knowledge of the state of affairs.

The following cases were referred to in connection with the relation between fraudulent misrepresentation and consequential damage, as cause and effect—*Peck v. Gurney*, (1873) L. R., 6 Ap. Ca., H. L., 377; *Scott v. Dixon*, (1859) 29 L. J., Exch., 62 in note; *Bedford v. Bagshaw*, (1859) 29 L. J., Exch., 59; *Barry v. Crosskey*, (1861) 2 J. and H., 23; *Clarke v. Dickson*, (1859) 6 C. B., N. S., 453; 28 L. J., C P., 453; *Smith v. Chadwick*, (1882) L. R., 20 Ch. Div., 443: In Appeal (1884) 9 Ap. Ca., 187.

[217] Mr. *H. H. Asquith*, Q. C., Mr. *W. H. Upjohn*, Q. C., and Mr. *J. Roskill*, for the Respondent. The right to recover on the alleged fraudulent misrepresentation had not been made out by the evidence. In order to maintain a suit founded upon a false representation it was essential that the plaintiff should have been induced thereby to act, to his detriment. The balance-sheets from 1886 were false, but, except for the one issued in October 1890, the respondent had been found by the Courts below not to be responsible. The evidence was referred to at length to show that the Court below was

right in finding that, though this balance sheet was false and the report also, they were not inducements, in fact, leading the plaintiff into the transaction; as he had, in fact, bought the first parcel of shares, and had engaged to buy the remaining forty-seven, before either of these documents had reached him. The case for the defence rested on the facts established by the evidence. But, in regard to the law, it was also contended on behalf of the respondent, that too wide a range of consequential damage had been suggested by the counsel for the appellant for cases of false representation. There must be a limit in respect of what would be legally included among the consequences entitling a person to sue on the ground of false representation made. If here the immediate object of its being made was to keep up the bank, then the sale of shares by a director was only an indirect, and remote, consequence. If the direct aim and intention in issuing the false balance-sheet was to make the shareholders declare a dividend, it did not follow that this false representation would support this suit. Reliance was placed on what was said in the judgment of Lord CAIRNS in *Peck v. Gurney*, (1873) L. R., 6 App. Cas., H. L. 377. If a representation has been made for a purpose different from the result which is alleged as the ground of damages, responsibility only attaches where the damages are proximate. In this case they were too remote. *Barry v. Crosskey*, (1861) 2 J. and H., 23, was also cited. The injury to support a suit must have been the immediate, not the remote, consequence [218] of the misrepresentation, which, in the case where a third person, to whom it had not been directly addressed, had acted upon it, must have been such that the act was within the defendant's intention, or contemplation. This had not been shown in the present case.

Mr. J. D. Mayne, in reply, argued that the limit of consequences was in the degree of probability attending the act relied on as being a probable consequence of the fraudulent misrepresentation. The limit was to be regarded as dependent upon how far the act may have been a natural consequence.

Afterwards, on the 26th November 1898, their Lordships' judgment was delivered by Sir R. Couch.

The appellant in this case became a shareholder in the Himalaya Bank in 1886, several years before the transactions which are the subject of this appeal. This respondent had become a director of the bank in 1885, and continued to be one until it stopped payment on the 8th July 1891 and went into liquidation. On the 16th of May 1893 the appellant brought a suit against the respondent, alleging in his plaint that the respondent strongly advised him to buy shares in the bank as a good investment, and said the bank had a large reserve fund; was on a thoroughly sound footing, and that the directors had declared and paid the usual dividend of 10 per cent.; that the respondent had been for years a director of the bank, and for years, certainly since 1887, had issued or permitted the issue of false half-yearly reports and had issued false balance-sheets that alleged the existence of a reserve fund of Rs. 70,000 in 1885, and that every half-year the sum of Rs. 5,000 had been added to the reserve fund, whereas no reserve fund ever existed; that the balance-sheets purported to show that each half-year a profit of about 19 per cent. on the capital had been made, whereas no profit had been made; that in July 1890 the respondent issued a balance-sheet and subsequently issued a directors' report, both of which he knew to be false; that on the 28th of August 1890 the appellant on the faith of the false statements of the respondent, made both as a [219] director and as a private individual, was induced to purchase 100 shares for which he paid Rs. 11,000 on the 10th of September 1890; that on the 31st of October 1890 the false report and balance-sheet for the half-year

ending the 30th of June 1890 was laid before the shareholders and the *ad interim* dividend of 10 per cent. declared and paid on the 1st of August 1890, was on that day confirmed, the respondent using the appellant's proxy for that purpose; that about the end of November 1890, by reason of the false representations made by the respondent, the appellant was induced to purchase 47 more shares for which he paid Rs. 5,170 on or about the 27th of November 1890. The respondent pleaded that he did not induce the appellant to make the purchases, and did not make any false statement or misrepresentation. The suit was heard by the Subordinate Judge of Dehra Dun who on the 31st July 1893 made a decree in favour of the appellant. On appeal to the High Court for the North-Western Provinces this decree was reversed and the suit was dismissed. Although the Courts differed in the result, they were agreed as to some of the facts in the case, and as their Lordships will treat concurrent findings of facts as binding upon the parties it is unnecessary to consider the evidence which is only applicable to them. Both Courts have found that the balance-sheets issued since 1887 were false. But they agree that the respondent is not responsible for them. The High Court say there is not sufficient evidence to show that the balance-sheet issued previous to that of 1890 were false to his knowledge. The Subordinate Judge found expressly that he was not responsible for those balance-sheets. They were prepared by Moss, the Manager of the Bank, who was absent in Australia when that for the half-year ending on 30th June 1890, was prepared. It was indeed admitted by Mr. Mayne who appeared for the appellant, that previous to April 1890 the directors were acting upon representations made to them by Moss. The important part of the case is the issuing of the balance-sheet and report for the last half-year and declaring and paying the dividend on the 1st of August. Both [220] Courts have found that the verbal representations alleged to have been made by the respondent were not proved. The evidence of appellant of these representations has not been believed by either of the Courts. The case of the appellant must therefore rest upon what was done after April 1890.

It appears in the minutes of a meeting of the directors of the bank on the 10th of July 1890, of which the respondent was chairman, that the directors had gone through the accounts of the bank and that the state of its affairs had become known to them. In the minutes of a meeting on the 16th of the same month, the respondent being the chairman, it is stated that "the half-yearly balance sheets ending 30th June 1890 having been duly approved of, it was decided to declare the usual *ad interim* dividend of 10 per cent. per annum, and that the usual notice be inserted in the newspapers." And both Courts have found that the respondent knew that balance-sheet to be false.

With regard to the 100 shares bought on the 10th September 1890, the material question is whether the appellant in buying them was acting upon a representation contained in the balance-sheet ending on the 30th June 1890, or made by the declaration of the *ad interim* dividend, and was thereby induced to buy those shares. *Barry v. Croskey*, 2 J. and H., 23; *Peek v. Burney*, L.R., 6 E. and I. A., 412. The appellant was examined as a witness in support of his case, and in considering the value of his evidence it should be observed that as regards the verbal representations said to have been made by the respondent, neither of the Courts below has believed his evidence. He said, "On 10th September I bought 100 shares at Rs. 110 each. I produce the scrip. I subsequently bought more scrip in the end of November—47 shares at the same price, from the defendant. The scrip is in the possession of the Mussoorie Bank. In purchasing these I was influenced by the consideration mentioned before by the half-yearly report for the half-year ending 30th June 1890, Exhibit

B, dated 31st October 1890." In cross-examination being questioned as to a [221] letter of his to the respondent of the 17th September 1891 in which he said—" You signed the directors' report for the half-year ending 30th June 1890, declaring a dividend at the rate of 10 per cent. per annum, and stating that the net profits were Rs. 19½ per cent. and a fraction. By this report the public were deceived as to the state of the bank, and I myself was led to buy 147 more shares from you " and asked why he was led by the balance-sheet of the 30th June 1890 to purchase 147 shares, he answered:— "The No. 147 was a mistake for 47, and the mistake of writing 147 was a clerical error The balance-sheet of 30th June 1890 did not influence me in buying the shares." In the printed record before their Lordships there is between "the " and "shares" the words "(paper torn)." It is not necessary to quote the whole of his evidence on this matter. In their Lordships' opinion the effect of it is that he was not induced to purchase the 100 shares by the balance-sheet of the 30th June 1890, or the declaration of the *ad interim* dividend.

As to the 47 shares the case is different. The evidence relating to that purchase is mainly documentary. It appears in the appellant's deposition that before the 8th September 1890 there had been a negotiation for the purchase of the 100 shares, and on that day the appellant wrote to the respondent—"I have sold those 100 shares to Wright & Co., and they pay transfer charges, and I have also sold 200 other shares to our friend at Sialkot, so if Moss " (the Manager of the Bank) " will lend me Rs. 10,000, we can do a large business." On the 3rd October he wrote another letter to the respondent in which, after speaking about the payment for the 100 shares, he said:—" I suppose Mr. Moss has returned by this. Have you asked him at what rate he can lend me money, say Rs. 5,000? If he lends it at 8 per cent., I will buy 46 more shares in the Himalaya Bank from you at the same price." On the 20th November he wrote to the respondent:—" I do not understand that I only receive dividends on the 47 shares from the 1st of January 1891. It is only two months since I [222] bought the 100 shares from you without any such understanding, and as the dividends for the current half-year will not be paid till March or April I cannot consent to any such condition of the purchase of the 47 shares as you now propose, nor should I have gone to so much trouble in raising a loan for their purchase if you had said that was what you meant. I explained to you that I could only buy Himalaya shares on favourable terms. The bank has now a very bad name as evidenced by the large extra security required by the Mussoorie Bank and by other indications also."

He does not notice the half-yearly balance-sheet, which he said in his deposition he received in October, or the *ad interim* dividend, as having induced him to buy the shares. And on the 27th November he wrote:—" You state that I am to draw dividends for the current half-year, so the matter is settled between us."

A more important letter is one which the appellant wrote to the respondent on the 11th March 1891. It is as follows:—

" Dear Wilson,—What are the strange rumours which I hear again respecting the Himalaya Bank? I heard things against it last year, but they were denied by you and the other directors, and so I myself was led not to believe them. At the same time you sold me a large number of shares at less than the market price. *Capital* has, I am told, a very damaging paragraph against the Himalaya Bank in which it is stated that its paper is being hawked about in the streets of Calcutta. I do not know what all this means."

"Of course I know very well last year that the Bank had become exceedingly unpopular and had lost numerous constituents under Mr. Greenway's management ; but I was hoping that it would come round after Mr. Moss' return.

"Banks generally go to grief. and indeed can only go to grief either by speculation or by large bad debts. Now I do not think that there is any body robbing the Himalaya Bank, and its operations being necessarily on a small scale, I have not heard nor can I conceive that it has had any serious losses, and I do not understand the rumours I hear except in so far as that the Bank's business is not good at present."

"I would request the favour of your enlightening me and giving me your advice as to whether I ought to sell out, and if so, at what rate? You were quite right in selling, and I cannot blame you if the worst comes to the worst ; but I think you ought to give me your candid advice now that matters appear to have become serious."

[223] This letter is not consistent with the appellant having been induced to buy either the 100, or the 47, shares by the half yearly balance-sheet of June 1890 or the publication of the *ad interim* dividend. Their Lordships think that if he had been so induced there would have been some allusion in it to them.

It has been seen that his evidence about the verbal representation was not believed by the Courts below, and their Lordships cannot consider his evidence where he says that in purchasing the 47 shares he was influenced by the half-yearly report dated 31st October 1890 as sufficient proof of it, or infer it from his knowledge of the reports. In their opinion he has failed to prove that, in buying the shares, he acted upon or was induced by any false representation for which the respondent is liable, and they will humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The costs of it will be paid by the appellant.

Appeal dismissed.

Solicitors for the Appellant :—Messrs. *Pyke and Parrott.*

Solicitors for the Respondent :—Messrs. *Rooke and Sons.*

[21 All. 223]

The 18th November and 10th December, 1898.

PRESENT :

LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR R. COUCH.

Muhammad Siddiq Khan and others

and

Muhammad Nasir Ullah Khan and others.

On appeal from the High Court for the North-Western Provinces.

*Contract construed as to interest claimed on part of purchase money
left unpaid by arrangement—Tender.*

By an agreement between vendor and vendee part of the purchase money was retained by the latter, but not as a mere deposit by the vendor. The money was to be retained as security, that the property sold should be cleared of incumbrances and a good title made.

The vendee was not liable for interest unless he should refuse, or omit, to pay the money so retained when the vendor should have shown readiness to clear off the incumbrances. Till then the vendee was not bound to pay or to tender to the vendor the money retained.

APPEAL from a decree (11th June 1895), of the High Court modifying a decree (30th June 1893) of the Subordinate Judge of Meerut.

[224] This suit (16th June 1892) was brought by Haji Begam, the original plaintiff, now represented by the appellants, against the first respondent, and others, for Rs. 29,935.

In this, with some additions, three sums mainly formed the claim :—one sum of Rs. 17,000, balance of the purchase-money due to the plaintiff as representing her deceased husband, who in his life had sold a share in a mauza, on the 16th September 1887, to the first defendant and his wife for Rs. 20,000, this purchase-money remaining with the vendees. Another of the sums claimed amounted to Rs. 9,718 for interest on the unpaid purchase-money from the above date to 15th June 1892. A third sum was claimed as damages. The vendees, by the contract, were allowed to retain Rs. 17,000 for payment over to an incumbrancer, to whom it was due, Lala Srikishen Das ; and also to retain Rs. 3,000 for payment to another. The latter of these sums was paid accordingly ; but Srikishen was obliged to sue for the money due to him. The damages mentioned above were in respect of his costs of suit.

The defendants paid into Court, on the 25th January 1893, Rs. 14,400, as being all that was due from them. The question on this appeal related to the interest which was claimed on the money so left in the hands of the vendees.

The Subordinate Judge decreed in favour of the plaintiffs Rs. 14,120. This was for the sum of Rs. 17,000 left as above stated, with interest thereon, but allowing for the money paid into Court, and not awarding anything in respect of costs incurred in Srikishen's suit.

Against this decree both parties appealed.

The High Court (EDGE, C. J., and BANERJI, J.) modified the decree awarding, against the purchasers, Rs. 3,000 only, with interest from the date of the decree below till payment. Their reasons were thus expressed :—

" Under that sale deed it was the duty of the vendor to give a clear title to the vendees, they on their part paying Rs. 17,000 and Rs. 3,000, which together made up the purchase money. [225] The evidence given on behalf of the defendants is entirely consistent with what we would understand from the sale deed itself to have been the terms when once we were informed that there were outstanding liabilities on the property. We find that it was agreed that the vendors should pay Srikishen Das and Indarman. We find that the vendees offered to pay to Srikishen Das before suit by him the Rs. 17,000 and that Srikishen Das would not receive it. Under these circumstances, what is the decree to which these plaintiffs are entitled ? They are clearly entitled to a decree for the balance of Rs. 17,000, viz., Rs. 3,000, Rs. 14,000 having been received by them. When the vendees offered to pay the Rs. 17,000 to the vendor, he did not decline the offer on the ground that the money was not produced at the moment the offer was made, but he declined the offer, except on the condition that interest should be paid. Consequently the offer in this case amounted to a valid tender, and that would disentitle the plaintiffs to any interest prior to decree."

On this appeal—

Mr. J. D. Mayne appeared for the Appellants.

Mr. Herbert Cowell, for the Respondents, was not heard.

Afterwards on the 10th December their Lordships' judgment was delivered by Sir R. Couch :—

By a deed dated the 10th September 1887, Muhammad Ghulam Kadir Khan sold a share of mauza Alipur Gajauri to Nasir-ul-lah Khan and Mussammat Ulfat, his wife, in consideration of Rs. 20,000, which sum was in the deed stated to be for paying the debts due to Lala Srikishen Das and Indarman, Bhora, and the money was said in the deed to be "left with the vendees" for paying to the former Rs. 17,000 and to the latter Rs. 3,000. The latter sum was paid to Indarman and the question in this appeal relates to the Rs. 17,000. The suit was brought by Haji Begam, the widow of Ghulam Kadir Khan, against Nasir-ul-lah Khan and his wife, and in the course of it the appellants and respondents were on their decease substituted [226] for them as plaintiffs and defendants. The plaint alleged, as was the fact, that the Rs. 17,000 were not paid to Srikishen Das, and prayed for a decree for that sum and Rs. 9,718-6-9 interest from 10th September 1887 to 15th June 1892, the day of filing the plaint, and also for the costs of a suit by Srikishen Das against Ghulam Kadir Khan. The facts were that at the time of the sale Rs. 22,000 were due to Srikishen Das and there was also a mortgage to Harjit Singh and others upon which Rs. 15,000 were due. The evidence showed that the balance due to Srikishen Das and the money due on the mortgage to Indarman were agreed to be paid by Ghulam Kadir Khan and the property sold released from mortgages. Ghulam Kadir Khan failed to provide the money for this purpose, and Srikishen Das brought a suit against him and obtained a decree for what was due to him with interest and costs and the amount decreed was realised by Srikishen Das on the 18th March 1892. The second and third of the issues in the suit were whether the Defendants should be charged with interest on the Rs. 17,000, and the costs of that suit. The Subordinate Judge who tried the suit allowed the interest but not the costs, and gave a decree for the balance of the claim after deducting Rs. 14,000, which he said had been paid on the 25th January 1893. It did not appear how this was paid. Both parties appealed to the High Court, which decided that the plaintiffs were not entitled to either the interest or costs, and modified the decree of the lower Court by giving to the plaintiffs Rs. 3,000, the balance of the Rs. 17,000 with interest from the 30th June 1893, the date of that decree. The plaintiffs have appealed against this decree.

Their Lordships are of opinion that there is no ground for the appeal. The Rs. 17,000 were not left with the vendees simply as a deposit of the money of the vendor. They were to retain it as a security that the property sold should be freed from the incumbrances upon it and that they should have a good title. They were entitled to retain it until the vendor provided the rest of the money necessary for this purpose. Unless this [227] was done, a payment of the Rs. 17,000 would leave the property still incumbered, as Srikishen would only receive it, if he did so, in part payment of what was due. From the nature of the transaction it was not a deposit upon which the vendees would be liable to pay interest unless they refused or omitted to pay the money when they were informed by the vendor that he was prepared to pay the balance necessary to satisfy what was due to Srikishen. Without that balance they were not bound to pay or tender to him the Rs. 17,000. Their Lordships will therefore humbly advise Her Majesty to affirm the decree of the High Court and dismiss the appeal. The appellants will pay the costs.

Appeal dismissed.

Solicitors for the Appellants: *Messrs. Barrow and Rogers.*

Solicitors for the Respondents: *Messrs. Ranken Ford, Ford, and Chester.*

NOTES.

[In (1912) 15 I.C., 854 (All.), it was held that the mortgagee was not bound to redeem the previous mortgage when the money left with him fell short of the amount payable under it.]

[21 All. 227]

APPELLATE CIVIL.

The 7th February, 1899.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Sheoraj SinghJudgment-debtor

versus

Gauri Sahai and others.....Decree-holders."

Civil Procedure Code, sections, 344 et seq—Insolvency—Holder of decree on mortgage not entered amongst the scheduled creditors—Decree-holder not debarred from executing his decree.

Held, that a judgment-creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Haró Priá Dabía v. Shama Charan Sen*, (1889) I. L. R., 16 Cal., 592, and *Shridhar Narayan v. Atmaram Govind*, (1889) I. L. R., 7 Bom., 455, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Pandit *Baldeo Ram*, for the Appellant.

[228] Munshi *Ram Prasad* and Munshi *Gokul Prasad*, for the Respondents.

Knox and Banerji, JJ.—Raja Sheoraj Singh, the appellant before us, is a judgment-debtor of the respondents. The respondents hold a decree against him, dated the 5th March 1885, for sale under a mortgage deed. Before the decree had been passed Raja Sheoraj Singh had applied, under the provisions of Chapter XX of the Code of Civil Procedure, to be declared an insolvent. With his application he filed a list of his creditors. The list was subsequently amended by him, and in the amended list under the head No. 8 Har Sahai, father of the respondent, was entered as a creditor holding a decree dated the 5th March 1885, arising out of a mortgage bond in favour of Har Sahai, which bore date the 5th March 1879. The judgment-debtor was eventually declared an insolvent by the order of this Court dated the 16th July 1886. Upon this the creditors mentioned in the application were called upon to produce evidence as to the amount and particulars of their respective pecuniary claims, and the record prepared at the time shows that Har Sahai did not put in an appearance. The entry says that he was said to be dead. The amount proved was declared to be *nil*. A receiver was appointed in due course, who made collections, paid the scheduled creditors in full, and found himself with a balance in hand of Rs. 8,324-7-11. After all this had taken place the present respondents made an application to the Collector, to whom the decree had been transferred for execution by reason of the property

* First Appeal No. 278 of 1897, from a decree of Pandit Raj Nath Saheb, Subordinate Judge of Moradabad, dated the 20th September 1897.

concerned being ancestral property, for attachment, and in due course of time we find that the District Judge paid over the balance to the respondents. They took it, and afterwards asked that the property now in dispute might be brought to sale for the recovery of the balance due from the appellant to the respondents. The property in question is the same property which had been mortgaged in the bond of 1879, and which the receiver had handed over for restoration to the judgment-debtor. Upon the application for sale the appellant raised several objections. Among them was the objection now before [229] us; but, with the exception of a question bearing on the question of interest, the application for execution was allowed to proceed and the property declared liable for sale. From this order arises the present appeal. It is contended before us that as the decree-holders had, under section 356 of the Code of Civil Procedure, received their distributive share of the assets of the appellant in the hands of the receiver they cannot now execute the decree for the balance of the decretal amount; further, that by virtue of the proceedings taken under sections 351, 356 and 357, the decree is incapable of execution. It was said that the moment the judgment-debtor was declared insolvent, all creditors were bound to come and prove their debts; that the schedule prepared under section 352 operated as a decree, and that any creditor who did not come in within the period of limitation allowed by article 174 * of the second schedule of the Indian Limitation Act and prove his debt or, when the schedule was in error, did not get the schedule amended, lost any further rights or remedies in respect of his debt. In the present case the respondents had made no attempt either to prove their debt when the schedule was prepared, or to get the schedule amended after it had been prepared, and hence it was urged that they were not entitled to execute the decree they hold. We are unable to agree with this contention. We can find nothing in section 353 or in any other part of Chapter XX of the Code which declares that where a creditor has not proved his claim or got an entry in the schedule amended he has debarred himself of all rights to execute a decree which he holds, especially when that decree is subsisting and is based upon a mortgage debt. Section 357, which lays down in effect the consequence of the discharge of the judgment-debtor under the Code, refers only to scheduled debts. More than this, scheduled creditors are expressly declared to be still empowered to proceed against property other than that vested in the receiver under certain restrictions, whether that property was previously or subsequently acquired. In the case of *Haro Pria Dabia v. Shama Charan Sen*, (1889) I. L. R., 16 Cal., 592, it [230] has been pointed out "that where a person has got a right and it is contended that that right is taken away by statute, the right cannot be held to have been taken away except by express words in the statute, or by inference so clear from the terms of the enactment that there can be no doubt about it." The principle of that case is on all fours with the case before us. Our view is supported by the case of *Shridhar Narayan v. Atmaram Govind*, (1883) I. L. R., 7 Bom., 455. We dismiss the appeal with costs.

Appeal dismissed.

[* Art. 174.—

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|-----------------------|---|
| By a creditor of an insolvent judgment-debtor under section 353 of the Code of Civil Procedure. | Ninety days | The date of the publication of the schedule.] |

NOTES.

[This was approved in (1905) 30 Cal., 407 ; (1907) 9 Bom. L.R., 466, where it was held that execution could be taken in respect of the debt not included in the schedule notwithstanding the discharge of the insolvent judgment-debtor.]

[21 All. 230]

The 9th February, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Sita Ram.....Plaintiff

versus

Nauni Dulaiya.....Defendant.*

Civil Procedure Code, sections 25, 562—Transfer—Procedure—Suit transferred to his own file by District Judge—Appeal to High Court—Remand to District Judge—Judge not competent to transfer.

By order of a District Judge under section 25 of the Code of Civil Procedure a suit was transferred from the Court of the Subordinate Judge to his own Court. The District Judge decided the suit, and from his decree there was an appeal to the High Court. The High Court remanded the suit under section 562 of the Code to the Court of the District Judge. The latter transferred the suit so remanded for trial to the Subordinate Judge. *Held*, that the District Judge had then no power to transfer the suit, but was bound to try it himself.

Semle, that section 25 of the Code of Civil Procedure has no application to a case remanded under section 562 of the Code.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu *Jogindro Nath Chaudhri* and Babu *Ratan Chand*, for the Appellant.

Munshi *Gulzari Lal* (for whom Babu *Satish Chandar Banerji*), for the Respondent.

Blair and Burkitt, JJ.—The suit in which this second appeal has been instituted was transferred under the provisions [231] of section 25 of the Code of Civil Procedure by the District Judge of Jhansi from the Court of the Subordinate Judge for trial before himself. After trial the District Judge came to the conclusion that the plaint disclosed no cause of action, and he therefore dismissed the suit. On appeal to the High Court the decision of the Judge was reversed. It was held that the plaint did disclose a cause of action, and the case was remanded to the District Judge under section 562 of the Code of Civil Procedure to be heard on the merits.

The District Judge, however, instead of trying the case himself on the remand, thought fit, for some reason unknown to us, to disregard the orders of this Court, and sent the case for trial to the Subordinate Judge. Subsequently the District Judge heard the case on appeal from the decree of the Subordinate Judge and dismissed the suit.

On second appeal to this Court the first plea urged is that the District Judge had no power to refer the case for trial to the Subordinate Judge, and that all the proceedings in the Jhansi Courts after the remand order of this Court were without jurisdiction.

*Second Appeal No. 830 of 1896, from a decree of F. W. Fox, Esq., District Judge of Jhansi, dated the 3rd June 1896, reversing a decree of A. Rahman, Esq., Subordinate Judge of Jhansi, dated the 26th February 1896.

We think this plea is sound and must prevail. When a case is remanded under section 562 of the Code, that section provides that the remand shall be to the Court against whose order the appeal was made—in this case the Court of the District Judge of Jhansi. It then is the duty of that Court to re-admit the suit under its original number in the register and to proceed to hear it on the merits. There is no power given to the Judge to transfer the case to another Court. His power of transfer under section 25 had been exhausted when the suit was originally withdrawn from the Court of the Subordinate Judge, so, even if section 25 were applicable to a case remanded under section 562, (we think it is not applicable) that section does not empower the District Judge to re-transfer the case to the subordinate Court from which it had been withdrawn.

The plain and unmistakeable duty of the Judge was to have obeyed the law by hearing the case himself as a Court of original [232] jurisdiction. He must now perform that duty, and it is much to be regretted that the illegal procedure adopted by the Judge has entailed heavy costs on the parties. We allow this appeal. We set aside as without jurisdiction all proceedings in the Jhansi Courts in this case subsequent to the remand order of this Court, and we direct the District Judge now to re-admit the suit under its original number and to proceed to determine it on the merits.

Costs will follow the event. *Appeal decreed and cause remanded.*

NOTES.

[The C.P.C., 1908, by sec. 24 clause 1 (b) iii, empowers the Court to “re-transfer the same for trial or disposal to the Court from which it was withdrawn.” See also (1913) 23 I. C., 425 (Mad.); (1913) 19 I. C. 552 (Nagpur).]

In (1902) 24 All. 304, this was approved; but in (1907) 5 C. L. J. 611; 36 Cal., 193; (1908) 9 C.L.J., 572, it was held that there was inherent power to make the transfer. See also (1905) 32 Cal., 875.]

[21 All. 232]

The 11th February, 1899.

PRESENT :

MR. JUSTICE BANERJI, AND MR. JUSTICE AIKMAN.

Mahesh Partab Singh.....Defendant

versus

Dirgpal Singh.....Plaintiff.*

Hindu law—Impartible Raj—Allowance to younger sons—Matters which may be considered in assessing such allowance.

Held, that in calculating what allowance might properly be made to the younger brother of the holder of an impartible raj regard might properly be had, not merely to the extent of the property constituting the raj, but to the other sources of income, whencesoever derived, possessed by the incumbent of the raj.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Ram Prasad, Pandit Sundar Lal and Munshi Gobind Prasad, for the Appellant.

Pandit Moti Lal and Babu Jiwan Chandar Mukerji, for the Respondent.

Banerji and Aikman, JJ.—The appellant, who was the defendant in the Court below, is the Raja of the Anowla raj, in the Gorakhpur district, admitted to be an impartible raj. The plaintiff is one of his younger brothers. The

* First Appeal No. 102 of 1897, from a decree of Maulvi Syed Jafar Husain, Subordinate Judge of Gorakhpur, dated the 26th March 1897.

suit, out of which this appeal has arisen, was brought by the plaintiff, and he prayed that property yielding an annual income of twelve hundred rupees be determined to be property out of which he should obtain his [233] maintenance as a junior member of the family, and he be put in possession of such property, or in the alternative a maintenance allowance of twelve hundred rupees a year should be fixed and charged on the property mentioned in the plaint. The plaint contained other prayers also, with which we are not concerned in this appeal. The defendant denied the plaintiff's right to maintenance and disputed the propriety of the amount claimed as the proper amount of plaintiff's maintenance. The Court below has made a decree in the plaintiff's favour, declaring him entitled to an annual allowance of six hundred rupees, to be paid out of the raj.

Both parties have appealed, but the only question to which the appeals were confined in the argument before us is that of the amount of the allowance fixed, the defendant contending that it is too high and the plaintiff urging that it is too low. We have to be satisfied that the amount fixed by the Court below is unreasonable with reference to the circumstances of the case. As we have said above, it is no longer disputed that the plaintiff is entitled to an allowance for maintenance. In our opinion the amount of maintenance in a case like this should be determined upon the same principles upon which the amount which ought to be awarded as maintenance has ordinarily to be determined, and every case must be decided with reference to its own peculiar facts. In this case it appears that the raj has an income of over nine thousand rupees from villages. There is also an income from malikana, which is appurtenant to the raj, so that the profits from the raj itself amount to over twelve thousand rupees per annum. Besides, there is an income of over nine thousand rupees derived from money-lending carried on in the names of the Raja and his wife. It was within the power of the defendant to show that this income was derived from sources unconnected with the raj, but he made no effort to prove that the capital invested in money-lending was not a part of the property which came to him from his father. Having regard to the amount of profits yielded by the immovable property belonging to the raj and the number of years the defendant has been in possession it is [234] very probable, as alleged by the plaintiff, that the said capital was inherited by the defendant from his father. It appears no doubt that the plaintiff has some income of his own derived from shares in some villages and other property standing in his name. The defendant urges that the villages in which shares are recorded in the name of the plaintiff were acquired by the father of the parties and form a part of the raj. This has not been proved. The villages were acquired in the name of the plaintiff and stood recorded for several years in his name. It is, however, immaterial to decide whether the property in the possession of the plaintiff is a part of the raj or not, because we are of opinion that in fixing an allowance for the plaintiff we should take into account the sources of income, however derived, which the plaintiff now enjoys. We think that the principle upon which maintenance is allowed to a Hindu widow should be applied in determining the amount of maintenance to be awarded to the plaintiff. Having regard to the income of the raj and also to the fact that the plaintiff has some other sources of income, the amount fixed by the Court below, namely, fifty rupees per mensem, does not appear to us to be unreasonable. In coming to this decision we have to bear in mind the claims of other members of the family and the expenditure which the defendant has to incur in maintaining his position as a Raja. While therefore, on the one hand, the allowance to be fixed for the junior members is not

to be such as to cripple the raj, it must, on the other hand, be proportionate to the fair wants of a person in the position and rank in life of the plaintiff. We think the allowance fixed by the lower Court is reasonable and answers all requirements. We dismiss the appeal with costs.

Appeal dismissed.

[235] FULL BENCH.

The 16th February, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, MR. JUSTICE
BURKITT AND MR. JUSTICE AIKMAN.

Madan Lal.....Defendant

versus

Bhagwan Das.....Plaintiff*.

Mortgage—Prior and subsequent mortgages—Mortgaged property sold twice in execution of decrees in suits in each of which the other mortgagee was not a party—Suit for ejectment by one auction purchaser against the other—Form of decree.

B mortgaged a house, first to *D* and subsequently to *M* and *C*. *M* and *C* brought a suit on their mortgage without making *D* a party to it, obtained a decree, and put the house up to sale, and it was purchased by *ML*. Subsequently to the date of the decree in the above suit *D* brought a suit on his mortgage, without making *M* and *C* parties thereto, obtained a decree and put the house up to sale, and it was purchased by *BD*. *BD* then sued *ML* for ejectment and damages. *Held*, that the plaintiff's suit must be dismissed, and that it was not competent to the Court to grant a decree in favour of the plaintiff conditioned on the failure of the defendant to redeem the mortgage upon which the plaintiff's title was ultimately based. *Hargu Lal Singh v. Gobind Rai*, (1897) I. L. R., 19 All., 541, followed and explained.

THE facts of the case, as stated in the judgment of the Lower Appellate Court, were as follows :—

" Baij Nath, the owner of a house in Allahabad, mortgaged it first to Dina Nath, a minor, on 26th June 1891, for Rs. 200.

" On 2nd February 1892, he made a second mortgage of the same house for Rs. 150 to Maina Bibi and Mul Chand.

" Dina Nath's mortgage was repayable in 10 years, with interest at 12 per cent. There was a covenant in the deed that so long as the mortgage was not satisfied, the house will not be sold, gifted or mortgaged, and there was a further provision—'if, God forbid, the mortgagee entertained, within the period fixed for payment, in any way, a doubt, whether, weak or strong, with regard to the realisation of his money, he was at liberty to realise at once his

* Second Appeal No. 644 of 1896, from a decree of Babu Brij Pal Das, Subordinate Judge of Allahabad, dated the 9th June 1896, reversing a decree of Mr. H. David, Munsif of Allahabad, dated the 17th February 1896.

money, principal and interest, by the cancelment of [236] the term fixed for repayment ; I, my heirs, my representatives have no objection to it.'

"Both the mortgages were registered. Maina Bibi and Mul Chand, the second mortgagees, instituted on 11th May 1894, a suit on their mortgage, without making the first mortgagee a party to it, and obtained a decree on 25th June 1894. The house was sold in execution of that decree on 21st December 1894, and purchased by Madan Lal, defendant, for Rs. 72.

"On 28th September 1894, Dina Nath instituted a suit on his mortgage, and obtained a decree on 8th November 1894. Maina Bibi and Mul Chand, the second mortgagees, who had obtained the decree on 25th June 1894, on their mortgage, were not made parties to this suit.

"The house was sold on 25th June 1895, in execution of Dina Nath's decree and purchased by the plaintiff for Rs. 265.

"Plaintiff, attempting to take possession of the house, was resisted by the defendant; therefore plaintiff brought this suit for possession and for Rs. 11-4-0 compensation."

The Court of First Instance dismissed the claim. On appeal the Lower Appellate Court reversed the decree of the first Court and decreed the plaintiff's claim, but subject to the condition that if the principal and interest of Dina Nath's mortgage, from the date of the deed to the date of payment, less Rs. 60 received in lieu of interest, should be paid by the defendant within four months from the date of the decree, the plaintiff's suit would stand dismissed.

The defendant appealed to the High Court.

Babu Jogindro Nath Chaudhri and Babu Satya Chandar Mukerji, for the Appellant.

Pandit Sundar Lal and Babu Datti Lal, for the Respondent.

Strachey, C. J.—We do not think that we ought to allow the questions decided by the Full Bench of this Court in *Hargu Lal Singh v. Gobind Rai*, (1897) I. L. R., 19 All., 541, so recently as July 1897, to be now reopened. The only question therefore upon which we have heard [237] the learned pleaders on both sides is whether the present case is distinguishable from that decided by the Full Bench. The conclusion at which we have arrived is that there is no material distinction in principle between the two cases. Certain differences have been suggested in reference to the title set up by the defendant here; but these cannot make the cases distinguishable, for the decision of the Full Bench was necessarily irrespective of any view of the defendant's title, and based exclusively upon the failure of the plaintiff to prove a title to present possession at the date of his ejectment suit. Here, as there, the only title of the plaintiff was derived from a simple mortgage which did not entitle the mortgagee to possession as against any one, and a purchase under a decree for sale in a suit to which this defendant was not a party. Here, as there, the suit was an ordinary suit for ejectment, the plaintiff claiming to recover possession from the defendant absolutely and not subject to any condition. Here, as there, one of the Courts below—there the Court of First Instance, here, the Lower Appellate Court—gave the plaintiff a decree for possession with a conditional right to the defendant to redeem. Before us the learned advocate for the plaintiff respondent has admitted that his client is not entitled to an absolute decree for possession. He has, however, argued that the case is distinguishable from *Hargu Lal Singh v. Gobind Rai*, on the ground that here it is the Lower Appellate Court which has given his client a decree for possession with a conditional right to the defendant to redeem, and that there is nothing in the Full Bench decision

which necessarily implies that such a decree is wrong or requires this Court in second appeal to set it aside. From the paper-book in the Full Bench case it appears that there the plaintiff, in his memorandum of appeal in this Court against the Lower Appellate Court's decree, absolutely dismissing the suit, pleaded that he was entitled, if not to an absolute, at least to a qualified, decree for possession, such as the first Court had given him. The Full Bench nevertheless dismissed the appeal, and did not give the plaintiff the qualified decree for possession [238] which he asked for. It is suggested that that particular plea in the memorandum of appeal may not have been pressed before the Full Bench, as the judgment does not refer to it. However this may be, it appears to us that the Full Bench did distinctly indicate their opinion that, in a suit for ejectment, such as the present, a decree for possession, with a conditional right to the defendant, should not be passed. They say that the plaintiff's suit "was properly dismissed, though on other grounds;" in other words, that the Lower Appellate Court acted properly in setting aside the qualified decree for possession passed by the first Court, and in substituting for it a decree absolutely dismissing the suit, though it gave wrong reasons for doing so. It is impossible to suppose that they would have said that and proceeded to confirm the Lower Appellate Court's dismissal of the suit if they had thought that a qualified decree for possession, such as the first Court had passed, was right in such a suit. We cannot see any substantial distinction between this case and that. We must follow the decision in *Hargu Lal Singh v. Gobind Rai*, and the result is that we allow this appeal, set aside the decree of the Lower Appellate Court, and restore that of the first Court, dismissing the suit with costs in all Courts. KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ. concurred.

Appeal decreed.

NOTES.

[As regards the relative rights of incumbrancers who were not made parties to suits by other incumbrancers, see also (1915) 30 M.L.J., 347; (1911) 21 M.L.J., 213; (1907), 29 All., 339 on appeal from (1903) 7 O. C., 243; (1903) 26 All., 464; (1906) II O. W. N., 314.

As regards the conversion of a suit of one character into a suit of another character, see also (1906) 5 C.L.J., 527; *Rash Behari Ghosh on Mortgages* (IV Edn., 1911) Vol. I p. 614.]

[21 All. 238]

APPELLATE CIVIL.

The 18th February, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Kishan Lal.....Plaintiff

versus

Garuruddhwaja Prasad Singh and others.....Defendants.*

Hindu-law—Pious duty of son to pay his father's debts— Civil Procedure Code section 317—Execution of decree—Sale in execution—Benami purchase— Suit by creditor on the ground that the certified purchaser is not the real purchaser.

Held that the provisions of section 317 of the Code of Civil Procedure are subject to no limitation other than such as is contained in the section itself, [238] namely, that the suit the maintenance of which is prohibited by that section should be (1) brought against a certified purchaser and (2) based upon the ground that the purchase was made on behalf of a

* First Appeal No. 93 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 23rd December 1896.

person other than the certified purchaser. The question of who the plaintiff may be is not material.

The judgment of KNOX, J., in *The Delhi and London Bank v. Chaudhri Partab Bhaskar*, (1898) I. L. R., 21 All., 29 approved; *Ram Kurup v. Sri Devi*, (1892) I. L. R., 16 Mad., 290, followed; *The Uncovenanted Service Bank v. Abdul Bari*, (1896) I. L. R., 18 All., 461, distinguished; *Mussumat Buhurs Kowur v. Lalla Buhoorree Lall*, (1872) 14 Moo., I. A., 496 and *Williamson v. Norris*, (1898) 68 L. J., Q. B., p. 34, referred to.

THE facts of this case are fully stated in the judgment of the Court.

Munshi Gobind Prasad and Maulvi Ghulam Muftaba, for the Appellants.

Mr. D. N. Banerji, for the Respondent, Hub Lal.

The judgment of the Court was delivered by BURKITT, J.:—This is an appeal by the plaintiff from a decree of the Subordinate Judge of Aligarh, partly dismissing the plaintiff's suit. The suit was one for sale on a mortgage of certain property executed by the defendant Garuruddhwaja Prasad Singh on February 28th 1893. Among the mortgaged properties, in addition to landed property, was one-half of a fort or kila at Baswan, which had belonged to the mortgagor. This fort had, previous to suit, been sold in execution of a money decree held by one Madhri Saran, and had been purchased by the defendant, Hub Lal. The Subordinate Judge has given the plaintiff a decree against the mortgagor, but dismissed the suit as against the mortgagor's minor son, Matmatanga-dhwaja Prasad Singh, and as against Hub Lal. The result of this decree is that in execution the plaintiff can proceed only against the father's (the mortgagor's) interest (presumably one-half) in the mortgaged property, other than the fort, and that the latter cannot be touched at all.

The plaintiff now appeals, contending that he is entitled to a decree for sale of the whole property mortgaged to him without any exception. There are thus two matters to be considered in this appeal. The first is concerned with the dismissal of the [240] suit against the respondent, Matmatanga Prasad, the minor son of the mortgagor. We regret that this respondent has not been represented by counsel at the hearing of the appeal. The grounds on which the lower Court dismissed the suit against him are "that Garuruddhwaja is an extremely immoral and extravagant man, and that he has wasted property worth lakhs of rupees in a very short time. Therefore the sons and grandsons of such a man should not be held liable for any debt incurred by him." Further, the Subordinate Judge says that "whatever portion of the debt passed into Garuruddhwaja's hand was, like other debts, spent by him for his own private purposes."

These reasons are not, in our opinion, sufficient to exonerate the son from the pious duty of paying his father's debt. Had it been proved that the debt had been contracted for immoral purposes and that the person who advanced the money was aware of the purpose for which it was being borrowed, the son would not have been liable. There is, however, not a scrap of evidence to show that the debt which formed the consideration for the bond in suit was contracted for any such purpose. Indeed the details in the schedule show that such was not the case. A mere general allegation that the father led an extravagant, immoral, and licentious life would, even if proved, not be sufficient to relieve the son. It is now settled law in this Court since the case of *Badri Prasad v. Modan Lal*, (1893) I. L. R., 15 All., 75, that a son can be sued jointly with his father to recover a debt contracted by the father if the debt had not been contracted for purposes such as would exonerate the son from the pious duty of paying his father's debt. We are therefore constrained to allow this

appeal as far as the respondent Matmatangadhwaja Prasad Singh is concerned, and to give a decree against him in favour of the appellant.

We have next to deal with the second portion of this appeal, namely, the case of the respondent, Hub Lal, the purchaser of the mortgagor's interest in the fort at Baswan. That interest was purchased by Hub Lal for Rs. 2,901 on May 10th 1894, in execution [241] of a decree held by one Madhri Saran, and was under attachment by the Court in execution of the latter decree when it was mortgaged to the plaintiff-appellant in February 1893. That mortgage, therefore was void to the extent provided for by section 276 of the Code of Civil Procedure. The contention for the appellant is that at the auction sale the real beneficial purchaser was not the respondent, Hub Lal, who is the certified purchaser, and that the latter purchased benami for the judgment-debtor Garuruddhwaja Prasad Singh, appellant's mortgagor. It was thereupon contended for the appellant that his mortgagor is the real beneficial owner of the fort, and that the latter was liable to be taken in execution to satisfy any decree which appellant might obtain on his mortgage. It is to be noticed that the plaint does not contain any prayer asking for a declaration that the mortgagor, Garuruddhwaja Prasad, was the beneficial owner, and Hub Lal a fictitious purchaser. But the plaint contained a prayer which is certainly peculiar, bearing in mind the fact that this Court had refused to set aside the sale to Hub Lal. It asked that if the sale to him were found not to be fictitious, the Court should direct him to receive back the purchase-money he had paid, and that on that being done the Court should direct the sale of the fort with the rest of the mortgaged property. This rather extraordinary request does not seem to have been pressed in the Court below, and is not repeated in the memorandum of appeal. The memorandum of appeal, however, contends that it has been established that Hub Lal had purchased benami for Garuruddhwaja Prasad, but like the plaint, it abstains from asking that a declaration to that effect should be made. The appeal, as regards Hub Lal, was, however, fought before us by counsel on both sides as if the object of the suit, as far as the appellant was concerned, was to obtain a declaration that the plaintiff's mortgagor, Garuruddhwaja Prasad, was the beneficial purchaser and an order thereupon that the fort should be sold in satisfaction of the mortgage of February 1893. Such a construction can certainly be put on the plaint, as otherwise the allegation of the benami purchase would be superfluous.

[242] It being then admitted for the appellant that his suit, as far as Hub Lal, the certified purchaser, is concerned, is a suit against Hub Lal, instituted on the ground that his purchase was made on behalf of the appellant's debtor Garuruddhwaja Prasad, the question arises whether such a suit can be maintained, or whether it is forbidden by section 317 of the Code of Civil Procedure. The words of that section are:—"No suit shall be maintained against the certified purchaser on the ground that the purchase was made on behalf of any other person." The opening words "no suit shall be maintained" mean, we have no doubt, "no suit shall be instituted, and if such a suit be instituted it shall fail." That is the only meaning we can attach to the word "maintained." We have heard very able and learned arguments from counsel on either side as to the construction to be put on this section 317. For the respondent it was contended that the section means what it says, neither more or less, and that it forbids the institution of any suit by any plaintiff against the certified purchaser if the object of the suit is to have it declared that the purchase was made on behalf of any person other than the certified purchaser. For the appellant, on the other hand, it was argued that we should not put on the section its literal and grammatical meaning, that we should import into it an exception which

finds no place in it, and that the section should be construed so as to permit of a suit by a creditor of the alleged beneficial purchaser, by adding after "any other person" the words "except it be a suit by a creditor of such other person."

We fail to see why we should put such a restrictive interpretation on the very wide language of the section, and why we should say that the words "no suit" do not really mean "no suit," in their plain grammatical sense, and do mean "no suit excepting a suit by a creditor." Had the Legislature intended that a certain class of suits should be excepted from the sweeping prohibition laid down in section 317 it would, we think, certainly have altered the wording accordingly, and would [243] not have left it to the ingenuity of Judges to discover that it really did not mean what it purported to say in the plainest language.

The object of the section was no doubt to prevent judgment-debtors from purchasing their own property at auction in the name of another, and for that purpose the section provided that no suit shall lie against the certified purchaser on the ground that the purchase was benami. The section does not designate any particular person or class of persons as being the person who shall not sue. It confines itself to indicating the person who shall not be impleaded as defendant in a suit instituted on the specific ground mentioned. In that way it prevents judgment-debtors who have purchased in the names of other persons from suing the certified purchasers for possession; that is to say, it permits the benami certified purchaser to reap the benefit of his fraud by barring the real purchaser from suing him, and if it also prevents the creditors of such a judgment-debtor from suing the certified purchaser, it may well be that the evil is not unequally balanced. The cases are by no means few in which the benami certified purchaser defies all attempts by the real purchaser to get possession and holds on to the property. According to the construction for which appellant contends, such a certified purchaser could be sued by the creditors of the judgment-debtor, though not by the judgment-debtor, the beneficial purchaser. It appears to us that if one infringement of the hard-and-fast rule laid down by section 317 be allowed in the case of creditor of judgment-debtor it will be impossible to prevent others. Why should not the same privilege be allowed to a person who had purchased from the judgment-debtor the property fraudulently withheld benami by the certified purchaser? Similarly, why should not a mortgagee holding a mortgage executed by the alleged beneficiary after the alleged fictitious sale, be allowed to sue such certified purchaser for sale on his mortgage? Other cases might be put, such as cases of gift, devise by will, and the like. It seems to us that if the creditor of a judgment-debtor be not debarred [244] by section 317 from suing the certified purchaser on the ground mentioned in that section, it will be impossible to exclude many other classes of plaintiffs from the same privilege. It is objected that the classes of persons mentioned above derive title from the judgment-debtor. But surely so does the appellant in the present case. How does his title differ from that held by a vendee or mortgagee to whom the alleged beneficiary had sold or mortgaged the property after the alleged fictitious sale? *Ex hypothesi* the property really belongs to the judgment-debtor to deal with as he pleases. If then the benami certified purchaser set him at defiance, we fail to see how, on the construction of section 317 for which the appellant contends, a suit by such a vendee or mortgagee could be held to be barred by that section, or even a suit by the holder of a simple money decree for money borrowed subsequent to the date of the alleged fictitious sale, and in this way the alleged real purchaser would be allowed to maintain that suit indirectly through a friendly party

which the law forbids him to maintain directly. We cannot see that the fact that these new obligations came into existence subsequently to the alleged fictitious sale has any bearing on the question. On the above considerations we are of opinion that if we accept appellant's contention we must read the opening words of section 317 as if they ran "no suit by a judgment-debtor shall be maintained" and must hold that with one exception any person may institute a suit against a certified purchaser "on the ground that the purchase was made on behalf of any other person." We are not prepared to adopt that conclusion. If the construction we put on this section is one which in some cases enables fraudulent judgment-debtors to defraud their creditors the remedy is, we think, to be sought for in legislation, and not by putting a constrained meaning on words which are plain and unmistakeable.

The question of the construction to put on section 317 of Code of Civil Procedure has recently been most exhaustively considered by our brother KNOX in the case of *The Delhi and London Bank* [245] v. *Chaudhri Partab Bhaskar*, (1898) I. L. R., 21 All., 29, at pp. 40 *et seq.* The decision at which that learned Judge arrived was that he was "unprepared to import extrinsic matter which will limit or qualify the same words beyond those which are to be found in the section itself, and which limit the suit to a suit (1) brought against a certified purchaser, and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser." He also examined the long array of decisions which at first sight appear to support the construction of section 317 for which the appellant here contends, and showed conclusively that nearly all of them were suits in which the ostensible auction-purchaser, the certified purchaser, was the plaintiff, and not suits against such a purchaser. There can be no doubt now that the maintenance of the former class of suits is not forbidden by section 317, for, to use the words of their Lordships of the Privy Council in the case of *Mussumat Buhuns Kowur v. Lalla Buhooree Lall*, (1872) 14 Moo., I. A., 496, (on the section corresponding to section 317 of the present Code)—"there is nothing from which it can be inferred that more is meant than is expressed. It is confined to a suit against a certified purchaser and to a specific direction as to what should be done with it, etc." In suits in which the certified purchaser is the plaintiff the question which has been discussed in this appeal could not arise, and any decision on it would be *obiter* and not binding on us. The case of the *Uncovenanted Service Bank v. Abdul Bari*, (1896) I. L. R., 18 All., 461, to which our brother KNOX did not refer, was a suit in which the certified purchaser was plaintiff, and in which he asked for a declaration that his purchase was not *benami*. Such a suit clearly is not within the prohibition contained in section 317.

On the whole, we have come to the conclusion, for the reasons given above, that this suit, so far as it concerns the respondent Hub Lal, being a suit against the certified purchaser on the ground that the purchase was made on behalf of the respondent, [246] Garuruddhwaja Prasad Singh, cannot be maintained. We fully concur in the opinion expressed by our brother KNOX in the case cited above, and we are supported in our conclusion by the High Court of Madras in the case of *Ram Kurup v. Sri Devi*, (1892) I. L. R., 16 Mad., 293, in which the Chief Justice and Mr. Justice HANDLY, dissenting from one of the Calcutta decisions cited by our brother KNOX in the case mentioned above, say that that decision "seems to us to contravene the clear meaning of the section (317). It is not, in our opinion, a sufficient reason for not carrying out the express terms of the section, that to do so would be to allow a fraud to be perpetrated. The person in whose name a purchase has been made for the benefit of, and with the money of another, of course commits a fraud in

claiming that property as his own. Nevertheless the law says that a suit shall not be maintained against him on the ground that the purchase was benami, and thus provides that this fraud shall prevail. The object of the section was, we consider, to put a stop to benami purchases at execution sales, and this object can only be carried out by enforcing it in all cases without regard to consequences." The above observations have our fullest concurrence, and to them we would add the following from a judgment of Mr. Justice WILLS in *Williamson v. Norris*, (1898) 68 L. J. Q. B., at p. 34 :—"To argue that, because an enactment may have an effect which was not thought of when it was passed, it cannot have the plain and obvious meaning of the words used is a fallacy, though a common one."

The appeal therefore, as far as Hub Lal is concerned, fails and must be dismissed. It is therefore unnecessary for us to discuss the question of fact as to whether Hub Lal's purchase was or was not benami. We will only remark that the evidence of Hub Lal himself, whom the plaintiff-appellant called as his witness, seems to settle the question.

We allow this appeal with costs as against the respondent Matmatanga Prasad, and we dismiss the appeal with costs as against the respondent, Hub Lal.

Decree modified.

NOTES.

[1. As regards the son's rights under the Hindu Law, see also (1908) 30 All., 156 ; (1909) 31 All., 176 ; (1901) P.R., 58.

2. As regards the question of benami, see also (1903) 26 All., 92 ; (1905) 8 O.C., 306 ; the C.P.C., (1908) sec. 66, clause (2).]

[247] CIVIL APPELLATE JURISDICTION.

The 20th February, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Deocharan Singh and others.....Plaintiffs

versus

Beni Pathak and others.....Defendants.*

*Landholder and tenant—Act No. XII of 1881 (N.-W. P. Rent Act),
section 189—Appeal—"Rent payable by the tenant" not in issue.*

Certain defendants being sued by the zamindars for the rent of land held by them, pleaded in effect that, whatever the rent of the land in suit might be, they were entitled to retain it under an agreement between them and the predecessor in title of the plaintiffs in lieu of interest payable to them on account of a mortgage given by the said predecessor in title.

Held that the case was not one in which an appeal would lie to the District Judge under section 189 of the N.-W. P. Rent Act, inasmuch as the rent payable by the tenant was not in issue in the suit.

THE facts of this case are sufficiently stated in the judgment of the Court.

Munshi Gobind Prasad, for the Appellants.

Mr. Amiruddin, for the Respondents.

* Appeal No. 23 of 1898, under section 10 of the Letters Patent.

The judgment of the Court was delivered by STRACHEY, C. J.—The question in this appeal is whether Mr. Justice DILLON was right in holding that the plaintiffs had no right of appeal under section 189 of the N.-W. P. Rent Act, XII of 1881, from the decision of the Collector dismissing their suit on appeal from the Assistant Collector of the second class. Its solution depends on the exact nature of the matter in issue and decided in the suit, and this is not altogether easy to determine. The suit was in terms one for arrears of rent for three years, under section 93(a) of the Rent Act. The written statement of the defendants is not very clearly expressed. Its principal plea is thus stated:—"The rent of the land, in respect of which rent is claimed, has all along been enjoyed by the defendants' ancestor and subsequently by the defendants in lieu of interest under a mortgage deed of 23rd December 1886, executed by the former zamindar from the time of the execution of the said deed of mortgage. No zamindars of the mahal ever received or realized [248] rent in respect of the said land. Hence, unless all the co-sharers in the mahal repay the mortgage debt and get the mortgage redeemed, no zamindar of the mahal can be competent to sue for arrears of rent." In another paragraph of the written statement the defendant pleaded that in two of the years to which the suit related "the mahal was joint. The plaintiffs alone are not competent to sue. There were also other sharers." The best construction which we are able to place upon the written statement is that the defendants, while not denying that the land in suit was held under the plaintiffs and their co-sharers as zamindars, pleaded that under a mortgage executed in favour of their ancestor by the plaintiffs' predecessor in title, they were entitled, until redemption of the mortgage, to apply, in satisfaction of the interest due, the money which they would otherwise have had to pay to the zamindars as rent. Although they stated that no zamindars of the mahal ever received or realized rent in respect of the land, they did not plead that the relation of landholder and tenant did not exist, or that, as no rent had been either fixed by agreement or determined by a Court, the suit under section 93(a) was not maintainable. Their case was, in substance, that while it was true that rent was to be paid on account of the holding of the land, that rent was, by a special agreement, not to be paid to the landholder but to be appropriated by themselves in lieu of interest due to them, the tenants, from the landholder upon a mortgage debt, until the landholder should redeem the mortgage. The mortgage had not yet been redeemed, and hence for years the rent had not been paid to the landholder. They raised no issue as to the rent payable, but pleaded that, whatever it might be, they were entitled to apply it in the manner which had been agreed.

So much for the pleadings. The Assistant Collector of the second class who tried the suit framed three issues: first, "is the mahal a joint mahal and are the plaintiffs competent to sue?" second, "are the defendants the tenants and are they liable to pay rent?" third, "has the rent been paid or is it in arrears?" Upon the second issue the Assistant Collector [249] apparently regarded the mortgage set up by the defendants as not sufficiently proved, saying in his judgment "it does not appear to me to be worth consideration." Relying mainly upon the settlement papers, in which there was no mention of the mortgage and in which the land was entered in the name of the defendants' ancestor as a tenant at fixed rates, and as bearing a rent of Rs. 3-1-10, he held that the defendants' liability to pay rent at that rate was established, and decreed the suit. Against his decision the defendants appealed to the Collector of the District under section 183 of the Rent Act. In their memorandum of appeal they again relied upon the mortgage, which they described as showing "that the rent of the land in suit, amounting

to Rs. 115, has been mortgaged to the appellants in lieu of interest; " and again contended that "under the circumstances, unless a redemption of the mortgage is secured, no claim for arrears of rent can stand." That is how the case came before the Collector. His conclusion was thus stated: "I do not entertain any doubt that this mortgage really does exist, and that no agreement to pay rent, either at all, or at any particular rate, has so far been entered into between the parties." He accordingly allowed the appeal and dismissed the suit. His finding was in substance that the defendants held the land as mortgagees and not as tenants—a view which, whether right or wrong, was not that which the defendants themselves put forward in their pleadings. That is how the case stood when the plaintiffs appealed to the District Judge from the Collector's dismissal of their suit. The District Judge reversed the Collector's decision and decreed the suit on grounds which it is unnecessary to state. The question is, whether he was competent to entertain the appeal.

Under section 183 of the Rent Act the order of the Collector was, *prima facie*, final. Notwithstanding that section, however, an appeal lay to the District Judge under section 189, if the suit was one in which the amount or value of the subject-matter exceeded Rs. 100, or in which the rent payable by the tenant had been a matter in issue and had been determined, or in which [250] the proprietary title to land had been determined between parties making conflicting claims thereto. In the present case, the amount or value of the subject-matter was less than Rs. 100, and there was no question of conflicting claims to the proprietary title to land. Unless, therefore, it can be held that the rent payable by the tenant was a matter in issue and was determined, no appeal lay to the District Judge. The words in section 189—"the rent payable by the tenant—were inserted in the Rent Act by section 5 of Act XIV of 1886, and have been considered in several rulings of this Court. See *Radha Prasad Singh v. Pergash Rai*, (1890) I. L. R., 13 All., 193; *Radha Prasad Singh v. Mathura Chaube*, (1891) I. L. R., 14 All., 50; *Mohib Ali Khan v. Martin*, (1893), I. L. R., 16 All., 51; *Sarju Prasad v. Haidar Khan*, Weekly Notes, 1896, p. 148. The effect of these rulings is that the words "the rent payable by the tenant" mean the rate of rent, and not merely the actual amount of money which is due at any given time by the tenant to the landlord as rent. Whether the rent payable by the tenant in this sense has been a matter in issue and has been determined, depends upon whether the determination of the question of rent is one which would affect and be binding on the parties as *res judicata*, not merely for a particular year, but for all succeeding years, so long as no change in their relations was made either by their own agreement or by the Act of a Court. The principle would exclude an appeal where the issue had been whether the whole or part of the rent payable had been paid or not. If, then, the defendants here had pleaded that they had paid the rent payable either in whole or in part, the ruling would obviously be applicable and would exclude an appeal under section 119. If their plea had been not payment but accord and satisfaction, the result would be the same. If it had been neither payment nor accord and satisfaction, but that, by virtue of an agreement between the parties, the defendants had set off against the rent otherwise payable by them, a sum payable to them by the plaintiffs, the same result would follow, as the rate of rent [251] would not have been in issue. The issue in fact raised by the defendants was closely similar to this. They raised no question as to the rate of rent payable. Their plea was, in substance, that, whatever the rent payable might be, it was by virtue of a particular contract not to be paid in to the plaintiffs' hands, but appropriated in a special manner, namely, the discharge of the

plaintiffs' liability to pay interest due under the mortgage. If the mortgagee had been a third person, the plea would obviously have been one of payment. As the mortgagee alleged to be entitled to interest was also the tenant from whom rent was claimed, it was in the nature of a set-off of the interest due against the rent repayable, and it impliedly admitted that whenever the rent payable ceased to be applicable by the defendants in satisfaction of the interest, the zamindars would be entitled to recover it. It is difficult to distinguish in principle such a plea from a plea that the rent payable in respect of the years in suit had been in effect paid or otherwise satisfied in full, and in this view of the case we think, having regard to the ruling, that the rent payable by the tenant was not a matter in issue, that the decision of Mr. Justice DILLON was right, and that this appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[This decision was explained in (1901) 23 All., 283.]

[21 All. 251]

APPELLATE CIVIL.

The 20th February, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE KNOX.

Dondh Bahadur Rai and others.....Plaintiffs

versus

Tek Narain Rai and others.....Defendants.*

Mortgage—Usufructuary mortgage—Suit for redemption—Non-payment at proper time of the whole mortgage money—Dismissal of suit—Second suit for redemption accompanied by payment in full—Res judicata—Act No. IV of 1882 (Transfer of Property Act) sections 92, 93.

Held that a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92† of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its in-

* Appeal No. 43 of 1898, under section 10 of the Letters Patent.

Decree in Redemption- † [Sec. 92 :— In a suit for redemption, if the plaintiff succeeds, suit. the Court shall pass a decree ordering—

that an account be taken of what will be due to the defendant for the mortgage-money and for his costs of the suit, if any, awarded to him, on the day next hereinafter referred to, or declaring the amount so due at the date of such decree ;

that, upon the plaintiff paying to the defendant or into Court the amount so due on a day within six months from the date of declaring in Court the amount so due, to be fixed by the Court, the defendant shall deliver up to the plaintiff or to such person as he appoints, all documents in his possession or power relating to the mortgaged property, and shall retransfer it to the plaintiff free from the mortgage and from all incumbrances created by the defendant or any person claiming under him, or, when the defendant claims by derived title, by those under whom he claims, and shall, if necessary, put the plaintiff into possession of the mortgaged property ; and

that if such payment is not made on or before the day to be fixed by the Court, the plaintiff shall (unless the mortgage be simple or usufructuary) be absolutely debarred of all right to redeem the property, or (unless the mortgage be by conditional sale) that the property be sold.]

stitution, paid or tendered the whole of the mortgage money at a time authorized by the deed, did not have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the [252] deed expressly authorizing redemption on payment of the mortgage money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second. *Inman v. Wearing*, (1850) 3 De. G. and S., 729, at p. 734; *Marshall v. Shrewsbury*, (1875) L. R., 10 Ch. A., 250; *Curtis v. Holecombe*, (1837) 6 L. J. (N. S.) Ch., 156; 34 R. R., 30; *Collinson v. Jeffery*, L. R., 1896, 1 Ch., 644; *Karuthasami v. Jaganatha*, (1885) I. L. R., 8 Mad., 478; *Nainappa Chetti v. Chidambaram Chetti*, (1897) I. L. R., 21 Mad., 18; *Roy Dinkur Doyal v. Sheo Golam*, (1874) 22 W. R., C. R., 172; *Muhammad Sami-ud-din Khan v. Mannu Lal*, (1889) I. L. R., 11 All., 386; and *Sheikh Golam Goosein v. Musumat Alla Rukhee Beebee*, (1871) N.-W. P. H. C. Rep., 1871, p. 62, referred to. *Hay v. Rasiudain*, (1897) I. L. R., 19 All., 202, distinguished.

THE facts of this case are fully stated in the judgment of the Court.

Munshi Gobind Prasad, for the Appellants.

Munshi Haribans Sahai, for the Respondents.

Strachey, C. J. :—The question raised by this appeal is whether a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under section 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not prior to its institution paid or tendered the whole of the mortgage money at a time authorized by the deed, has the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the deed expressly authorizing redemption on payment of the mortgage money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second.

The mortgage of which redemption was sought was a usufructuary mortgage of a fixed rate holding, and was executed by the tenants on the 25th May 1872, to secure the sum of Rs. 200. It provided that the principal money with interest should be paid in the month of Jeth, 1280 Fasli, and that if after that date the mortgagors should pay the whole amount due in any future month of Jeth in any year, they would be entitled to get redemption of the property. It also provided that the mortgagors were to pay to [253] the zamindar the rent due in respect of the holding, but did not provide for the event of their making default in such payment. In 1894 the mortgagors brought a suit for redemption, alleging that Rs. 200 only was due, and that the mortgagee had refused to accept their tender of that amount. The defendant mortgagee did not contest the right of the plaintiffs to redeem, but claimed to be entitled to add to the mortgage debt sums exceeding Rs. 700, which he alleged, that he had paid to the zamindar as arrears of rent for the holding in default of payment by the mortgagors, and that as this part of the mortgage money had not been paid or tendered in accordance with the deed in the month of Jeth, the suit should be dismissed. The Court of First Instance found that all that remained due on the mortgage, besides the Rs. 200 principal tendered by the plaintiffs, was Rs. 25, interest for one year, and on the 9th March 1895 it passed a decree for redemption conditional upon the plaintiffs paying this further Rs. 25 in the next month of Jeth, which ended on the 7th June 1895. From this decree the defendant mortgagee appealed, and the appellate Court reversed the decree and dismissed the suit, on the ground that the plaintiffs had not paid or tendered the whole Rs. 225 due in the Jeth preceding the suit. Considering that the whole of the principal had been tendered; that only a trifling sum representing one year's interest remained; and that the defence pleaded by the mortgagee was clearly unfounded, it was, to say the least, taking

a very strong course to dismiss the suit outright instead of allowing the plaintiffs, as the first Court had done, to redeem conditionally on their making good the deficiency in Jeth in accordance with the deed. However, the plaintiffs did not appeal, so that on the 18th May 1896, the suit for redemption stood finally dismissed. A week later, on the 25th May, which fell within the month of Jeth, the plaintiffs tendered to the defendant the whole sum of Rs. 225, which in the previous suit had been found due on the mortgage. The defendant again refused to accept the tender, and the plaintiffs having, on the 27th May, deposited the Rs. 225 in Court under section 83 of the [254] Transfer of Property Act, brought the present suit for redemption on the 30th July. In their plaint they set forth the proceedings in the former suit. In his written statement the defendant again pleaded that the plaintiffs were not entitled to redeem except on payment of Rs. 737, which he had paid as arrears of rent to the zamindar, in addition to the Rs. 225 deposited. He did not plead that the suit was barred by the dismissal of the former suit. The Court of First Instance, holding that the defendant was not entitled to add any part of the Rs. 377 to the mortgage money, and that the Rs. 225 which had been deposited was all that was due on the mortgage, passed a decree for redemption. The defendant appealed from the decree, but confined his appeal to the matter on which he had failed in the first Court, and did not suggest that the claim was barred by the dismissal of the former suit. The Lower Appellate Court agreed with the Court of First Instance and dismissed the appeal; and the defendant then brought a second appeal to this Court in which he for the first time raised the plea of *res judicata*, upon which his appeal has been allowed and the suit for redemption dismissed. Against that dismissal the plaintiffs have now appealed under section 10 of the Letters Patent.

It is obvious that the defendant has no defence on the merits; that his only plea in the Courts below was wholly unsustainable; and that he has succeeded only upon a technical ground taken for the first time in second appeal in this Court. The plaintiffs have done all that their deed required as the condition of redemption, and their chief mistake appears to have been their not appealing against the appellate decree in the former suit. The question is whether, not having done so, they are in consequence for ever barred from redeeming the property. The right to redeem belonging to every mortgagor, including usufructuary mortgagors like the plaintiffs, is conferred by section 60* of the Transfer of

* [Sec. 60 :—At any time after the principal money has become payable, the mortgagor has a right, on payment or tender, at a proper time and place, of the mortgage-money, to require the mortgagee (a) to deliver the mortgage-deed, if any, to the mortgagor, (b) where the mortgagee is in possession of the mortgaged property, to deliver possession thereof to the mortgagor, and (c) at the cost of the mortgagor either to retransfer the mortgaged property to him or to such third person as he may direct, or to execute and (where the mortgage has been effected by a registered instrument) to have registered an acknowledgment in writing that any right in derogation of his interest transferred to the mortgagee has been extinguished :

Provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court.

The right conferred by this section is called a right to redeem, and a suit to enforce it is called a suit for redemption.

Nothing in this section shall be deemed to render invalid any provision to the effect that, if the time fixed for payment of the principal money has been allowed to pass or no such time has been fixed, the mortgagee shall be entitled to reasonable notice before payment or tender of such money.

Nothing in this section shall entitle a person interested in a share only of the mortgaged property to redeem his own share only, on payment of a proportionate part of the amount remaining due on the mortgage, except where a mortgage, or, if there are more mortgagees than one all such mortgagees, has or have acquired, in whole or in part, the share of a mortgagor.]

Redemption of portion of mortgaged property.

Property Act, 1882. It exists "at any time after the principal money has become payable." It arises "on payment or tender at a proper time and place of the mortgage-money." What is a proper time for payment or tender depends upon the [255] terms of the mortgage deed. Here the mortgage deed expressly authorized the mortgagors to redeem on payment in the month of Jeth in any year after the mortgage money became payable. The plaintiffs are found to have tendered to the defendant in the month of Jeth prior to the institution of the suit the full amount due upon the mortgage. They are therefore *prima facie* entitled to a decree for redemption. But their right to redeem is, of course, subject to the proviso to section 60: "provided that the right conferred by this section has not been extinguished by act of the parties or by order of a Court." So long as there has been no such act or order, so long as the relation of mortgagor and mortgagee exists, the right to redeem is inseparable from that relation, and may be enforced by suit. There is no suggestion that the right has here been extinguished by act of the parties. The only order of a Court which, it is suggested, has extinguished the right is the dismissal of the previous suit for redemption. If the dismissal of that suit has had that effect, it can only be by virtue of some provision of the Transfer of Property Act, or of some other enactment. It has been suggested that the dismissal of the previous suit has extinguished the right to redeem, first, because it operates as a foreclosure of the mortgage, and, secondly, because it operates as *res judicata* by virtue of section 13 of the Code of Civil Procedure. As regards the first point, it is necessary to see what are the orders of a Court which, under the Transfer of Property Act, extinguish the right to redeem, and under what circumstances, if any, a usufructuary mortgage is foreclosed. The only orders to which the Act expressly gives the effect of extinguishing the right to redeem are orders absolute for foreclosure under section 87 in a mortgagee's suit for foreclosure under section 86, orders absolute for sale under section 89 in a mortgagee's suit for sale under section 88, and orders for foreclosure or sale under section 93 in a mortgagor's suit for redemption under section 92. As under section 67 a usufructuary mortgagee as such cannot sue for either foreclosure or sale, and as under sections 92 and 93 no order for foreclosure of a usufructuary [256] mortgage can be made in a redemption suit, it is obvious that in the case of a usufructuary mortgage, the right to redeem cannot be extinguished by any express order for foreclosure. The reason of this, as Mr. Justice SHEPARD points out in his commentary on the Act, is that the usufructuary mortgage does not effect a transfer to the mortgagee of the legal ownership of the land: "foreclosure implies that the property is vested in the mortgagee subject to a condition, and that an equity only remains to the mortgagor." The only order which under the Act expressly extinguishes a usufructuary mortgagor's right to redeem is the order for sale which under sections 92 and 93 may be made in a redemption suit, though the usufructuary mortgagee could not have sued for sale any more than for foreclosure. If then the usufructuary mortgagee cannot sue for foreclosure, if on default of payment under a decree for redemption an order for foreclosure is expressly excluded, and if in the case of such default there is no provision for the extinguishment of the right to redeem except on the passing of an order for sale on the mortgagee's application, why should the usufructuary mortgagor's failure to obtain a decree for redemption put the mortgagee in any better position, or give him a right for which he never bargained? It is true that in England if a mortgagor files his bill for the redemption of a legal mortgage and it is dismissed for any reason except want of prosecution, the dismissal operates as a decree for foreclosure against him. *Inman v. Wearing*, (1850) 3 De. G. and S., 729, at p. 734; *Marshall v. Shrewsbury*, (1875) L. R., 10 Ch. A., 250, and other cases cited in Fisher on the

Law of Mortgage, (4th ed., p, 1002). It is also true that the rule in England has been applied to the case of a Welsh mortgage, the incidents of which closely resemble those of a usufructuary mortgage under the Indian Transfer of Property Act, and in connection with which it has been held that, although the mortgagee has no right to foreclose, the mortgagor, upon failure to pay the amount due under a decree for redemption, will be foreclosed: *Curtis v. Holcombe*, (1837) 6 L. J. (N. S.), Ch. 156; 34 R. R., 305. It is to be observed [257] that in that case the bill for redemption was not dismissed in the first instance, but decreed, and the ground of the decision was that the mortgagor "ought not to be allowed to obtain a decree for redemption and afterwards avail himself of the peculiar form of the deed to decline a redemption." There was a decree for redemption in the usual terms, "but in default of the plaintiff so redeeming the said mortgage by the time aforesaid, the plaintiff's bill was from thenceforth to stand dismissed out of this Court, with costs to be taxed by the Master." That has little or no resemblance to the present case where the plaintiffs were not, in the former suit, "allowed to obtain a decree for redemption." It is more analogous to the case of default by a usufructuary mortgagor in payment of the amount due under a decree for redemption, with this difference, that under sections 92 and 93 of the Transfer of Property Act the consequence of such default is not, as in England, a further order for absolute dismissal of the suit—*Collinson v. Jeffery*, L. R., 1896, 1 Ch., 644, or foreclosure of the mortgage, but, if the mortgagee applies for it, an order for sale. However this may be, there is no reported Indian case adopting the broad English rule that the dismissal of a suit for redemption for any reason except want of prosecution operates as a decree for foreclosure. The absence of any such rule from the Transfer of Property Act indicates, we think, that the Legislature did not intend it to be adopted in India. We think that its application to a usufructuary mortgage would be inconsistent with the incidents of such a mortgage and with the provisions of the Act to which we have referred. So far then as the Act is concerned, the dismissal of the former suit for redemption does not, in our opinion, bar the present.

While in the only reported case in which the English rule was applied to a Welsh mortgage the decision was put on the ground that the plaintiff could not get a decree for redemption without the usual penalty in case of default, the decisions applying it to other kinds of mortgage are based on the same principle as the rule of *res judicata*. "The mortgagor," said Lord Justice JAMES in [258] *Marshall v. Shrewsbury*, "by filing the bill admits the title of the mortgagee and admits the mortgage debt, and the dismissal of the bill operates as a decree for foreclosure because he cannot afterwards file another bill for the same purpose; he is not allowed thus to harass the mortgagee." In this country the question of *res judicata* depends on section 13 of the Code of Civil Procedure. Was the matter directly and substantially in issue in the present suit directly and substantially in issue and heard and finally decided in the former suit? To see what was directly and substantially in issue in both suits, one must look at the contentions of the parties and the judgments and decrees of the Courts. The existence of the plaintiff's right to redeem on payment of the mortgage money in Jeth of any year was not a matter in issue in the former suit. The matter in issue in the first Court was what the mortgage money must be considered to include, whether it included the arrears of rent paid by the mortgagee, whether the plaintiffs were entitled to redeem on payment of Rs. 200, as they alleged, or of over Rs. 700, as the defendant contended. The matter decided by that Court was that the mortgage money was Rs. 225 only, and did not include the arrears of rent, and that the

plaintiffs were entitled to redeem on payment of Rs. 25, the unpaid balance, in the following Jeth. The only matter decided by the appellate Court was that the plaintiffs were not entitled to get a decree for redemption in that suit, as they had not prior to its institution paid or tendered the Rs. 225 in the month of Jeth. So far as this decided the fact that the mortgage was unpaid, and the principle that it could only be redeemed on payment or tender in a Jeth prior to a suit for redemption, it had, no doubt, the effect of *res judicata*. But it did not decide that there could under no circumstances be any redemption except on payment or tender in some Jeth prior to that particular suit, or in any other particular Jeth. It decided nothing inconsistent with the continuance of the mortgage relation or with the mortgagors' right to sue again for redemption, provided that before doing so they paid or tendered the full amount due in a Jeth. In the present suit the matter then heard and [259] decided is not again in issue. The suit is based on a tender and deposit of the whole Rs. 225 found to be due in a Jeth prior to its institution, as the former judgment decided was necessary. The only matter directly and substantially in issue in the Courts below was whether the Rs. 225 alone or the Rs. 225 *plus* the arrears of rent constituted the mortgage money. That matter was in the former suit decided by the first Court adversely to the defendant: the appellate Court did not decide it at all, but dismissed the suit on another ground. It appears to us that in this state of the facts, section 13 of the Code does not bar the present suit. The plaintiffs admittedly have a right to redeem in a Jeth of any year. The dismissal of the former suit appears to us to be equivalent to a decision that that particular suit was prematurely brought, and does not affect the plaintiff's right to sue for redemption upon tender prior to suit of the full amount due in a Jeth subsequent to the dismissal. This view is supported by the judgment of the Privy Council in *Nawab Azimut Ali Khan v. Jowahir Singh*, 12 Moo., I. A. 404, at p. 412. That was a suit, prior to the Transfer of Property Act, for redemption of a usufructuary mortgage; and their Lordships said of a decree in a previous suit for redemption, "that decree in fact did nothing but dismiss the then pending suit for redemption, on the ground that the full and entire amount of the mortgage money had not been deposited. According to the course and practice of the Courts in India, the only point to be determined in such a suit is whether the mortgage-debt has been fully satisfied after taking into account the sum tendered or deposited; nor is the finding of any particular amount as still due conclusive against the mortgagee in a subsequent suit." Nothing has happened to terminate the relation of mortgagor and mortgagee, and hence the right to redeem, which is an essential part of that relation, has not been extinguished by any order within the proviso to section 60 of the Transfer of Property Act and this suit to enforce it is not barred.

[260] We were much pressed by the pleader for the respondent with the judgment of Sir JOHN EDGE, C. J., and Mr. Justice BURKITT in *Hay v. Razindin*, (1897) I. L. R., 19 All., 202. That case is obviously distinguishable from the present. There the first suit for redemption, instead of being, as here, wholly dismissed, was decreed, though the decree did not comply with section 92 of the Transfer of Property Act, in that it did not specify what should take place in case the mortgage money was not paid within the prescribed period. The terms of the usufructuary mortgage are not fully stated in the report. No payment of the mortgage money was made, the decree was allowed to lapse, and it was held that the mortgagor could not again sue for redemption. The principle of that decision, when read with the Full Bench ruling of this Court which it follows, and with the Bombay ruling which it approves, is that the mortgage is merged in the decree for redemption and the original cause of

action thus extinguished ; that the mortgagor's failure to comply within time with his decree for redemption cannot give him a fresh cause of action ; that the decree thenceforth alone regulates the relations of the parties, and the mortgagor's sole remedy is by execution, a second suit on the same cause of action and for substantially the same relief being barred by sections 13 and 244 of the Code ; and that consequently if by his own neglect he allows execution of the decree to become barred by limitation, no remedy by redemption is left, and the mortgage is thus virtually foreclosed. That decision can have no application to a case where there has been no decree for redemption merging the mortgage, extinguishing the cause of action, or substituting a remedy by execution which by the mortgagor's neglect has become barred by limitation, where therefore section 244 does not apply, and where the cause of action upon which the second suit is based is not the mortgagor's failure to comply with any decree in his favour, but his right under the deed to redeem in a Jeth subsequent, as well as, in one prior, to the dismissal of the first suit. The observation in the judgment cited that " it was the intention of the Legislature as [261] expressed in sections 92 and 93 of the Transfer of Property Act that there should be one suit only for redemption," when read with the preceding and following sentences, must, we think, be construed as meaning one suit for redemption in which a decree for redemption is passed. It cannot indeed be said that, even thus understood, the proposition is absolutely settled law. Apart from the Madras decisions to the contrary mentioned in the judgment [to which may be added *Karuthasami v. Jaganatha*, (1885) I. L. R., 8 Mad., 478, and *Nainappa Chetti v. Chidambaram Chetti*, (1897) I. L. R., 21 Mad., 18, and the decision of the Calcutta High Court in *Roy Dingur Doyal v. Sheo Golam*, (1874) 22 W. R., 172] the judgment is admittedly in conflict with *Muhammad Samiuddin Khan v. Mannu Lal*, (1889) I. L. R., 11 All., 386, where it was held that the ruling of the Full Bench in *Sheikh Golam Hoksein v. Musumat Alla Rukhee Beebee*, (1871) N.-W. P. H. C. Rep., 1871, p. 62, was not binding since the passing of the Transfer of Property Act, and that as in a decree for redemption of a usufructuary mortgage foreclosure could not be directed, such decree could not operate to deprive the mortgagor of the right to redeem. It is, however, unnecessary for us to express any opinion upon this conflict of authority. It is sufficient to say that, in our opinion, the principle of *Hay v. Raziuddin*, assuming it to be good law, does not apply and should not be extended to a case where no decree for redemption has been passed prior to the suit before the Court. In the judgment now under appeal it is observed that if the present suit could be maintained, " the plaintiffs might institute a fresh suit for redemption upon every Jeth for the whole period for which the mortgage might subsist, and upon their failure to pay into Court the full amount due, might have their suit dismissed, and then be in a position in the following year to commence another suit." Even if the liability to pay costs were not an effectual deterrent, the provisions of section 92 and 93 of the Transfer of Property Act would probably be sufficient to prevent the course supposed. The proper course for the Court to [262] take in that case would be not to dismiss the suit,—for, as pointed out by Mr. Justice SHEPHARD, the usual practice is not now, as it appears to have once been, to dismiss a redemption suit outright because the money has not been paid or even tendered,—but to pass a conditional decree for redemption in the terms of section 92, and then in the event of default of payment within the time fixed, the mortgagee could under section 93 obtain an order for sale extinguishing the right to redeem and preventing any future suit of the kind. The danger of repeated suits for redemption is thus hardly a practical one. In any case we think that there was nothing to bar the present suit.

The only other point relates to an objection which the present respondent raised in his memorandum of appeal to this Court, and which Mr. Justice BLAIR decided against him. One of the provisions of the mortgage deed was, as we have mentioned, that the mortgagors should pay the rent of the fixed rate holding to the zamindar. That is the construction placed upon the deed by the defendant mortgagee both in his written statement and in his memorandum of appeal to the Lower Appellate Court. The mortgagors did not pay the rent, and the mortgagee consequently did so. In both suits for redemption the defendant claimed to add the Rs. 700 odd so paid to the mortgage debt. Upon this point the Lower Appellate Court found in effect that the payments of rent were made by the mortgagee voluntarily and were not necessary to preserve the mortgaged property from forfeiture or sale. We agree with Mr. Justice BLAIR that this finding of fact is a conclusive answer to the objection in second appeal. The respondent relies on section 76 (c) of the Transfer of Property Act. As it is his own case that there was in the mortgage deed "a contract to the contrary" providing that the mortgagors and not the mortgagee should pay the rent, it is obvious, without going any further, that section 76 cannot help him. The only other ground upon which he could claim to add the amount of these payments to the mortgage debt is section 72 (b), which authorizes a mortgagee in possession to spend such money as is necessary for the preservation [263] of the mortgaged property from destruction, forfeiture or sale. That ground, however, is disposed of by the Lower Appellate Court's finding of fact that the payments were not necessary for any such purpose.

The result is that we must allow this appeal, set aside the decision of the learned Judge of this Court, and restore that of the Lower Appellate Court with costs.

Appeal decreed.

NOTES.

[This was followed in (1901) 24 All., 14; (1910) 7 A. L. J., 185, but distinguished in (1902) 25 Mad., 300.]

[21 All. 263]

APPELLATE CRIMINAL.

The 23rd March, 1899.

PRESENT:

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE.

Queen-Empress

versus

Mahabir Tiwari.*

*Act No. XLV of 1860 (Indian Penal Code), sections 34, 397—Dacoity—
Commission of grievous hurt in the course of a dacoity—Person
liable under section 34, liable also under section 397.*

Held that the words "such offender" in section 397 of the Indian Penal Code include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of section 34 of the Code.

* Criminal Appeal No. 126 of 1899.

THE material facts of this case are as follows:—On the night of the 24th of February 1898, one Gajraj was sleeping at his threshing floor. He was awakened by a noise and saw some five or six thieves going off with loads from his threshing floor, while some others were engaged in picking up loads for themselves. Gajraj at once caught one of them, the appellant Mahabir. The other men then attacked him and beat him with lathis until he was forced to let Mahabir go, whereupon Mahabir also beat him. Meanwhile the other men at the threshing floor had been aroused and approached near enough to see and recognize the thieves. Two of these men also received lathi blows and they ran off and hid themselves among the stacks on the threshing floor. Two men then came running up from their fields close by, and on their approach the thieves ran away. Gajraj was carried away from the threshing floor insensible, and on examination it was found that one of his arms was broken, but [264] it did not appear from the evidence which of the dacoits had caused that particular injury. On these facts the Sessions Judge convicted Mahabir under section 397 of the Indian Penal Code and sentenced him to seven years' rigorous imprisonment. Mahabir appealed to the High Court.

Mr. B. E. O'Connor for the Appellant.

The Government Pleader (Munshi Ram Prasad) for the Crown.

Strachey, C.J.—Mr. O'Connor, who holds Mr. Colvin's brief for the appellant, states that he does not propose to press this appeal except upon the question of sentence. The appellant has been convicted of an offence punishable under section 397 of the Indian Penal Code, and has received the minimum sentence under that section, namely, seven years' rigorous imprisonment. Unless therefore that section is inapplicable, I have no power to reduce the sentence. Mr. O'Connor has contended that the section does not apply, because, according to the evidence for the Crown, and in particular that of the complainant Gajraj, the blow which caused grievous hurt by breaking Gajraj's arm, and which was struck during the commission of the dacoity, was struck, not by the appellant, but by another of the dacoits. He supports this argument by reference to the case in the Madras High Court (Weir 99) cited in Mr. Mayne's note to section 397, and to the use of the expression "such offender," which implies that the liability to enhanced punishment under the section is limited to the offender who actually causes grievous hurt. There can be no doubt, however, that the appellant was one of the persons committing the dacoity; and the evidence shows, that upon Gajraj seizing the appellant while the dacoits were engaged in plundering the threshing floor, all the dacoits attacked and beat him with lathis, and that the appellant similarly joined the rest in so beating him. It is thus clear that the attack on Gajraj was made by the dacoits, including the appellant, in furtherance of the common intention of all, and therefore each of them was liable under section 34 of the Code in the same [265] manner as if he were the sole assailant. If without any dacoity the persons concerned had together attacked Gajraj, and in that attack his arm had been broken, but with no evidence as to who struck that particular blow, or even if the evidence showed that one of them other than the accused had struck it, there can be no doubt that all would, by reason of section 34, have been guilty of causing grievous hurt to him. That principle cannot cease to be applicable because the assault happened to be committed in the course of a dacoity, or because the evidence shows that it was not the appellant's hand which in that dacoity struck the blow causing the grievous hurt. The words "such offender" in section 397 therefore include any person taking part in the dacoity who, though he may not have himself struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of section 34, and

I am therefore of opinion that this appellant caused grievous hurt to Gajraj at the time of committing the dacoity; that the case falls within section 397, and that I have therefore no power to reduce the sentence. I dismiss the appeal.

NOTES.

[In (1906) 28 All., 404, sec. 397 was held to apply only to the actual person using the deadly weapons.]

[21 All. 266]

REVISIONAL CRIMINAL.

The 21st February, 1899.

PRESENT :

MR. JUSTICE BLAIR.

*In re the Petition of Kalyan Singh.**

Criminal Procedure Code, section 253—Discharge—Evidence—Duty of Magistrate in dealing with the evidence produced in a case triable by a Court of Session.

Held, that a Magistrate inquiring into a case triable by the Court of Session is not bound to commit simply because the evidence for the prosecution, if believed, discloses a case against the accused, but he is competent to consider the reliability of such evidence and to discharge the accused if he find it untrustworthy.

THE facts of this case are as follows : —

Six persons were brought before the District Magistrate of Etah who held an inquiry into an alleged offence of dacoity said to have been committed by them. The fact of the dacoity was [266] testified to by two men, a sowar and an ekka-driver, who represented themselves to have been the victims of the alleged dacoity, and who profess to identify some of the accused as their assailants. A hospital assistant proved that the sowar arrived at the hospital with a broken arm and other marks of lathi blows. One of the accused made a full confession. The Magistrate discharged all the accused, finding that the stories of the ekka-driver and the sowar were "extraordinarily discrepant," though that of the sowar was "in some respects" supported by the confession, and that the proceedings of the police, which led up to the arrest of the accused, were "bogus." After examination and criticism of the evidence the Magistrate came to the conclusion that "every bit of the evidence bears intrinsic traces of falseness," and that "the evidence in the case could not stand the slightest criticism," and that the confession itself was open to the "greatest suspicion."

Alston for the applicant (complainant) contended that the Magistrate's order of discharge was, under the circumstances, illegal. A *prima facie* case of dacoity against the accused had been disclosed. The dacoity itself was proved, and there was evidence connecting the accused with the said dacoity, which evidence, if believed, was sufficient for a conviction. Dacoity was an offence exclusively triable by the Court of Session, and in discussing and criticising the evidence on its merits, and in taking upon himself the responsibility of discrediting the confession of one of the accused, the Magistrate had "tried" the case as fully and completely as the Court of Session would have

* Criminal Revision No. 14 of 1899.

done. It was contended that where the evidence sufficed for a conviction and the offence was one exclusively triable by the Court of Session, a Magistrate was bound to commit. A Magistrate had to see that there were "sufficient" grounds for committing the accused for trial, but this did not mean that he was to take it upon himself to reject evidence and confessions according as he thought them true or not. To do so was to "try" the case, which the Sessions Court alone was entitled to do.

[267] Blair, J.—This is a petition for revision. I am invited to lay down the general proposition that a Magistrate having before him formally and categorically evidence which discloses a case for trial in some Court to which such Magistrate might in his discretion commit, is bound so to commit, and that he is wrong in point of law in exercising a discretion and considering the sufficiency of the evidence. The proposition is dangerously large. It is not the practice of Magistrates within the range of my experience, nor I have heard the law so laid down in England. That is the only question I have to answer, for it is not in this case suggested that the Magistrate who refused to commit did not exercise a judicial discretion when he found that there were not sufficient grounds for commitment. The petition is dismissed.

NOTES.

[These are similar decisions :—(1899) A. W. N., 135 ; 26 All., 564 ; 9 C. W. N., 829 ; 35 Bom., 163 ; (1909) P. R., 10 ; 6 C. L. J., 760.]

[21 All. 267]

APPELLATE CIVIL.

The 1st March, 1899.

PRESENT :

MR. JUSTICE BANERJI, AND MR. JUSTICE AIKMAN.

Bholai Khan.....Defendant

versus

Abu Jafar.....Plaintiff.*

Jurisdiction—Civil and Revenue Courts—Appeal—Suit not tried on the merits in the Court of First Instance—Act No. XII of 1881 (N.-W. P. Rent Act), section 208.

Held, that the application by an appellate Court of the provisions of section 208 of Act No. XII of 1881 is not precluded by the fact that the Court of First Instance has dismissed the suit on a preliminary point without any trial of it on its merits.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. W. M. Colvin, for the Appellant.

Pandit Sundar Lal and Maulvi Muhammad Ishaq, for the Respondent.

Banerji and Aikman, JJ.—The appellant, who is a tenant at fixed rates, erected a building on land held by him for agricultural purposes. Thereupon the plaintiff, one of the zamindars of the village, brought the suit, out of which this appeal has [268] arisen, for the demolition of the building, and for the restoration of the land to its former condition. The Court of First Instance was of opinion that the suit was one which came within the purview of clause (cc)

* First Appeal No. 125 of 1898, from an order of L. Marshall, Esq., District Judge of Jaunpur, dated the 16th August 1898.

of section 93 of Act No. XII of 1881, and held that it was not cognizable by the Civil Court. In this view the Munsif ought to have returned the plaint for presentation in the proper Court, but instead of doing so he dismissed the suit. The plaintiff appealed to the District Judge and the District Judge was asked to apply section 208 of Act No. XII of 1881 to the case, and to remand it for trial to the Court of First Instance. The learned Judge was of opinion that as the suit had not been tried by the Court of First Instance on the merits, section 208 was not applicable. He then proceeded to consider whether the suit was or was not cognizable by a Civil Court, and, coming to the conclusion that it was cognizable by a Civil Court, remanded the case to the Court of First Instance under section 562 of the Code of Civil Procedure. From this order of remand this appeal has been preferred, and the contention on behalf of the appellant is that the suit is cognizable by a Court of Revenue. If section 208 of Act No. XII of 1881 is applicable to the case, the last paragraph of that section precludes the appellant from raising the contention urged on his behalf. We have therefore to determine whether section 208 is or is not applicable. We are clearly of opinion that the learned Judge of the Lower Appellate Court is wrong in thinking that sections 206, 207 and 208 would not apply to a case which has not been tried on the merits. The policy of those sections was to protect a suitor from being bandied about from Court to Court. If the question of jurisdiction was raised in the Court of First Instance, sections 207 and 208 would, in our opinion, undoubtedly apply. Section 207 applies to a case in which all the materials necessary for the determination of the suit are before the appellate Court. If such materials are not before the appellate Court, or if the materials before that Court are so imperfect that the appellate Court is not in a position to [269] determine the suit, section 208 empowers the appellate Court either to remand the case under section 562 of the Code of Civil Procedure or to frame and refer issues for trial under section 566, or require additional evidence under section 568. As in this case there were no materials before the Court for the trial of the suit, the Court was justified in remanding the case under section 562. We shall treat the order of remand of the Lower Appellate Court as an order under section 208, and, that being so, we cannot entertain the contention that the Court of First Instance, to which the case has been remanded, was not competent to entertain the suit. We therefore uphold the order of remand. We deem it necessary, however, to observe that when the case goes to the Court of First Instance, that Court will have to determine, in trying the question of limitation raised by the defendant, whether the limitation applicable to the suit is that provided by the Indian Limitation Act of 1877, or the limitation provided by Act No. XII of 1881. It may be necessary for the determination of that question to consider whether the suit was one of the nature cognizable by a Civil Court or a Court of Revenue, but in doing so the Court of First Instance should keep out of view the conclusion arrived at by the learned District Judge upon the question of jurisdiction. In our opinion it was not necessary for the learned District Judge, having regard to the view we have taken of the case, to consider that question at all.

We dismiss the appeal with costs.

Appeal dismissed.

[21 All. 269]

9th March, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Narain Das.....Defendant

versus

Lalta Prasad and others.....Plaintiffs.*

Execution of decree—Civil Procedure Code, section 319—Possession—Formal possession—Effect of formal possession as against a third person other than the judgment-debtor—Limitation.

Held, that whatever might be the effect of the delivery of formal possession under section 319 of the Code of Civil Procedure as against the judgment-[270]debtor himself, such formal delivery of possession will not take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. *Mangli Prasad v. Debi Din*, (1897) I. L. R., 19 All., 499, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal*, for the Appellant.

Pandit *Sundar Lal*, for the Respondents.

Banerji and Aikman, JJ.—The suit out of which this appeal has arisen, was one for possession of mortgage rights in certain zamindari properties. Those rights originally belonged to one Shankar Lal. He mortgaged them to the father of the present plaintiffs, and the father of the plaintiffs obtained a decree on his mortgage in September 1883. In execution of that decree he purchased Shankar Lal's rights on the 20th August 1884. On the 4th of May 1885, formal possession was delivered to him, apparently under section 319 of the Code of Civil Procedure. At that time, it is admitted, the present appellant, Narain Das, was in possession by virtue of an auction-purchase in execution of a decree held by him against Shankar Lal. His purchase was made on the 21st of April 1884, and he obtained delivery of possession in January 1885. It was found by the Court of First Instance, and that finding was not questioned in the Lower Appellate Court, that the plaintiffs never obtained actual possession, that their allegation of an ouster in 1886 was untrue, and that since January 1885, the defendant has been in possession. The present suit was brought on the 27th of April 1897, that is a week before the expiry of twelve years from the date of the delivery of possession to the plaintiffs' father. The Court of First Instance held the claim to be barred by limitation, applying article 138 of the second schedule of Act No. XV of 1877, and dismissed the suit. The Lower Appellate Court has set aside that decree. It was of opinion that the delivery of possession to the plaintiffs' father on the 4th of May 1885 gave a fresh start to the plaintiffs for the computation of limita-[271]tion. It accordingly remanded the case to the Court of First Instance under section 562 of the Code of Civil Procedure. From that order of remand the present appeal has been preferred, and the only question which we have to determine is whether the claim was brought within time. The question is not by any means free from difficulty. There can be no doubt that had the suit been brought against the plaintiffs' judgment-debtor, it would have been within time, as held in *Mangli Prasad v. Debi Din*, (1897), I. L. R., 19 All., 499. But here we have the case of another person, namely, the purchaser

* First Appeal No. 107 of 1898, from an order of Maulvi Syed Muhammad Tajammul Husain, Subordinate Judge of Farrukhabad, dated the 7th September 1898.

of the rights of the judgment-debtor, who is in possession. Had the judgment-debtor been in possession, the delivery of formal possession, whether under section 318 or 319 of the Code of Civil Procedure, would have amounted to an ouster of the judgment-debtor and an entry into possession by the purchaser. If subsequently to this delivery of possession the judgment-debtor remained in possession, his possession would amount to an ouster of the purchaser, and would be adverse possession from the date of the ouster; but in the case of a third person who had already purchased the property and obtained actual possession, delivery of possession, as against the judgment-debtor alone, cannot amount to an ouster of the person in possession. Therefore it cannot be said that such delivery of possession gave the subsequent auction purchaser a new cause of action, so as to make the possession of the person other than the debtor, who was already in possession, adverse possession from the date of delivery of possession to the auction purchaser. The possession of such person commenced on the date on which he obtained possession, and from that date must be regarded as adverse to the debtor or to the auction purchaser. As in the present case the defendant was in possession for more than twelve years anterior to the institution of the suit, the claim was barred by limitation, either under article 138 or 144. Mr. Baldeo Ram on behalf of the respondents relied on the doctrine of *lis pendens*. There can be [272] no doubt that the title of the plaintiffs is superior to that of the defendant, but the question is whether the plaintiffs have come into Court in time to assert and enforce that title. In the view which we have taken of the case, their claim was beyond time and was rightly dismissed by the Court of First Instance. The plaintiffs are themselves to blame for having lost through their own laches the title which they acquired under their auction purchase. We allow the appeal, set aside the order of the Lower Appellate Court, and dismiss the appeal to that Court with costs. The appellant will get his costs of this appeal.

Appeal decreed.

NOTES.

[Symbolical possession is not effectual as against strangers :—(1910) 33 All., 224 ; (1904) 27 Mad., 262 ; (1911) 9 I. C., 271 (Mad.) ; (1907) 6 C. L. J., 472 ; (1907) 7 C. L. J., 640.]

[21 All. 272]

The 13th March, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Muhammad Niamat Ali Khan.....Plaintiff

versus

Ghaffar Muhammad Khan and others.....Defendants.*

Mortgage—Suit for sale—Pleadings.—Purchaser of mortgaged property paying off prior incumbrances.

The purchaser of a portion of certain mortgaged property paid off certain prior mortgages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given

* First Appeal No. 137 of 1897, from a decree of Rai Shankar Lal, Subordinate Judge of Saharanpur, dated the 4th March 1897.

an opportunity of redeeming the defendant's prior mortgages. *Salig Ram v. Har Charan Lal*, (1890) I.L.R., 12 All., 548, distinguished. *Kali Charan v. Ahmad Shah Khan*, (1894) I. L. R., 17 All., 48, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* and *Pandit Sundar Lal*, for the Appellant.

The Respondents were not represented.

Banerji and Aikman, JJ.—The plaintiff-appellant brought the suit, which has given rise to this appeal, for sale upon a mortgage, dated the 1st of November 1890, made in his favour by the first defendant *Ghaffar Muhammad Khan*. The second defendant *Maulvi Nazir Hasan* purchased a part of the mortgaged property, which he sold to the third defendant, his wife. The [273] other defendants are purchasers of different other portions of the mortgaged property. The third defendant opposed the claim, among other grounds, upon the plea that she had discharged some mortgages which were prior in date to the mortgage of the plaintiff, and that the plaintiff was not entitled to a decree for the sale of the property purchased by her without paying to her the amount which she had paid in discharge of the prior mortgages, or a proportionate share thereof. The Court below has totally dismissed the suit on the single ground that the plaintiff had not offered in his plaint to redeem the prior mortgages which the third defendant had discharged, and in support of this opinion the learned Subordinate Judge has referred to the ruling of this Court in *Salig Ram v. Har Charan Lal*, (1890) I. L. R., 12 All., 548. We cannot agree with the learned Subordinate Judge that that case is not distinguishable from the present case. That was a case in which the purchasers were themselves prior mortgagees, the consideration for their purchase being the amount of the prior mortgage. That case, in our opinion, cannot be regarded as a basis upon which every suit for sale, in which the plaintiff impleads as defendant a subsequent purchaser, but owing to ignorance or some similar cause does not mention in his plaint the fact of the purchaser having discharged a prior mortgage, should be dismissed. In the judgment in *Kali Charan v. Ahmad Shah Khan*, (1894) I. L. R., 17 All., 48, the learned Judges who decided that case observed:—"We are unable to lay down as a rule of universal application the principle that a plaintiff who claims too much or fails to admit reasonable deductions from his claim is therefore to be deprived of that to which he is legally entitled." With that observation we concur. This case more nearly resembles the case to which we have just referred, and which should have been followed by the lower Court. As we have said above, the third defendant or her husband from whom she purchased a portion of the mortgaged property was not a prior mortgagee of that property; it is only by reason of her having [274] paid off a prior mortgage that she can use that mortgage as a shield against the plaintiff's claim to the extent of the amount paid by her. The fact that the plaintiff made no mention in his plaint of the alleged payment, was not, in our opinion, a valid reason for totally dismissing the suit. The amendment which the plaintiff asked for should have been granted, and the suit decided on the merits and a proper decree passed. We allow the appeal, and, setting aside the decree of the Court below, remand the case to that Court under section 562 of the Code of Civil Procedure, with directions to re-admit it under its original number in the register and decide it on the merits. The appellant will get his costs of this appeal; other costs heretofore incurred will abide the event.

Appeal decreed and cause remanded.

[21 All. 274]
REVISIONAL CIVIL.

The 14th March, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Janki Prasad and another.....Applicants

versus

Sukhrani.....Opposite Party.*

Civil Procedure Code, section 108—Decree ex parte—Death of judgment-debtor—Application by legal representative to have the decree set aside.

Held, that where a defendant, against whom a decree has been passed *ex parte* for default of appearance, dies, his legal representative is not competent to apply under s. 108 of the Code of Civil Procedure for an order to set the *ex parte* decree aside.

THIS was a reference made by the District Judge of Jhansi under section 617 of the Code of Civil Procedure. The facts of the case are thus stated in the order of reference. "The appellants in this case are the sons of one Jhalkan, deceased, against whom the respondent got on *ex parte* decree on the 26th November 1897. There was no decree against the two appellants. On the 1st of July 1898, the respondent executed the *ex parte* decree by issuing a notice to the appellants under section 248 of the Code of Civil Procedure. The appellants at once filed an application under section 108 of the Code to restore the original [275] suit to the file, presumably that they might defend it. They alleged that their father could not attend through illness on the date the suit was disposed of *ex parte*."

The Munsif dismissed the application on the merits, and against this order the applicants appealed to the District Judge. The District Judge being of opinion that it was not competent to the appellants to make the application at all referred that question to the High Court.

Babu Badri Das, for the Appellants.

Babu Ratan Chand, for the Respondent.

Strachey, C. J., (Knox, J., concurring).—In this case the District Judge of Jhansi has referred to this Court, under section 617 of the Code of Civil Procedure, the question whether the legal representative of a deceased defendant against whom an *ex parte* decree was passed, can apply to the Court under section 108 of the Code of Civil Procedure to have the *ex parte* decree set aside.

Section 108 provides that "in any case in which a decree is passed *ex parte* against a defendant, he may apply to the Court by which the decree was made for an order to set it aside; and if he satisfies the Court that the summons was not duly served, or that he was prevented by any sufficient cause from appearing when the suit was called on for hearing, the Court shall pass an order to set aside the decree upon such terms as to costs, payment into Court, or otherwise as it thinks fit, and shall appoint a day for proceeding with the suit."

Now, the remedy created by this section is in terms limited to the defendant against whom the decree has been passed *ex parte*. In such a case the

section says "he may apply to the Court for an order to set it aside," and the applicant has to satisfy the Court that the summons was not duly served, or that he himself was prevented by any sufficient cause from appearing.

In order to make this remedy available to the legal representative, some general principle of law would be necessary by which the word defendant should be construed as including the legal [276] representative of a deceased defendant. No authority has been cited to us, and we are aware of none, which establishes any such general principle.

The summary remedy of an application to set aside an *ex parte* decree is created by the section, and in determining to whom that remedy is available, we cannot look beyond the terms of the section itself. It is true that where a party against whom a decree has been passed dies, his legal representative is entitled to appeal against the decree if his interest is affected by it. Section 540 of the Code gives a right of appeal from an original decree, including a decree passed *ex parte*, in terms widely different from those of section 108, and which do not necessarily confine the right of appeal to the person against whom the decree was passed, or exclude the legal representative whose interest is affected by the decree from appealing against it. The same observations apply to section 584, which gives a right of second appeal.

Where the Legislature intended to allow the legal representative of a deceased defendant to have himself substituted for the defendant, or to allow a person claiming to be the legal representative to apply to set aside an order, it has expressly provided for such an application to be made by the legal representative or the person claiming to be such. Instances of such provisions will be found in sections 363 and 371 of the Act. There is nothing of the kind in section 108. The result is that, in our opinion, the Code gives no right to the legal representative of the defendant, or to any person except the defendant himself, to apply to the Court under section 108 to set aside a decree passed *ex parte*. That is our answer to the reference.

Appeal dismissed.

NOTES.

[This was dissented from in (1901) 29 Cal., 33; (1905) P.R., 36, but in (1905) 28 Mad., 361, the decision was similar, while in (1907) 29 All., 574, the case of a defendant dying while the application to set aside the *ex parte* decree was pending, was distinguished. See now the C. P. C., 1508, sec. 146.]

[277] APPELLATE CIVIL.

The 15th March, 1889.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Liladhar and others.....Plaintiffs

versus

Chaturbhui and others.....Defendants. *

Civil Procedure Code, Section 244—Execution of decree—Jurisdiction of Court executing the decree.

Held, that when a decree for the sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of

* First Appeal No. 161 of 1887, from a decree of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 2nd April 1887.

the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. *Maulji v. Fakir Chand*, (1896) I. L. R., 22 Bom., 225; *Seth Chand Mal v. Durga Dei*, (1889) I. L. R., 12 All., 313; *Sanwal Das v. Bismillah Begam*, (1897) I. L. R., 19 All., 480, and *Lochan Singh v. Sant Chandar Mukerji*, Weekly Notes, 1899, p. 24, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal* and Babu *Durga Charan Banerji*, for the Appellants.

Pandit *Moti Lal* and Munshi *Pokul Prasad*, for the Respondents.

Banerji and Aikman, JJ.—This is an appeal from a decree of the Subordinate Judge of Agra dismissing the suit of the plaintiffs appellants on the ground that it is barred by the provisions of section 244 of the Code of Civil Procedure. The facts are these:—One Musammat Jhuna, the widow of Kishore Chand, executed a mortgage in favour of the predecessor in title of the respondents on the 13th of January 1881, in respect of property to which she had succeeded as Kishore Chand's widow. The respondents obtained a decree for sale upon the said mortgage against Jhuna Kunwar on the 28th of June 1893, and they obtained an order absolute for sale on the 23rd of March 1895. On the 29th of August 1895, Jhuna Kunwar died, and on the 13th of June 1896, application was made for execution of the decree dated the 28th of June 1893. The plaintiffs, who are [278] the sons of Kishore Chand's brother Salig, were made parties to the execution proceedings as the legal representatives of Jhuna Kunwar. They raised several objections in regard to the application for execution, the first of which was to the effect that the decree was a decree for the sale of the life interest of Jhuna Kunwar only, and that that estate having determined on her death the decree was no longer capable of execution. They also contended that Jhuna Kunwar was not competent to effect a mortgage of the property to enure beyond her lifetime, and that there was no justifying necessity for such a mortgage.

The Court executing the decree considered the first objection only, and, being of opinion that the decree ordered the sale of the mortgaged property itself and not of the life interest of Jhuna Kunwar only, dismissed the objection. Thereupon the present suit was instituted, and the relief sought is a declaration that the decree dated 28th of June 1893, which was obtained by the defendants against Musammat Jhuna Kunwar, became void and inoperative at her death, and that the property mentioned in the plaint, which is in the possession of the plaintiffs, and which the defendants have caused to be advertised for sale, is not liable for the amount of the said decree. Among the grounds upon which the above declaration is sought, is the ground which was raised in the objections in execution proceedings, and which was decided adversely to the plaintiffs: we refer to the objection that what Jhuna Kunwar had mortgaged was her life interest only, and that the decree was for the sale of that interest alone. The learned counsel for the plaintiffs admits that the claim cannot be sustained on that ground, and that the decision on that point of the Court executing the decree was a decision properly falling within the meaning of section 244, and has become final between the parties. There are other grounds, however, upon which the validity of the decree as a decree which can operate against the estate of Kishore Chand is challenged. The suit is in substance a suit for a declaration that there was no necessity which justified the widow of Kishore Chand in making a mortgage of the property which could take effect even [279] after her death. The ground upon which this claim is based is that she did not in reality incur a loan, and that there were no debts left by Kishore Chand, for the payment of which it was necessary to incumber his property. In order to determine whether the present suit is maintainable, we have to

consider whether the questions raised in the suit are questions which could have been determined by the Court executing the decree, under section 244 of the Code of Civil Procedure. Clause (c) of that section is the clause which, it is contended, is applicable to the case. If the matter now in controversy between the parties could be decided under that clause, then there can be no doubt that the present claim is not maintainable. We are of opinion that under clause (c) of section 244, the Court executing a decree could not consider the question of the validity of the decree. A Court executing a decree is bound to give effect to it as it finds it, and it is not in the province of that Court to consider whether the decree was or was not rightly passed. The decree in this case was a decree for the sale of the property; the plaintiffs, who were parties to the execution proceedings in the character of legal representatives of Musammat Jhuna Kunwar, could only raise objections relating to the execution, discharge, or satisfaction of the decree, or to the stay of execution thereof, starting with the assumption that the decree was a valid one. That a judgment-debtor cannot dispute the validity of a decree, is a proposition for which we have abundant authority. We may refer to the recent case of *Maluji v. Fakir Chand*, (1896) I. L. R., 22 Bom., 225. It is clear that a person claiming title through the original judgment-debtor cannot dispute the validity of the decree, and where a decree directs the sale of particular property, a person who does not claim through the mortgagor cannot in execution contend that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. Such questions would, in our opinion, be outside the province of the Court executing the decree; for instance, in the present case, if we assume that the present plaintiffs could [280] properly raise the objection upon which they mainly rely, the Court executing the decree would have to determine, after taking evidence, whether the mortgage was effected by Jhuna Kunwar, *i. e.*, whether the mortgage bond was executed by her, whether there was consideration for the mortgage, and whether there was valid necessity for it. Such an inquiry is certainly not contemplated by section 244 of the Code of Civil Procedure. The case of a decree for money in which, after the death of the debtor, property is attached as the assets of the debtor, and in which the legal representatives of the deceased debtor object to the attachment on the ground that the property attached is no part of the assets of the deceased debtor, is different from the case of a decree which orders sale of specific property: a case of the former class is contemplated by the ruling of the Full Bench in *Seth Chand Mal v. Durga Dei*, (1889) I. L. R., 12 All., 313. But when a decree specifically orders the sale of particular property no question of assets can arise, and the Court executing the decree is bound to execute it as it stands. Any question relating to the validity of that decree must, in our opinion, be decided in a separate suit. This was the view taken by this Court in *Sanwal Das v. Bismillah Begam*, (1897) I. L. R., 19 All., 480, which is entirely in support of the contention of the learned advocate for the appellants. For the respondents our ruling in *Lochan Singh v. Sant Chandar Mukerji*, Weekly Notes, for 1899, p. 24, was pressed upon us. Some of the observations contained in that judgment may probably have to be reconsidered when a proper occasion arises, but we do not think that that ruling governs the present case.

We are of opinion that the Court below was wrong in holding that the suit was barred by section 244 of the Code of Civil Procedure. We allow the appeal, set aside the decree of the Court below, and remand the case to that Court under section 562 of the Code of Civil Procedure, with directions to readmit it under its original number in the register, and try it on the merits.

The appellants will have their costs of this appeal. Other costs heretofore will abide the event.

Appeal decreed and cause remanded.

NOTES.

[This was approved and followed in (1904) 32 Cal., 265 ; (1899) 21 All., 356 ; (1908) 31 All., 45 ; (1906) 30 Mad., 26 ; (1909), 32 Mad., 429 ; (1904) 6 Bom. L.R., 1043 ; (1909) P.R., 105. See also (1908) 5 A.L.J. , 550, wherein this was distinguished.]

[281] FULL BENCH.

The 18th March, 1899.

PRESENT :

MR. JUSTICE BLAIR, MR. JUSTICE BURKITT, AND MR. JUSTICE AIKMAN.

Kesho Deo and another.....Plaintiffs

versus

Hari Das and others.....Defendants.*

Joint Hindu family—Mortgage—Mortgage executed and registered by major son and by the father for himself and for a minor son—Registration—Act No. III of 1877 (Registration Act), section 35.

A joint Hindu family consisted of the father and two sons, the one of full age, the other a minor. The father and the major son executed a mortgage of the joint family property, the father describing himself in the bond as acting for himself and as guardian and next friend of the minor son. The bond was registered on the admission of the father and the major son.

Held, on suit by the mortgagees for sale, that there being no dispute as to the fact of the debt for which the mortgage was executed, and it not being alleged that such debt was incurred for any purpose which would exempt the son from the pious obligation of paying it, that there was no defect in the registration of the bond in suit which would prevent its affecting the share of the minor son. *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All., 599, overruled. *Muhammad Ewaz v. Birj Lal*, (1877) I. L. R., 1 All., 465. *In the matter of Ram Chunder Biswas*, (1871) 16 W. R. C. R., 180, and *Badri Prasad v. Madan Lal*, (1893) I. L. R., 15 All., 75, referred to.

THIS was a suit to recover the balance of a debt alleged to be due on a hypothecation bond dated the 1st February 1889. The defendants were Hari Das, and his two sons Babu Ram and Mannu Lal, the three defendants forming a joint Hindu family. At the time of the execution of the bond Mannu Lal was a minor and the bond purported to be executed by Babu Ram for himself, and by Hari Das "for self and as guardian and next friend of Mannu Lal, minor, my son." The bond was registered by Hari Das and Babu Ram, but did not purport to be registered on behalf of Mannu Lal. At the time of suit the defendant Mannu Lal was of full age, and in his written statement he took the plea that the bond sued on not having been registered at his instance was inoperative as against him. On the issue raised by this plea the Court of First Instance [282] (Subordinate Judge of Agra), relying on the ruling in the case of *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All., 599, held that the person and property of Mannu Lal must be exempted from liability in respect to the bond in

* First Appeal No. 270 of 1896, from a decree of Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 6th June 1896.

suit. The Court gave the plaintiffs a decree against the two other defendants. Against this decree the plaintiffs appealed urging that the Court of First Instance was in error in holding that Mannu Lal was not liable to the plaintiffs' claim.

Pandit *Moti Lal* and *Kunwar Parmanand*, for the Appellants.

Mr. *E. A. Howard*, for the Respondents.

Aikman, J. (Blair and Burkitt, JJ. concurring)—This appeal arises out of a suit brought by the plaintiffs, who are appellants here, on a mortgage bond, dated 1st February 1889. The defendants are a Hindu father, Hari Das, and his two sons, Babu Ram and Mannu Lal. The executants of the bond are Hari Das and Babu Ram. In the bond, Hari Das describes himself as acting for himself and "as guardian and next friend of Mannu Lal, minor, my son." The bond was registered on the admission of the two executants, Hari Das and Babu Ram.

The learned Subordinate Judge gave the plaintiffs a decree, but only as against the shares of Hari Das and Babu Ram, exempting the one-third share of Mannu Lal, on the sole ground that the bond had not been registered on his behalf.

The judgment of the lower Court is based on, and is supported by, the decision of the Court in *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All. 599. The facts of that case were similar to those of the case before us. The bond in suit had been executed by one Harbans Singh for himself and as guardian of his minor son Jograj Singh, and by an adult son named Balbir Singh. It was registered on the admission of Harbans Singh and Balbir Singh. The learned Judges observe:—"There is no question but that Jograj Singh was an executing party to the bond by representation of his father. But he was not represented in the [283] registration of the instrument. Now, under section 35 of the Indian Registration Act, as explained and applied by the Judicial Committee of the Privy Council in *Muhammad Ewaz v. Birj Lal*, (1877) I. L. R., 1 All., 465, this document was unregistered *quoad* Jograj Singh, disabled from executing or registering it by reason of minority and not represented for the purpose of registration by any person, far less by such a person as alone is capable of representation under part VI of the Registration Act. This being so, the instrument on which the suit is founded shall not affect any immoveable property comprised therein, in so far as Jograj Singh is interested in the same." In the result the learned Judges affirmed the decree of the lower Court which had dismissed the suit as regards Jograj Singh and his share of the property.

When the present appeal came on for hearing before a Division Bench of this Court, the Judges composing that Bench, finding themselves unable to concur with the judgment in *Shankar Das v. Jograj Singh*, referred the appeal for hearing by a Full Bench, and it has now come before us for decision.

With all deference to the learned Judges who decided the case of *Shankar Das v. Jograj Singh*, we find ourselves unable to agree with them in the view they took of the provisions of the Registration Act. What section 35 of that Act requires is that "the persons executing the document" presented for registration should appear before the registering officer, either in person or by a duly qualified representative, assign or agent. When they so appear and admit execution, the registering officer must register the document, unless it appears to him that any of the persons by whom it purports to have been executed is a minor, an idiot, or a lunatic. It is the actual executants of the document who are required to appear. The law nowhere requires for the purposes of registration the appearance of the person on behalf of whom a document

The appellants will have their costs of this appeal. Other costs heretofore will abide the event.

Appeal decreed and cause remanded.

NOTES.

[This was approved and followed in (1904) 32 Cal., 265 ; (1899) 21 All., 356 ; (1908) 31 All., 45 ; (1906) 30 Mad., 26 ; (1909), 32 Mad., 429 ; (1904) 6 Bom. L.R., 1043 ; (1909) P.R., 105. See also (1908) 5 A.L.J. , 550, wherein this was distinguished.]

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Held, on suit by the mortgagees for sale, that there being no dispute as to the fact of the debt for which the mortgage was executed, and it not being alleged that such debt was incurred for any purpose which would exempt the son from the pious obligation of paying it, that there was no defect in the registration of the bond in suit which would prevent its affecting the share of the minor son. *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All., 599, overruled. *Muhammad Fawaz v. Birj Lal*, (1877) I. L. R., 1 All., 465. *In the matter of Ram Chunder Biswas*, (1871) 16 W. R. C. R., 180, and *Badri Prasad v. Madan Lal*, (1893) I. L. R., 15 All., 75, referred to.

THIS was a suit to recover the balance of a debt alleged to be due on a hypothecation bond dated the 1st February 1889. The defendants were Hari Das, and his two sons Babu Ram and Mannu Lal, the three defendants forming a joint Hindu family. At the time of the execution of the bond Mannu Lal was a minor and the bond purported to be executed by Babu Ram for himself, and by Hari Das "for self and as guardian and next friend of Mannu Lal, minor, my son." The bond was registered by Hari Das and Babu Ram, but did not purport to be registered on behalf of Mannu Lal. At the time of suit the defendant Mannu Lal was of full age, and in his written statement he took the plea that the bond sued on not having been registered at his instance was inoperative as against him. On the issue raised by this plea the Court of First Instance [282] (Subordinate Judge of Agra), relying on the ruling in the case of *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All., 599, held that the person and property of Mannu Lal must be exempted from liability in respect to the bond in

* First Appeal No. 270 of 1896, from a decree of Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 6th June 1896.

suit. The Court gave the plaintiffs a decree against the two other defendants. Against this decree the plaintiffs appealed urging that the Court of First Instance was in error in holding that Mannu Lal was not liable to the plaintiffs' claim.

Pandit *Moti Lal* and *Kunwar Parmanand*, for the Appellants.

Mr. *E. A. Howard*, for the Respondents.

Aikman, J. (Blair and Burkitt, JJ. concurring)—This appeal arises out of a suit brought by the plaintiffs, who are appellants here, on a mortgage bond, dated 1st February 1889. The defendants are a Hindu father, Hari Das, and his two sons, Babu Ram and Mannu Lal. The executants of the bond are Hari Das and Babu Ram. In the bond, Hari Das describes himself as acting for himself and "as guardian and next friend of Mannu Lal, minor, my son." The bond was registered on the admission of the two executants, Hari Das and Babu Ram.

The learned Subordinate Judge gave the plaintiffs a decree, but only as against the shares of Hari Das and Babu Ram, exempting the one-third share of Mannu Lal, on the sole ground that the bond had not been registered on his behalf.

The judgment of the lower Court is based on, and is supported by, the decision of the Court in *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All. 599. The facts of that case were similar to those of the case before us. The bond in suit had been executed by one Harbans Singh for himself and as guardian of his minor son Jograj Singh, and by an adult son named Balbir Singh. It was registered on the admission of Harbans Singh and Balbir Singh. The learned Judges observe:—"There is no question but that Jograj Singh was an executing party to the bond by representation of his father. But he was not represented in the [283] registration of the instrument. Now, under section 35 of the Indian Registration Act, as explained and applied by the Judicial Committee of the Privy Council in *Muhammad Ewaz v. Birj Lal*, (1877) I. L. R., 1 All., 465, this document was unregistered *quoad* Jograj Singh, disabled from executing or registering it by reason of minority and not represented for the purpose of registration by any person, far less by such a person as alone is capable of representation under part VI of the Registration Act. This being so, the instrument on which the suit is founded shall not affect any immovable property comprised therein, in so far as Jograj Singh is interested in the same." In the result the learned Judges affirmed the decree of the lower Court which had dismissed the suit as regards Jograj Singh and his share of the property.

When the present appeal came on for hearing before a Division Bench of this Court, the Judges composing that Bench, finding themselves unable to concur with the judgment in *Shankar Das v. Jograj Singh*, referred the appeal for hearing by a Full Bench, and it has now come before us for decision.

With all deference to the learned Judges who decided the case of *Shankar Das v. Jograj Singh*, we find ourselves unable to agree with them in the view they took of the provisions of the Registration Act. What section 35 of that Act requires is that "the persons executing the document" presented for registration should appear before the registering officer, either in person or by a duly qualified representative, assign or agent. When they so appear and admit execution, the registering officer must register the document, unless it appears to him that any of the persons by whom it purports to have been executed is a minor, an idiot, or a lunatic. It is the actual executants of the document who are required to appear. The law nowhere requires for the purposes of registration the appearance of the person on behalf of whom a document

purports to have been executed. The learned Judges who decided the case of *Shankar Das v. Jograj Singh* have, it appears to us, misapprehended the scope of the decision of the [284] Privy Council in *Muhammad Ewaz v. Birj Lal*, (1877) I. L. R., 1 All., 465, on which they rely. The document in that case was a deed of sale which, on the face of it, purported to have been executed by three persons, namely, Mubarak Jan, a Mubammadan lady, and her two sons Hyat Muhammad and Salamat-ulla. There was an admission of execution by the two sons before the registering officer, but not by the third executant, Mubarak Jan. Under these circumstances their Lordships sustained the decree of the Court of First Instance which had held the deed of sale to be valid as regards the sons' shares, but invalid as regards the share of the mother.

In the judgment in the case, *In the matter of Ram Chunder Biswas, petitioner*, (1871) 16 W. R. C. R., 180, the following passage occurs:—"As all the parties to the deed in question by whom it purports to have been executed had appeared before the Registrar and admitted the execution of the deed, the Registrar to whom the same was presented for registration had nothing whatever to do with the recitals of that deed or with its possible operation as regards parties who do not purport to execute it, and who must therefore be considered as third parties. If the Registrar finds that all the executants of the deed admit the execution, his duty is clear, that is, he must register the deed." We concur in these observations.

For the above reasons we dissent from and overrule the judgment of this Court in *Shankar Das v. Jograj Singh*, (1883) I. L. R., 5 All., 599, and hold that there is no defect in the registration of the bond in suit which would prevent it affecting the share of the defendant Mannu Lal. The fact of the debt is not disputed, and it is not alleged that it was incurred for any purpose which would exempt the son from the pious obligation of paying it. On the authority of the decision of the Full Bench of this Court in *Badri Prasad v. Madan Lal*, (1893) I. L. R., 15 All., 75, the plaintiffs are therefore entitled to a decree against the whole of the joint family property hypothecated in the bond.

[285] We accordingly allow the appeal, and, modifying the decree of the Court below, order that the defendants pay to the plaintiff or into Court the sum of Rs. 7,255-8-0 within three months from the date of this decree, in default whereof the hypothecated property or a sufficient portion thereof shall be sold, and the proceeds of the sale shall be applied in payment of what has been found due to the plaintiffs, and the balance, if any, shall be paid to the persons entitled to the same. The plaintiffs will get future interest on the sum decreed up to the date of realization and proportionate costs from the mortgaged property as well as from the person of the defendant Har Dasu Mal. The persons of Babu Ram and Mannu Lal are exempted. The costs will include the costs of this appeal.

In the decree as modified we have left untouched that portion of the decree of the lower Court which awarded future interest as to which no appeal was preferred.

Decree modified.

NOTES.

[The strict construction of sections 32—35 of the Registration Act (1877, 1906) was adopted in (1915) 97 All., 49 P. C.]

[21 All. 285]
APPELLATE CIVIL.*The 25th March, 1899.*

PRESENT:

MR. JUSTICE AIKMAN.

Jagwant Singh and others.....Plaintiffs

versus

Silan Singh and others.....Defendants.*

*Act No. I of 1872 (Indian Evidence Act) Section 115—Admission—Estoppel—
Admission of point of law no estoppel.*

An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of section 115 of the Evidence Act. *Juttendro Mohun Tagore v. Ganendro Mohun Tagore* (1872) L.R., Sup. I. A., 47, and *Gopee Loll v. Mussamut Sree Chundraolee Buhoojee*, (1872) 11 B. L. R., 391, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Muhammad Ishaq for the Appellants.

Mr. Abdul Raoof for the Respondents.

[286] Aikman, J.—This is an appeal by the plaintiff in the suit out of which S. A. No. 402 of 1898, decided this day, arose.* As stated in my judgment in that appeal, one Salig Singh died possessed of shares in three villages. The plaintiff sued to recover possession of those shares as Salig Singh's heir. The learned Judge of the Lower Appellate Court decreed the plaintiff's claim in respect of two of the villages, and dismissed his claim to the share in the third village, Banbhirpur.

It is in respect of this dismissal that the present appeal is brought.

Salig Singh died on the 2nd of October 1894.

On 31st of October 1894 the parties to this suit presented a joint application to the Revenue Court, setting forth the fact of Salig Singh's death, stating that they owned and possessed his share in Banbhirpur in the following way, namely, that the plaintiff owned and possessed one-third, the defendants Babu Lal and Silan Singh one-third, and the defendants Bechu Singh and Ram Karan Singh the remaining third, and praying for mutation of names in accordance with this division. The application was granted. It has been found by the lower Courts that the plaintiff and the two sets of defendants discharged a debt due from the estate of Salig Singh, the plaintiff paying one-third and each set of defendants one-third. The learned District Judge held that the plaintiff was bound by his admission in the mutation proceedings in regard to the share in Banbhirpur, and on this ground dismissed his claim to that share. In appeal here it is contended by the learned vakil for the appellants, who has argued the case very ably, that the plaintiff's admission in the mutation proceedings forms no bar to the assertion of his legal rights in the present suit. I am of opinion that this contention must be sustained. When, in the mutation proceedings, the plaintiff stated that he and the two sets of defendants were, on Salig Singh's death, the owners of his property in Banbhirpu in equal shares, he made, no doubt under a misapprehension as to what were his legal rights, a mistaken statement of law. By law the plaintiff was the sole owner.

* Second Appeal No. 403 of 1898, from a decree of H. D. Griffin, Esq., District Judge of Azamgarh, dated the 22nd February 1898, modifying a decree of Babu Raj Nath Prasad, Munsif of Azamgarh, dated the 13th December 1897.

[287] Now, it has been held that an admission on a point of law is not an admission of a "thing," so as to make the admission matter of estoppel within the meaning of section 115 of the Evidence Act. In the case *Juttendro Mohun Tagore v. Ganendro Mohun Tagore*, (1872) L. R., Sup. I. A., 47, their Lordships of the Privy Council observed, at p. 71 of the judgment:—"The plaintiff is not bound by an admission of a point of law, nor precluded from asserting the contrary in order to obtain the relief to which, upon a true construction of the law, he may appear to be entitled." In the case *Gopee Loll v. Mussamut Sreechundraolee Buhoojee*, (1872) 11 B. L. R., 391, the validity of an adoption was in question. The plaintiff who maintained the validity of the adoption contended that the defendant was estopped by her previous admissions and conduct from disputing either the fact or the validity of the adoption. As to this plea their Lordships of the Privy Council remark, at p. 395 of the judgment:—"It appears to their Lordships there is no estoppel in the case. There has been no misrepresentation on the part of the defendant on any matter of fact. She is alleged to have represented that Luchmunjee was adopted. The plaintiff's case is that Luchmunjee was in fact adopted. So far as the fact is concerned, there is no misrepresentation. It comes to no more than this, that she has arrived at a conclusion that the adoption, which is admitted in fact, was valid in law—a conclusion which, in their Lordships' judgment, is erroneous; but that creates no estoppel whatever between the parties."

So in this case, when the plaintiff stated in the mutation proceedings that the share of Salig Singh in Banbhirpur was in the possession of himself and the defendants, he stated what was a fact. But in stating that on Salig Singh's death he and the defendants became owners of the share, he gave expression to a mistaken proposition of law which, on the authorities quoted above, creates no estoppel as between him and the defendants.

[288] There is another ground also on which I should be prepared to hold that there is no estoppel here. This is not the case of a person who knows or must be deemed to know the real state of things creating by his representation a belief in the mind of a person who does not know the real state of things. For, quite apart from any representation made by the plaintiff, the defendants must be deemed to have known what their legal rights were.

The learned counsel for the respondents endeavoured to support the decree of the lower Court by a plea based on section 43 of the Code of Civil Procedure. It appears that the plaintiff brought a suit on the allegation that in July 1896 the defendants ousted him from land in Banbhirpur of which he was in joint possession with them, and it is argued that as he did not then claim the whole share in Banbhirpur the provisions of the second paragraph of section 43 preclude the maintenance of the present suit. I cannot sustain this contention. The cause of action in this suit arose on the death of Salig Singh, and is different from the cause of action in the previous suit, which was the ouster by the defendants in July 1896.

As stated in my judgment in the connected appeal, the learned vakil for the plaintiffs-appellants admits that his clients are not entitled to an unconditional decree, and that the decree in their favour should be made subject to their repaying to the defendants the amounts which they disbursed towards defraying the debt due from Salig Singh's estate.

With reference to the above findings I allow the appeal and decree the plaintiff's claim subject to the condition that within three months from the date of this decree being certified to the Lower Appellate Court, they pay into Court the sum of Rs. 112, out of which Rs. 28 will be paid to each of the four

defendants. If the plaintiffs fail to pay the above amount within the time fixed their suit will stand dismissed.

Under the circumstances of the case I direct that the parties bear their own costs throughout.

Appeal decreed.

NOTES.

[An admission on a point of law will not constitute an estoppel :—(1906) 3 A. L. J., 534 ; (1906) 3 N. L. R., 72.]

[289] *The 4th April, 1899.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Dwarka Prasad..Defendant

versus

Lachhoman Das.....Plaintiff.*

Civil Procedure Code, section 108—Decree ex parte—Suit to set aside as fraudulently obtained a decree ex parte—Application to set aside ex parte decree.

An *ex parte* decree was passed against a defendant. The defendant judgment-debtor applied under section 108 of the Code of Civil Procedure to have such *ex parte* decree set aside, but his application was dismissed as barred by limitation. *Held*, that the defendant was not thereafter precluded from bringing a suit to set aside the *ex parte* decree as having been obtained by fraud. *Pran Nath Roy v. Mohesh Chandra Moitra*, (1897) I. L. R., 24 Cal., 546, followed.

THE facts of this case are as follows :—An *ex parte* decree was passed against the plaintiff respondent on the 27th March 1895. The plaintiff applied under section 108 of the Code of Civil Procedure to have that decree set aside, on the ground that he had never received notice of the suit. The Court (Munsif of Ghazipur) without taking any evidence dismissed the application as barred by limitation. From this order an appeal was preferred which was ultimately dismissed. Subsequently an application for review of the judgment was made under section 623 of the Code of Civil Procedure; but that application was rejected. The plaintiff then instituted a regular suit in which he prayed that the decree of the 27th March 1895 and all proceedings subsequent thereto might be set aside and declared null and void on the ground that the said decree had been obtained fraudulently by the defendant, (plaintiff in the former suit) without the plaintiff's knowledge on the basis of a fictitious bond, dated the 23rd May 1891. The Court of First Instance (Munsif of Ghazipur) dismissed the suit on the ground that it was precluded by the plaintiff's former application under section 108 of the Code. The plaintiff appealed. The Lower Appellate Court (Subordinate Judge of Ghazipur) holding with reference to the case of *Pran Nath Roy v. Mohesh Chandra Moitra*, (1897) I. L. R., 24 Cal., 546, that the suit was not barred, set aside the decision of the Munsif and remanded the case, [290] under section 562 of the Code. From this order of remand the defendant appealed to the High Court.

Munshi Gobind Prasad, for the Appellant.

Babu Bishnu Chandar Moitra, for the Respondent.

* First Appeal No. 134 of 1898, from an order of Maulvi Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 19th October 1898.

Banerji and Aikman, JJ.—The defendant-appellant obtained an *ex parte* decree against the plaintiff-respondent on the 27th March 1895. The plaintiff made an application under section 108 of the Code of Civil Procedure to have that decree set aside. That application was dismissed on the ground of limitation. He thereupon brought the present suit for a declaration that the *ex parte* decree and all the proceedings relating to it were null and void.

The ground upon which this suit was brought was that the defendant had fraudulently and collusively fabricated a bond purporting to be a bond executed by the plaintiff; that in furtherance of that fraud he had obtained an *ex parte* decree without the plaintiff's knowledge, and had secretly and without the knowledge of the plaintiff caused attachment orders to be issued in execution of that decree. The Court of First Instance dismissed the suit, being of opinion that it was not maintainable.

The Lower Appellate Court has set aside the decree of the Court of First Instance and remanded the case under section 562 of the Code of Civil Procedure. From that order of remand this appeal has been brought. The view of the Court below is supported by the ruling in *Pran Nath Roy v. Mohesh Chandra Moitra*, (1897) I. L. R., 24 Cal., 546. The application under section 108 of the Code of Civil Procedure was never heard on the merits, and the ground upon which the present suit has been brought was never considered by the Court.

We are of opinion that no sufficient ground has been made out for interfering with the lower Court's order. The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[These are similar :—(1901) 28 Cal., 475 ; (1902) 29 Cal., 395.

But where the fraud itself was set up as a ground in the first application, the principle of *res judicata* would apply :—(1907) 29 All., 212 ; 608.]

[291] *The 5th April, 1899.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Jhanday Lal.....Plaintiff

versus

Sarman Lal.....Defendant.*

Civil Procedure Code, section 588 (24)—Appeal from order made under section 485—Remand—Such order of remand not appealable—

Civil Procedure Code, section 562.

Held that no appeal would lie from an order of remand made under section 562 of the Code of Civil Procedure when such order was itself made in an appeal under section 588 from an order under section 485 of the Code. *Mathura Nath Ghose v. Nobin Chandra Kundu Biswas*, (1897) I. L. R., 24 Cal., 774, followed.

THE plaintiff in this case applied for attachment before judgment of certain property of the defendant, namely, a decree obtained by him in another suit. A conditional attachment order was issued on this application, and notice was sent to the defendant to appear within a week and show cause against the attachment or furnish security to the amount of Rs. 1,200. The defendant

* First Appeal No. 2 of 1899, from an order of W. F. Wells, Esq., District Judge of Agra, dated the 1st December 1898.

appeared within a week from the date when notice of the abovementioned order was served on him to show cause, but the Court (Munsif of Agra) held that the time was to be counted from the date of the order, and disallowed the defendant's objections. The defendant appealed, and the Lower Appellate Court (District Judge of Agra) remanded the case to the Munsif under section 562 of the Code of Civil Procedure, on the ground that the Munsif was wrong in finding the defendant's objections to be barred. Against this order of remand the plaintiff appealed to the High Court.

Babu Parbati Charan Chatterji, for the Appellant.

Maulvi Ghulam Muftaba, for the Respondent.

Banerji and Aikman, JJ.—The preliminary objection raised by Mr. Ghulam Muftaba that no appeal lies, must prevail. An order was made against the respondent for attachment before judgment under section 485 of the Code of Civil Procedure. An appeal was preferred from that order under cl. (24) of section 588 of the Code, and the Lower Appellate Court made an order of remand under section 562. This order of remand is the subject- [292] matter of the appeal before us. The last clause of section 588 provides that orders passed in appeal under that section shall be final. The order appealed from is an order passed under section 588, and therefore it is final according to the provision referred to above. It is true that section 588 allows an appeal from an order passed under section 562. But the order of remand from which an appeal is allowable must be an order which was not passed under section 588. The last paragraph of the section must be read as controlling the whole section and as barring a second appeal, where an appellate Court has made an order, whether for dismissing the appeal or decreeing the appeal or remanding the case before it. This view is supported by the ruling of the Calcutta High Court in *Mathura Nath Ghose v. Nobin Chandra Kundu Biswas*, (1897) I. L. R., 24 Cal., 774, with which we entirely agree. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See also (1911) 33 All., 479 ; (1907) 3 M. L. T., 249.]

[21 All. 292]

The 6th April, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Abdullah.....Defendant

versus

Amanat-ullah and others.....Plaintiffs.*

Muhammadian law—Pre-emption—Suit by pre-emptor not entitled to claim the whole of the property sold—Plaintiff not obliged to frame his suit as a suit for the whole.

Held, that where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it, he is not bound to frame

* First Appeal No. 7 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 22nd December 1898.

his suit as a suit for the whole of the property sold, but only for so much as he would be entitled to having regard to the claims of the other pre-emptors. *Amir Hasan v. Rahim Bakhsh*, (1897) I. L. R., 19 All., 466, and *Durga Prasad v. Munsif*, (1884) I. L. R., 6 All., 423, referred to. *Kashi Nath v. Mukhta Prasad*, (1884) I. L. R., 6 All., 370, and *Hulasi v. Sheo Prasad*, (1884) I. L. R., 6 All., 455, distinguished.

THE plaintiffs, five in number, claimed to pre-empt five-sixths of certain property which had been sold to the defendant by one Balua. They did not sue for the whole of the property, [293] because, as stated in the plaint, the defendant vendee was himself possessed of equal rights of pre-emption with the plaintiff. The Court of First Instance (Munsif of Azamgarh) dismissed the suit upon the ground that the plaintiffs were bound to have sued for the whole. The plaintiffs appealed. The Lower Appellate Court (Subordinate Judge of Azamgarh) decreed the appeal and remanded the case to the Munsif under section 562 of the Code of Civil Procedure. That Court held that as the plaintiffs were not entitled to pre-emption in respect of more than five-sixths of the property sold, they were under no obligation to claim the whole in their plaint. Against this order of remand the defendant appealed to the High Court.

Mr. *Abdul Raoof* and *Maulvi Ghulam Muftaba*, for the Appellant.

Mr. *Abdul Majid*, Mr. *Karamat Husain* and *Maulvi Muhammad Ishaq*, for the Respondents.

Banerji and Aikman, JJ.—This is an appeal from an order of remand under section 562 of the Code of Civil Procedure in a suit for pre-emption based on Muhammadan law. The appellant before us is the vendee and the respondents are the claimants for pre-emption. The vendee is admittedly a person who has the right of pre-emption as against a stranger. The plaintiffs, who are five in number, claimed five-sixths of the property sold to the defendant. The contention before us is that such a claim is opposed to Muhammadan law and should have been dismissed, that the plaintiffs were bound to claim the whole of the property sold, and that not having done so, they were not entitled to the decree which has been granted to them. It is not disputed that according to Muhammadan law, as explained in the ruling of this Court in *Amir Hasan v. Rahim Bakhsh*, (1897) I. L. R., 19 All., 466, when the purchaser is a person who would as against a stranger have the right of pre-emption, other persons entitled to pre-emption are entitled to get the property divided *per capita* between all the persons possessing the right of pre-emption and claiming such right. Upon this [294] authority, which is not questioned on behalf of the appellant, it is conceded that the plaintiffs could not obtain a decree for more than a five-sixths share of the property sold. It is, however, contended that the plaintiffs were nevertheless bound to claim the whole of the property, although the Court could not decree to them more than a five-sixths share. In support of this contention the learned counsel for the appellant has referred us to the rule of Muhammadan law, which requires that a claimant for pre-emption should not split up the bargain and claim a portion only of the property sold, but should claim the whole of it. He relies on the rulings of this Court in *Kashi Nath v. Mukhta Prasad*, (1884) I. L. R., 6 All., 370, and *Hulasi v. Sheo Prasad*, (1884) I. L. R., 6 All., 455. In our opinion these rulings do not support the contention of the learned counsel that in a suit like the present the whole of the property ought to have been claimed. They go no further than to lay down that a plaintiff claiming pre-emption must in his suit include the whole of that portion of the property sold to which his right of pre-emption extends. That this was the intention of the learned Judges who decided the two cases to which we have referred, is evident from the case of *Durga Prasad v. Munsif*, (1884) I. L. R., 6 All., 423. In his judgment in that case Mr. Justice MAHMOOD, who was a party to the decisions

relied on, observes :—" I have no hesitation in laying down the general rule that every suit for pre-emption must include the whole of the property subject to the plaintiff's pre-emption, conveyed by one bargain of sale to one stranger, and that a suit by a plaintiff pre-emptor, which does not include within its scope the whole of such pre-emptional property, is unmaintainable as being inconsistent with the very nature and essence of the pre-emptive right." As we have said above, it is conceded in the present case that even if the plaintiffs had claimed the whole of the property they could not have obtained a decree for a larger share than the five-sixths which they claimed in the plaint. [296] On the authority of the ruling in *Amir Hasan v. Rahim Bakhsh* referred to above, their right of pre-emption extended to a five-sixths share only, and as they have claimed that share we are unable to hold that in doing so they have transgressed any rule of Muhammadan law. The learned counsel on both sides have referred us to original authorities of Muhammadan law which have been translated and laid before us, and we are indebted to the learned counsel for the help they have thereby rendered to us. But we are unable to find anything in the authorities cited which requires that, whatever may be the extent of the share to which the pre-emptor may be entitled by virtue of his right of pre-emption, he is bound in his suit to claim the whole of the property sold to the vendee when the vendee is himself a pre-emptor. It is true that every person having the right of pre-emption is entitled to pre-empt the whole property sold, but when more persons than one have equal rights of pre-emption, there exists what the authorities of the Muhammadan law call an *impediment* to pre-emption, and unless the impediment is removed by the rival pre-emptor "relinquishing the right before the establishment of his ownership," the remaining pre-emptor is not entitled to the whole. "It is mentioned in *Nihaya* that when one of them surrenders his right the only alternative for the other is either to take the whole or relinquish it." (*Radd-ul-Muhtar*, Egyptian edition, p. 216). It follows that where the purchaser is himself a pre-emptor, one of several pre-emptors is entitled to the whole only when the purchaser surrenders the purchase. Where no such surrender has been made the several persons entitled to pre-emption who claim their right of pre-emption have only the right to get the property equally divided *per capita*. The passage from the *Fatawa Alamgiri* cited on page 472 of I. L. R., 19 All., establishes this proposition. That passage is as follows:—"If a person purchases a house of which he is a pre-emptor, and then appears another pre-emptor having an equal right with him, the Qazi (Judge) will pass a decree for one half." It is urged that [296] as a purchaser has the option of surrendering the property at any time before decree, it is the duty of a person claiming pre-emption to claim the whole property. The authorities on this point are somewhat conflicting, but we think that the conflict has been well reconciled by the author of the *Radd-ul-Muhtar* in the work called *Tankih Hamidia* Vol. ii, Egyptian edition, page 182, in the following passage, which has been translated for us :—"It seems that the meaning is this, that when he (pre-emptor) wishes to take a portion after having made the immediate demand and the demand with invocation of witnesses, the right is not extinguished, but if he demands a portion in the beginning, his right of pre-emption falls to the ground." This passage shows that what the Muhammadan law requires is that the immediate demand and the demand by invocation of witnesses should be made in respect of the whole property sold which the pre-emptor would have been entitled to claim had it been sold to a stranger instead of to one having an equal right of pre-emption with him. But this does not require that when

a claimant for pre-emption who has complied with the above rule has to resort to a Court to enforce his right against a purchaser who is himself a pre-emptor within the meaning of the Muhammadan law, he is bound to claim anything beyond what he is entitled to obtain. We have not been referred to any authority which goes the length of directing that in such a case the suit must relate to the whole of the property sold, although the plaintiffs might be entitled to a decree for a portion of it only. The purchaser, who is himself a pre-emptor, is given the option of surrendering the whole upon the immediate demand and the demand by invocation of witnesses being made. When he makes such a surrender there is no occasion for resorting to a Court to enforce any right. When, however, a surrender has not been made, but, as in this case, the plaintiff's right of pre-emption is denied before suit and his demand is resisted, there is no obligation upon the plaintiff to claim anything in excess of what he is legally entitled to. This is consistent with the rule of [297] justice, equity and good conscience which is the rule applicable to cases of pre-emption, and there is nothing in the Muhammadan law, as far as we are aware, which militates against it. This appeal must fail. We dismiss it with costs.

Appeal dismissed.

[21 All. 297]

The 7th April, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Kausalia and others.....Defendants

versus

Gulab Kuar and others.....Plaintiffs.*

Land-holder and tenants—Trees—Property in trees growing on tenant's holding—Burden of proof—Civil Procedure Code, section 561—Appeal—Objections by respondents—Letters Patent, section 10.

Held, that the property in trees growing on a tenant's holding is, by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Imdad Khan v. Bhagirath*, (1888) I. L. R., 10 All., 159; *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal*, (1894) I. L. R., 22 Cal., 742, and *Ruttonji Edulji Shet v. The Collector of Tanna*, (1867) 11 Moo. I. A., 295, referred to.

Held also, that section 561 of the Code of Civil Procedure is not applicable to appeals under section 10 of the Letters Patent.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri and Pandit Moti Lal, for the Appellants.

Babu Devendro Nath Ohdedar, for the Respondents.

Knox, J. (Strachey, C.J., concurring).—The respondents to this appeal (plaintiffs in the Court of First Instance) came into Court as zamindars or landholders of certain land, situate within which was a grove of trees. Their

* Appeal No. 24 of 1898, under section 10 of the Letters Patent.

position as zamindars was expressly admitted by all the defendants who now appear as appellants in the appeal before us. Their claim was for an injunction to restrain the defendants from cutting and selling the trees in this grove and for the recovery of damages or compensation on account of certain trees, which, according to them, some of the [298] defendants had illegally sold to other of the defendants, and which trees the last named defendants had illegally sold. The plaintiffs in a replication filed by them on the 21st of March 1896, admitted that they were not the owners of these trees, but only of the ground on which the trees stood. The District Judge of Allahabad upon hearing the appeal from the Court of the Munsif, who had dismissed the claim, held that the burden of proving that they had a right to the relief they sought lay upon the plaintiffs. He held it was for them to prove the custom set up by them, *viz.*, that they were empowered to interfere with the defendants and to prevent them from cutting and selling the trees standing in the grove in dispute, and that, as they had failed to prove it, their claim was rightly dismissed, and he accordingly dismissed the appeal before him.

The plaintiffs then came to this Court and impugned the judgment of the District Judge, first, upon the ground that the burden of proof had been wrongly laid upon them; and, secondly, upon the ground that, if it did lie upon them, the entries in the *wajib-ul-arz*, which they had proved and which were in their favour, sufficed to shift the burden of proof on to the respondents. The appeal was heard by Mr. Justice BURKITT. That learned Judge, following the precedent laid down in *Imdad Khan v. Bhagirath*, (1888) I. L. R., 10 All., 159, held that the property in trees growing on land in agricultural villages and on occupancy holdings vests in the zamindar subject to any customary right which may be established by tenants to cut down and to remove or take the produce of the trees. The entries in the village record-of-rights, he considered, did not in any way affect the question. He called for a finding upon the issue:—Have the defendants established by evidence any legal binding custom authorizing them to cut down and sell or otherwise dispose of the trees standing in the disputed grove? The finding on this issue was against the respondents, and the appellants' (plaintiffs') claim, so far as regards the injunction asked for by them, was granted.

[299] The defendants have now come under the Letters Patent, section 10, and ask us to reconsider the question of burden of proof. They made no attempt to deal with the precedents cited in the judgment now appealed from. Their case was that upon the pleadings the issue remitted did not arise. It had been admitted that they were owners, and their contention was that so long as they continued to occupy the grove they had a perfect right to deal with the trees as they chose.

On referring to *Imdad Khan v. Bhagirath*, (1888) I. L. R., 10 All., 159, we find that in that case, as in the present, the trees were the property of occupancy tenants, and the suit was a suit brought by the zamindar for cancelment of a deed of sale under which the tenants, relying on their right as owners of the trees, had purported to sell them to others. Upon a review of earlier cases decided by this Court the learned Judge who decided that appeal found that the trees upon an occupancy holding, whether planted by the tenant himself or not, belong and attach to such occupancy holding, and like it are not susceptible of transfer by the occupancy holder. It does not appear in the case before us what was the precise nature of the appellants' holding, but unless it were the holding of an exproprietary tenant, it could not be a holding susceptible of transfer. It is nowhere pleaded, and it certainly

would have been pleaded had there been any ground for it, that the tenancy was an exproprietary tenancy.

The case of *Nafar Chandra Pal Chowdhuri v. Ram Lal Pal*, (1894) I. L. R., 22 Cal., 742, was a similar case. There two Judges of the Calcutta High Court, after considering a number of cases on the point, held that the property in trees on a tenant's holding is by the general law vested in the zamindar. In *Ruttonji Edulji Shet v. The Collector of Tanna*, (1867) 11 Moo., I. A., 295, the Privy Council decided that the trees are part of the land on which they stand, and the right to cut them down and sell them is incident to the proprietorship of the land. Much was made of the admission by the respondents [300] that they were not the owners of the trees in the grove, but of the ground under the trees and of the claim being based on custom and usage as recorded in the village administration paper. But this admission must be read with paragraph 3 of the plaint. The two read together satisfy us that the admission was intended to be that while the defendants (appellants) were in possession, and the respondents were not owners in the sense of full and unlimited ownership, still they were owners of the ground on which the trees stood, and by virtue of this claimed the right to restrain the appellants from cutting down and selling the trees at the free will and pleasure of the latter.

In this view of the case we think the burden of proof was rightly laid and that the appellants did not prove any custom derogating from the general law.

The respondents have filed a paper which they term objections under section 561 of the Code of Civil Procedure. Section 561 is a section which applies to appeals from original decrees. It is true that section 590 of the Code makes the provisions of this section applicable, so far as may be, to appeals from orders, and section 587 similarly makes them applicable to second appeals, but no statute or rules have been pointed out to us making the terms of this section applicable to Letters Patent appeals. Nor can it be pointed out that the section has ever been made use of in Letters Patent appeals.

We dismiss the appeal with costs to be borne by the appellants and we also disallow the objections with costs. The costs of the appellants, so far as the objections are concerned, will be borne by the respondents.

Appeal dismissed.

NOTES.

[As regards the right to trees, this was followed in (1901) 23 All., 211; (1908) 4 N. L. R., 104; (1906) A. W. N., 140; (1910) 11 C. L. J., 209; (1910) 5 I. C., 256 (All.). See (1907) 29 All., 484, where it was held that the landlord also could not, during the tenancy, cut down the trees.

As regards the question relating to appeals, see also (1907) 18 M. L. J., 157.]

[301] *The 8th April, 1899.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Dharam Singh and others.....Defendants

versus

Angan Lal and others.....Plaintiffs.*

Hindu Law—Joint Hindu family—Liability of sons to pay debts incurred by father—Creditor's remedy against sons not barred by reason of his having sued the father separately—Mortgage—Act No. IV of 1862 (Transfer of Property Act), section 85.

Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay.

The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son.

There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt.

Lachmi Narain v. Kunji Lal, (1894) I. L. R., 16 All. 449; *Balmakund v. Sangari*, (1897) I. L. R., 19 All., 379; *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537; *Ramasami Nadan v. Ulaganatha Goundan*, (1898) I. L. R., 22 Mad., 49; *Ariabudra v. Dora Sami*, (1888) I. L. R., 11 Mad., 413 and *Nanomi Babuasin v. Modhun Mohun*, (1885) I. L. R., 13 Cal., 21, referred to.

The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick v. Rajendro Lall Moonshee*, (1879) I. L. R., 3 Cal., 353; *Dhunput Sing v. Sham Soonder Mitter*, (1879) I. L. R., 5 Cal., 292, and *Hoare v. Niblett*, L. R., 1891, 1 Q. B., 781, referred to.

THE facts of this case sufficiently appear from the judgment of BANERJI, J. Munshi Ram Prasad and Pandit Sundar Lal, for the Appellants.

Babu Jogindro Nath Chaudhri and Babu Durga Charan Banerji for the Respondents.

Banerji, J.—For a proper understanding of the questions raised in this appeal it is necessary to state the following facts. [302] One Lekhraj, whose sons and grandsons are the appellants before us, executed two mortgages in respect of the same property, which was ancestral property, in favour of Bhawani Prasad, the deceased father of the plaintiffs-respondents, on the 29th of June 1879, and the 30th of July 1880. Bhawani Prasad sued Lekhraj upon the mortgages and obtained a decree for sale on the 18th of August 1887. He did not make the present appellants parties to his suit. The mortgaged property was sold by auction on the 23rd of July 1889, in execution of the decree, and the present plaintiffs (Bhawani Prasad having in the meantime died) purchased it. Lekhraj had mortgaged the same property to one Chandan Singh on the 30th of November 1874. Sobha Ram and Ganesh Lal, the sons of Chandan Singh, brought a suit upon that mortgage,

* First Appeal No 267 of 1896 from a decree of Rai Anant Ram, Additional Subordinate Judge of Aligarh, dated the 30th June 1896.

obtained a decree, and in execution of it caused the mortgaged property to be advertised for sale. Thereupon the present plaintiffs who, as stated above, had already purchased the property, satisfied the decree on the 21st of December 1889, by payment of Rs. 1,612-14-5, the amount due upon it, and remained in possession of the property. On the 26th of November 1895, Dharam Singh, Bhawani Singh, Jiwa Ram and Ram Charan, the four sons of Lekhraj, sued the present plaintiffs for recovery of possession of a four-fifths share of the property, on the ground that the property was ancestral, that they had not been joined as parties to the suit brought by Bhawani Prasad upon his mortgages, and that the decree obtained by Bhawani Prasad could not consequently affect their interests in the property. On the 11th of March 1896, a decree was passed in their favour on the strength of the ruling of the majority of the Full Bench in *Bhawani Prasad v. Kallu*, (1895), I. L. R., 17 All., 537. Thereupon the present suit was instituted on the 25th of March 1896, against the sons and grandsons of Lekhraj, to recover four-fifths of the amount due under the mortgages in favour of Bhawani Prasad, and of the amount paid by the plaintiffs on account of Chandan's mortgage by sale of the four-fifths share of [303] the mortgaged property for which the sons of Lekhraj had obtained their decree.

The Court below has decreed the greater portion of the claim. The defendants have preferred this appeal, and the plaintiffs have taken objections under section 561 of the Code of Civil Procedure.

In order to clear the ground it may be stated that it is not contended in this appeal that the debts incurred by Lekhraj, in respect of which decrees for sale were obtained, were tainted with immorality, nor is it suggested that they were not in fact incurred, or that at the time when the suits for sale were instituted against Lekhraj the claims of the mortgagees were time-barred. It may also be observed that, although in the memorandum of appeal to this Court pleas were taken to the effect that sections 13 and 43 of the Code of Civil Procedure barred the claim, the learned advocate for the appellants did not press those pleas. Having regard to the fact that the present defendants were not parties to the suits brought against Lekhraj those pleas could not be sustained. The only contention of the learned counsel in the argument before us was, that the original mortgagees having sued their mortgagor, Lekhraj, upon the mortgages executed by him, and obtained decrees which were enforced, it was not open to the plaintiffs who stand in the shoes of the mortgagees to maintain the present suit in respect of the same debts. He does not urge that section 85 of the Transfer of Property Act, 1882, stands in the way of the plaintiffs and precludes them from bringing this suit. He concedes that, although the sons of the mortgagor, of whose interests in the mortgaged property the mortgagees had notice, were necessary parties to the mortgagees' suits, and the result of the omission to join them in the suits was, according to the rulings of this Court, that the suits were liable to dismissal, there is nothing in section 85 which forbids the institution of a second suit against persons who were not parties to the former suits. This is what was practically held by the Full Bench in *Balmakund v. Sangari*, (1897), I. L. R., 19 All., 379.

[304] Mr. Ram Prasad, however, argues that on general principles a second suit is not maintainable after judgment has been obtained and recovered upon the original debt. He refers to the case of joint obligors of a bond and to the rule which obtains in England that "a judgment recovered against one of joint obligors of a bond merges the joint liability on the bond, and is a bar to an action against the others." (See Leake on Contracts, 3rd edition, page 808,) and

the cases cited therein. See also *Hoare v. Niblett*, L. R., 1891, 1 Q. B., 781. Whether the law in this country is the same or not, it is not necessary in this case to decide, as I am of opinion that the analogy of the liability of joint debtors under the same contract does not apply to the case of the pious liability of a Hindu son for the debt of his father not tainted with immorality. Such liability arises, not from the contract entered into by the father, but from the fact that he is the son of the father and that the debt incurred by the father is of such a nature that it is the duty of the son to pay it. It is a liability which the Hindu law imposes on the son, and is independent of the contract made by his father. Whether the debt of the father has merged in a decree, or whether it subsist as a debt in respect of which no decree has been passed, the son is liable for it, provided that it was not incurred for immoral or impious purposes. The question we have to determine is whether the creditor's remedy against the son for the enforcement of the latter's liability is lost to the creditor by reason of his omitting to make the son also a party to the suit against the father. Their Lordships of the Privy Council have held in several well-known cases, to which it is unnecessary to refer in detail, that the son's liability for his father's debt is unaffected by the procedure to which the creditor may have resorted against the father alone for the recovery of the debt. In *Nanomi Babuasin v. Modhun Mohan*, (1885) 1 L. R., 13 Cal., 21, their Lordships said:—The decisions have for some time established the principle that the sons cannot set up their rights against their father's alienation for an antecedent debt, or against the creditor's remedies for their debts, if not [308] tainted with immorality." "If the father's debt was of a nature to support a sale of the entirety, he might legally have sold it without suit, or the creditor might legally procure a sale of it by suit. All the sons can claim is that, not being parties to the sale or execution proceedings, they ought not to be barred from trying the fact or the nature of the debt in a suit of their own." From these observations of their Lordships it is clear that, despite the passing of a decree against the father alone, the son may bring a suit to try the fact and the nature of the debt of the father. Upon the same principle on which a suit is allowable to the son, it seems to me it is open to the father's creditor to bring a suit against the son to establish the latter's obligation to pay his father's debt. In the case of a debt not secured by a mortgage it was held by this Court in *Lachmi Narain v. Kunji Lal*, (1894) I.L.R., 16 All., 449, that "if the creditor desires to obtain a remedy against the ancestral property, or any part of it, in the hands of the son, he must seek that remedy in suit against the son." That ruling was approved of in the Full Bench case of *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, and is an authority, so far as this Court is concerned, for the proposition that, although a decree may have been obtained against the father, a subsequent suit is maintainable against the son, in respect of the same debt, for the enforcement of the son's liability for it. In the case of a simple debt the creditor could, if he had so chosen, have made the son a party to his suit against the father [see *Ramasami Nadan v. Ulaganatha Goundan*, (1898) I. L. R., 22 Mad., 19]. The fact of his omitting to implead the son in his first suit has been held not to preclude him from suing the son afterwards. In my opinion there is no difference in principle, so far as the present question is concerned, between the case of a debt secured by a mortgage and a simple money debt. In the case of a mortgage debt the creditor was bound under section 85 of Act No. IV of 1882, as interpreted by this Court, to make the son a party to his suit, if he had notice of the son's interests. [306] The effect of his omission to do so is that the decree obtained against the father alone is not enforceable as such against the son's interests in the mortgaged property, and this is what was held by the majority of the

Full Bench in *Bhawani Prasad v. Kallu*, referred to above. I am unable to hold that in the case of a mortgage debt the creditor is in a worse position than the holder of an unsecured debt. As regards debts of both descriptions the liability of the son to pay them is the same. If in the one case the creditor is not precluded from bringing a subsequent suit against the son to enforce the latter's liability, I can see no principle or rule of law which bars a similar suit in the other. It is conceded that section 85 of the Transfer of Property Act, 1882, is no bar to it. In *Bhawani Prasad v. Kallu* the argument proceeded on the assumption that such a suit would be maintainable. In my dissentient judgment in that case I said, at p. 549:—"It is said that the creditor will not be without his remedy, and that he will still be able to bring a suit against the sons to enforce his mortgage against their interests in the ancestral estate on the ground of their pious obligation to pay their father's debts. It cannot possibly be held that no remedy will be open to the creditor, as such a decision will render the rulings of their Lordships of the Privy Council on the question of the liability of Hindu sons in respect of their father's debts wholly nugatory." To this view I still adhere, and I do not find from the report that on this point my learned colleagues expressed a different opinion. In *Ariabudra v. Dorasami*, (1888) I. L. R., 11 Mad., 413, it was held by the Madras High Court that "an execution-creditor is not precluded from instituting an independent suit against the appellants (sons) to recover from them the balance of the judgment-debt which remained unsatisfied, to the extent of the value of the ancestral property which had come to their hands." That was a case in which a mortgagee, who had obtained a decree for sale against the father without joining the sons as parties, brought a suit against the sons to recover the [307] balance of the judgment-debt from their interests in the mortgaged property, the Court executing the decree having allowed the objections of the sons respecting the sale of those interests. That case is therefore very similar to the present case, and supports the respondent's contention that a suit like the present is maintainable. The learned Judges who decided that case repelled the plea that section 244 of the Code of Civil Procedure was a bar to it, and held that the limitation applicable to it was that prescribed for a suit to enforce a mortgage. I agree with the view of the learned Judges, and hold that a suit like the present, in which it is sought to enforce against Hindu sons their pious obligation in respect of their father's debts not tainted with immorality, is maintainable, whether the debts were or were not secured by a mortgage, and whether a decree in respect thereof has or has not been obtained against the father alone. We have not been referred to any ruling in which a contrary view has been held, and I think the principle of the unreported judgment of my brothers BLAIR and BURKITT in second appeal No. 426 of 1898, decided on 20th July 1898, to which the learned vakil for the respondents has invited our attention, to some extent favours the respondent's case.

As I have already said, the analogy of a decree against one of several joint promisors does not apply to a case of this description. The obligation of joint contractors has been held to be single and undivided, and the cause of action against them to be one and the same. It was observed by GARTH, C. J., in *Hemendro Coomar Mullick v. Rajendro Lali Moonshree*, (1878) I. L. R., 3 Cal., 353, "that the cause of action is exhausted and satisfied by a judgment being obtained by the plaintiff against all or any of the joint contractors whom he chooses to sue. If a plaintiff under such circumstances were allowed to sue each of his co-debtors severally in different suits, he would be practically changing a joint into a several liability." It has been held that where the

obligation is joint and several "a decree obtained against one of the promisors [308] without satisfaction is no bar to a suit against another."—[*Dhunput Sing v. Sham Soonder Mitter*, (1879) I. L. R., 5 Cal., 292]. The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father; and the creditor's cause of action against the father and the son is not a single cause of action which is exhausted upon a decree being obtained against one of them only. A judgment recovered against the father only does not therefore bar a suit against the son. The fact of the mortgaged property having been once sold by auction in execution proceedings against the father alone does not amount to a satisfaction of the decree, where, as in this case, a large part of the property sold has been taken out of the hands of the creditor, purchaser, by the sons on the ground that they were not joined as parties to the creditor's suit. As four-fifths of the property which the creditor purchased at auction in satisfaction of his debt has been decreed to the sons, and the creditor has thus been deprived of that portion of the property, his debt must be held to have remained *pro tanto* unsatisfied. And as it has not been established that the debt was tainted with immorality, the sons, defendants in this case, are liable for it. There may, it is true, be instances in which the interests of the father alone fetched at auction-sale a price sufficient for the complete satisfaction of the debt. In such a case there would be no debt of the father due to the creditor for which the latter might proceed against the sons. But it has not even been hinted that this is a case of that description. The plaintiffs were therefore entitled to claim the amount decreed to them. No objection was taken in the argument before us as to the form of the decree passed by the Court below. As no other point was argued before us, this appeal must fail and be dismissed with costs.

The objections under section 561 of the Code of Civil Procedure are not pressed and are dismissed with costs.

Aikman, J.—I concur.

Appeal dismissed.

NOTES.

[This was followed in (1901) 23 All., 355; (1907) 29 All., 544; (1902) 25 All., 162; (1907) 11 C.W.N., 403; 5 C. L. J., 315; (1907) 12 C. W. N., 107; 6 C.L.J., 612; (1906) 9 O. C., 350; (1908) 11 O. C., 334. In (1900) 22 All., 394 the correct form of decree in such cases is pointed out.

See also (1900) 22 All., 307; 25 Bom., 378; 34 All., 604; 33 Mad., 317 where the rule in *King v. Hoare* was considered.]

[309] *The 26th April, 1899.*

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Muhammad Hamid-ud-din.....Plaintiff
versus

Shib Sahai and others.....Defendants.*

Mortgage—Sale of mortgaged property under a decree other than a decree on the mortgage—Mortgage not disclosed—Effect of such non-disclosure on mortgagee's rights under his mortgage—Estoppel.

Held that a mortgagee who causes the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage lien is estopped for ever from setting up that lien

* First Appeal No. 52 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated the 11th December 1896.

against the title of a *bona fide* purchaser. *Agar Chand Guman Chand v. Rakhma Hanmant*, (1888) I.L.R., 12 Bom., 678, and *Dullab Sirkar v. Krishna Kumar Bakshi*, (1869) 3 B.L.R., 407, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

The Hon'ble Mr. Conlan and Mr. Amiruddin, for the Appellant.

Pandit Sundar Lal and Mr. J. Simeon, for the Respondent.

Blair and Burkitt, JJ.—This first appeal arises out of a suit in which one Hamid-ud-din claims possession of a $2\frac{1}{2}$ biswa share in certain muafi land and two sihams out of 40 sihams of mauza Mahesra. He also claims a declaration of his right and title to three sihams of the same milk in the possession of mortgagees. In 1871, Harsahai, the ancestor of the present defendants, brought a suit upon a hypothecation bond of 1865 and got a decree in 1871. In the year 1872 he obtained decrees upon two other hypothecation bonds. The decree of 1871 was a decree upon a bond given by one of two brothers in which he hypothecated a 5 biswa share in mauza Mahesra. The bonds upon which the decrees were obtained in 1872 were bonds executed by both brothers hypothecating the same shares. The decrees of 1872 were first put into execution and one-half of the hypothecated property was sold, the price of that half satisfying the two decrees. In 1879 Harsahai attached and sold in execution of a money decree the $2\frac{1}{2}$ biswas which remained unsold upon the execution of the previous [310] decrees and purchased them himself in the name of his son. He then proceeded to put into execution the decree of 1871, and in execution of that decree a proclamation of sale was made, and he put up for sale and himself purchased the one-half of the property which had been sold under the decree of 1872. The purchaser under the decree of 1872 is the plaintiff here. He now seeks to recover possession of that two-and-a-half biswas. It has been contended on behalf of the appellant that the Subordinate Judge has wrongly found against him upon two issues fatal to his case. He has found first of all, that his claim is barred by limitation, the defendant having been in possession of the property for more than twelve years. He has also found that the plaintiff, when he purchased the shares at the sale of 1872, had notice of the decree of 1871 held by Harsahai. The finding of limitation is apparently based upon no evidence, and such evidence as we have before us shows that within the period of twelve years the defendants have filed a suit in which they allege dispossession of themselves. That suit was filed against the present plaintiff for the profits he had, as was alleged, received during the period of such dispossession. Upon the question of notice, we find that the Judge relies upon evidence of certain payments made at a period years after the sale for satisfaction of some lien. It has been shown to us to demonstration by documents on the record that such payments did not refer to the lien of Harsahai, the right to enforce which is disputed in the present suit; and indeed proof of knowledge at any time subsequent to the sale will be no proof of knowledge at the time of sale. Our attention has been called to two cases which seem to us accurately in point. The case of *Agar Chand Guman Chand v. Rakhma Hanmant*, (1888) I. L. R., 12 Bom., 678, and the case of *Dullab Sirkar v. Krishna Kumar Bakshi*, (1869) 3 B. L. R., 407. In those cases it was held that a decree-holder who, having a prior incumbrance, puts up for sale in execution of another decree such property without notifying that he has such a lien, is estopped for ever from setting up that lien against the title of a *bona fide* purchaser. Those rulings are not [311] merely an authority, but they are founded upon elementary principles of equity. It is manifest in this case that the sale of the property as unincumbered was a *mala fide* sale and fraud upon all intending purchasers.

For these reasons we allow the appeal, set aside the decree of the Court below, and decree the suit of the plaintiff in terms of the prayer in the plaint, with costs.

Appeal decreed.

NOTES.

[The rule of estoppel was applied in (1900) 14 C. P. L. R., 17; (1906) 2 N. L. R., 106. See also (1907) 35 Cal., 61; (1915) 37 All., 165, according to which a sale in contravention of sec. 99, T. P. A., 1882, is not a nullity.]

[21 All. 311]

The 27th April, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Sheodhyan and another.....Objectors

versus

Bholanath and others.....Opposite Parties.*

*Civil Procedure Code, section 311—Execution of decree—Sale in execution—
Sale without previous attachment—Material irregularity.*

Held that the absence of an attachment prior to the sale of immovable property in execution of a decree amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. *Ram Chand v. Pitam Mal*, (1888) I. L. R., 10 All., 506; *Ganga Prasad v. Jag Lal Rai*, (1889) I. L. R., 11 All., 333; *Harbans Lal v. Kundan Lal*, Weekly Notes, 1898, p. 212; and *Tasadduk Rasul Khan v. Ahmad Husain*, (1893) I. L. R., 21 Cal., 66, referred to. *Mahadeo Dubey v. Bholanath Dichit*, (1882) I. L. R., 5 All., 85, distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gokul Prasad, for the Appellants.

Munshi Ram Prasad, for the Respondents.

Banerji and Aikman, JJ.—This is an appeal from an order refusing to set aside an auction-sale of the property of the appellants, held in execution of a decree obtained by the respondents against the appellants. It appears that a portion of the said property had been attached before judgment, that after the decree was passed an application for execution was made, and that thereupon the remainder was also attached in the manner provided by law. The property was then sold, but the sale was set aside on the ground of material irregularity in publishing and conducting it. This was on the 23rd of April 1898. On that date the Court made [312] a further order that the decree-holders should take further steps on the 25th of that month. On the 25th the decree-holders do not appear to have made any further application, and thereupon the case was removed from the file of pending cases. On the 6th of May following the decree-holders presented another application for execution and prayed for the sale of the six villages which have now been sold. The property was not attached a second time, but the usual proclamations of sale were issued, and the sale actually took place on the 20th of August 1898. We notice that, during the pendency of the execution proceedings and before sale, the judgment-debtors filed an application on the 11th of August 1898, in which they stated that the property had been attached. This application was made in connection with

* First Appeal No. 6 of 1899, from an order of Maulvi Muhammad Mazhar Husain, Subordinate Judge of Moradabad, dated the 7th January 1899.

the decree-holders' prayer for the arrest of the judgment-debtors. After the auction-sale of the property on 20th of August 1898, the judgment-debtors applied to have the sale set aside on various grounds, one of which was that after the case had been struck off the file on the 25th of April 1898, the attachment of the property had come to an end; that the sale of the 20th of August 1898 was effected without a fresh attachment; and that the sale was consequently illegal and void. The Court below overruled the objections and confirmed the sale. It found that the judgment-debtors had not sustained any injury in consequence of the irregularities alleged by them. This finding has not been questioned in the appeal before us, so that we may take it that the judgment-debtors have not suffered any substantial loss within the meaning of section 311 of the Code of Civil Procedure. It is urged before us that, by the striking off of the execution case on the 25th of April 1898, the attachment which had been placed upon the property had determined, and that by reason of the property not being attached a second time there was an illegality in the sale which vitiated the sale. On the question of the effect which the striking off of an execution case has upon an attachment of property made in the case, there is a conflict of authority, but in the view which we take of this case we do not think it necessary to enter into a consideration of that question. In our opinion the [313] absence of attachment, assuming in this case that the property was sold without a previous attachment which subsisted at the date of sale, did not amount to anything more than a material irregularity in the publishing of the sale. An attachment is a step towards the sale of the judgment-debtor's property. The object of an attachment is to bring the property under the control of the Court, with a view to prevent the judgment-debtor alienating it, and thereby preventing its sale in execution of the decree. In the case of immovable property, one of the requirements of the law for perfecting and attachment is that the order of attachment should be publicly proclaimed. The main object of the proclamation of the order is to give publicity to the fact that the sale of the particular property attached is in contemplation, and to warn all persons against taking a transfer of it from the judgment-debtor to the prejudice of the rights of the decree-holder enforceable under the decree. The publication of the attachment is thus a step leading up to the publication of the sale, the actual proclamation of sale being a notice to the public that the sale is to take place upon a particular date. The absence of attachment may therefore be deemed to be a material irregularity in the publishing of the sale. That was the view taken in the case of *Ram Chand v. Pitam Mal*, (1888), I. L. R., 10 All., 506. We were much pressed with the Full Bench decision in *Mahadeo Dubey v. Bholanath Dichit*, (1882), I. L. R., 5 All., 86; but it seems to us that the principle of the ruling of their Lordships of the Privy Council in *Tasadduk Rasul Khan v. Ahmad Husain*, (1893), I. L. R., 21 Cal., 66, makes the decision in *Mahadeo Dubey v. Bholanath Dichit* inapplicable to the present question. In that case their Lordships of the Privy Council held, with reference to a proclamation of sale issued in violation of the provisions of section 290 of the Code of Civil Procedure, that that was nothing more than a material irregularity, and did not *ipso facto* vitiate the sale, as had been held by this Court in *Ganga Prasad v. Jag Lal Rai*, (1889) I. L. R., 11 All., 333. The same principle applies [314] to the question before us, and this seems to have been the opinion of the learned Judges who decided the case of *Harbans Lal v. Kundan Lal and others*, Weekly Notes, 1898, p. 212. In this view it is not necessary to consider the effect of section 490 of the Code of Civil Procedure or of the striking off of the execution case on the 25th of April 1898 upon the question of attachment. As the absence of attachment was, in our opinion, a material irregularity in publishing the sale, and as it has not been proved in this case that such irregularity

resulted in substantial injury to the judgment-debtors, the Court below was right in refusing to set aside the sale. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[In (1911) 86 Bom., 156, a sale without an attachment was treated as a nullity.

In (1907) 84 Cal., 811; 5 C.L.J., 687, the non-service of the notice under the Public Demands Recovery Act was held to vitiate the sale.]

[21 All. 314]

The 2nd April, 1899.

PRESENT :

MR. JUSTICE BLAIR, AND MR. JUSTICE BURKITT.

Chetan Charan Das, and others.....Defendants

versus

Balbhadra Das.....Plaintiff.*

*Parties to a suit—Death of plaintiff after hearing but before judgment—
Judgment given by Court in ignorance of plaintiff's death— Judgment
and decree valid—Doctrine of nunc pro tunc.*

The successful plaintiff in a suit died a few days after the hearing of the suit had been concluded and judgment reserved. Unaware of the death of the plaintiff, the Court proceeded to deliver judgment and pass a decree in favour of the deceased plaintiff. *Held*, that, nothing remaining to be done by the parties on the day when judgment was reserved, the judgment should read as from that date, and the decree was a valid decree. *Cumber v. Wane*, 1 Smith, L. C., 10th Ed., 325; *Ramacharya v. Anantacharya*, (1895) I. L. R., 21 Bom., 314, and *Surendro Keshub Roy v. Doorgasoodery Dossee*, (1892) I. L. R., 19 Cal., 513, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *E. A. Howard* and Munshi *Ram Prasad*, for the Appellants.

Mr. *D. N. Banerji*, Babu *Jogindro Nath Chaudhri* and Babu *Satya Chandar Mukerji*, for the Respondent.

[315] **Blair and Burkitt JJ** :—The first of the long list of the grounds of appeal in this case which was argued before us was the 11th. It is couched in the following words :—“ Because the decree in the suit was illegally passed after the death of the plaintiff without any person being brought on the record as his representative.” The facts are, that the trial was concluded, arguments were heard, and the judgment was reserved on the 5th of September 1896. The plaintiff died on the 9th of September 1896. He was then absent in Orissa, and his death was unknown to any of the parties or to the Court. Judgment was delivered, and the decree was passed on the 15th of September 1896. It was argued on behalf of the appellants that the suit abated from the moment of the death of the plaintiff, and that the Court was incompetent to pass a decree, no representative of the deceased having been put on the record. This is a matter which has long been disposed of in England by the application of a large general principle of law *actus curie nemini facit injuriam*. That principle was applied in the leading case of *Cumber v. Wane*, 1 Smith, L. C., 10th Ed., 325. A defendant in error died after the time when the Court took time to consider. It was prayed that the judgment might be entered *nunc pro tunc*; in other words, that the judgment should be dated as of the day when the

* First Appeal No. 50 of 1897, from a decree of Maulvi Saiyid Muhammad Sirajuddin, Subordinate Judge of Agra, dated the 15th September 1896.

Court reserved its decision, and to that prayer the Court acceded. Such has been the invariable practice in England ; and that practice finds expression in the rules framed under the Judicature Act of 1875. It seems to us that the decision to which we have referred and the subsequent practice of the Courts are consistent with justice and good sense. Nothing was left to be done by the parties from the moment the judgment was reserved. Any delay which took place was the delay of the Court, and we are not surprised to find that the English practice has been followed by the Courts in this country, notably in the case of *Ramacharya v. Anantacharya*, (1895) I. L. R., 21 Bom., 314. No case to the contrary has been cited before us. A similar view has been taken by the [316] Privy Council in the case of *Surendro Keshub Roy v. Doorgasoodery Dossee*, (1892) I. L. R., 19 Cal., 513. We think that that decision amounts to an authority which this Court is bound to follow. We follow it accordingly. Our ruling in this case must be taken to be strictly limited to its facts, namely, that everything to be done by the parties had been done, and nothing remained except the delivery of judgment, which had been reserved by the Court. We, therefore, over-rule this ground of appeal.

Appeal dismissed.

NOTES.

[See, likewise, (1892) 19 Cal., 513; (1905) 9 C.W.N., 710; (1907) 12 C.W.N., 590; (1897) 21 Bom., 314; (1903) 26 Mad., 101; (1909) 32 Mad., 167. The C.P.C., 1908, O. 22, r. 6 gives effect to these rulings by providing that there shall be no abatement by reason of death after hearing.

See also (1908) 30 All., 505, where the case of arbitration proceedings was distinguished.]

[21 All. 316]

The 29th April, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Beni Prasad Kunwar.....Defendant

versus

Mukhtesar Rai and others..Plaintiffs.*

Civil Procedure Code, Section 244—Execution of decree—Representatives of judgment-debtor—Death of party to suit before final decree in appeal—Subsequent proceedings in execution taken against representatives of such party—Sale in execution—Suit to set aside sale—Estoppel.

A decree was given to the defendant (then plaintiff) in 1856 for possession of land and mesne profits against numerous defendants, including one Dawan Rai. Some of the judgment-debtors, including Dawan Rai, appealed to the Sadr Diwani Adalat, but before the decree of the Sadr Diwani Adalat was passed, Dawan Singh died. No application was made to put any representative of Dawan Rai on the record ; but in 1881 (the amount of the mesne profits payable under the decree having been finally determined in 1877), certain persons were made parties, as representatives of Dawan Rai, to various proceedings in execution of the decree for mesne profits, which ended in the sale of certain property which had been of Dawan Rai in his lifetime. Subsequently the said representatives of Dawan Rai brought a suit to recover the property sold as above described on the ground that they were no parties to the decree under execution.

Held, that the plaintiffs were entitled to bring such a suit, and it was not barred by the Provisions of section 244 of the Code of Civil Procedure. *Radha Prasad Singh v. Lal Sahab Rai*, (1890) I. L. R., 13 All., 53 : s. C., L. R., 17 I. A., 150, referred to.

* First Appeal No. 81 of 1896, from a decree of Rai Kishan Lal, Subordinate Judge of Ghazipur, dated the 21st September 1895.

Held, also, that as it had not been shown that by reason of the plaintiffs not objecting that they had been improperly brought on to the record of the [317] execution proceedings, the defendant had been induced to accept less favourable arrangement for the satisfaction of the decree that he might otherwise have done, there was no estoppel against the plaintiffs.

THE facts of this case sufficiently appear from the judgment of the Court and the judgment referred to therein.

The Hon'ble Mr. Conlan, Munshi Ram Prasad and Pandit Sundar Lal, for the Appellant.

Munshi Gobind Prasad, for the Respondents.

Burkitt, J.—The suit out of which this appeal arises was brought by the plaintiffs to recover possession of certain immovable property which was sold by public auction on August 20th 1889, in execution of a decree held by the respondent as representative of her deceased husband Maharaja Radha Prasad Singh. There were originally three plaintiffs to the suit, namely, Mata Dayal Rai, Musammat Prayagi Kunwar and Musammat Bartana Kunwar. The suit of the third was dismissed by the lower Court. She is not concerned in this appeal. A decree was given in favour of Mata Dayal and of Musammat Prayagi. The present appeal is against that decree, the sons of Mata Dyal who died after decree having been substituted for him as respondents. The early history of this litigation, which has now lasted since 1855, will be found fully reported in the judgment of their Lordships of the Privy Council in the case of *Radha Prasad Singh v. Lal Sahab Rui*, (1890) I. L. R., 13 All., 53 : s. c., L. R., 17 I. A., 150. The subsequent facts are, that the decree of March 1st 1877, by which the mesne profits due to the Maharaja were for the first time ascertained was, after many interlocutory proceedings arising out of objections taken by the parties whom it was sought to make liable under the decree of March 1st 1877, transferred to the Collector of Gt azipur for execution under the provisions of section 320 and the following sections of the Code of Civil Procedure in August 1884. The Collector, with the consent of the parties against whom the decree was being executed, sold some 13 villages to the Maharaja for Rs. 75,000 in reduction of the decree, and the Maharaja consenting to accept Rs. 6,50,000 (about [318] one half of the amount due) in full discharge of the decree to him, the Collector made, with the consent of the parties against whom the decree was being executed, arrangements for paying off the Rs. 6,50,000 by instalments during a term of twenty years. This arrangement was fairly successful for a couple of years ; but eventually the persons against whom the decree was being executed interfered with the collections, themselves refused to pay and instigated their tenants to withhold their rents from the official appointed by the Collector to manage the estate. The result was, that by order of the Commissioner the attempt to save the attached property from sale was abandoned, and a sale under the decree of March 1st 1877, took place on August 20th 1889. The sale produced only Rs. 6,02,500—less than half the amount of the decree with interest.

Among the parties whose property was sold and purchased by the decree-holder, the Maharaja, were the plaintiff Mata Dyal Rai now represented by his three sons respondents) and Musammat Prayagi Kunwar now also represented since her death by the sons of her co-plaintiff Mata Dyal. The object of their suit has already been set forth. At the hearing of the suit several matters were argued and adjudicated on with which we have no concern now. The plea on which this appeal has been fought is that the plaintiff had no concern whatever with the litigation till they were brought in during 1881 as parties who were liable under the ascertainment of mesne profits decree of March 1st 1877.

They were brought in then as representatives of Dawan Rai. Now there can be no doubt that Dawan Rai was one of those impleaded in 1855, and that he was one of the 54 defendants who appealed to the Sadr Diwani Adalat against the decree of the District Judge of April 1856.

But it is alleged for the plaintiffs, and is now admitted by the respondents' learned counsel to be the fact, that Dawan died in 1862. The final decree of the Sadr Diwani Adalat on review was passed on April 7th 1866, four years after Dawan's death. No one was brought on the record of the case before the Sadr [319] Diwani Adalat as his representative, and it is admitted that no one representing Dawan was impleaded in the proceedings which terminated in the mesne profits decree of March 1st 1877. The plaintiffs here were brought on as Dawan's representatives some time in 1881, some four years after the decree of 1877. Now on the above state of facts, it seems to me to be hardly possible to distinguish the case of these respondents from that of the defendant Lal Sahab Rai in the case before their Lordships of the Privy Council mentioned above. Indeed the case of these respondents seems stronger, for though their ancestor Dawan Rai was a party to the decree in favour of the Maharaja, passed in 1856, and to the Sadr Diwani Adalat's decree in appeal in 1859, he was dead before the final decree of the Sadr Court (the decree on review) was passed in April 1866, and no one was brought on to represent him in the mesne profits ascertainment proceedings. These plaintiffs accordingly are *prima facie*, not bound by either the decree of April 1866 or the decree of March 1877, neither they nor any person whom they represent having been parties to either of those decrees. It was on that ground that the lower Court gave plaintiffs a decree.

For the appellant it was contended that the suit was not maintainable, that it was forbidden by the provisions of section 244 of the Code of Civil Procedure, and Mr. Conlan also with great earnestness contended that the respondents had estopped themselves from instituting such a suit.

Now as to section 244 the argument is that these plaintiffs when brought in in 1881 as representative judgment-debtors, liable under the decree of 1877, should at once have raised the objection that they were not then brought on the record to represent any one who had been a party to the decree of 1877. Had they raised the plea then it may be they could have been successful; but it is contended they are too late now, and cannot raise it in a separate suit. Reliance is placed for appellant on the last clause of section 244. It seems to me, however, that that clause is not in point. It clearly refers to a case where there is a [320] dispute between two or more persons as to which of them is the representative of a person who had been a party to the suit. It cannot, I think, be held to include a case in which there could be no representative, as there was no party to be represented, and therefore no question as to who was the representative. Sections 367 and 368 of the Code were also referred to by the learned counsel, but I cannot see how they affect the question.

The chief argument of the learned counsel was that the respondents had estopped themselves by their conduct from instituting the suit. He pointed out that they had submitted in silence from 1881 to 1889 to being treated as judgment-debtors liable under the decree of March 1st 1877, that they had never taken any objection to the position assigned to them, that they jointly with hundreds of other judgment-debtors had put in many petitions in the execution proceedings after 1881, in the Shahabad and the Ghazipur Courts, making such objections as are usual in the case of judgment-debtors liable under the decree then being executed, *e.g.*, as to the amount calculated to be due on the decree and the like, but that these plaintiffs had never, in any of those

numerous petitions, given the slightest hint that they really were not the representatives of any judgment-debtor and were consequently not liable under the decree of 1877 ; that they similarly joined in other petitions to the Collector when the execution proceedings were transferred to him, and joined in the proposal to the Collector that he should take over and manage the judgment-debtor's property holding it till the decree was paid off, and that in all these petitions and proceedings the plaintiffs remained silent as to their real position, and forebore to allege that they did not represent any defendant judgment-debtor liable under the decree of March 1st 1877. The estoppel is then put in this way, that by the continuous silence of the plaintiffs from 1881 to 1889, and their submission without objection to the execution proceedings taken against them as representatives of Dawan (a person who was not a judgment-debtor), they had permitted the decree-holder [321] to believe a thing to be true, which was not true, namely, that these plaintiffs were judgment-debtors liable under the decree of 1877 as representatives of Dawan Rai, and to act upon that belief. The act which the decree-holder is said to have done in consequence of that belief is that he consented to forego his claim to about half the amount due to him under the decree of March 1st 1877, amounting to more than 15 lakhs, and to accept a transfer of villages valued at the sum of Rs. 75,000 and a payment of 6½ lakhs of rupees to be paid by annual instalments of Rs. 34,240 in nineteen years, the property of the judgment-debtors to be placed under the Collector's management.

It is contended that if the decree-holder had known that these plaintiffs were not liable to him under the decree of 1877, he would not have accepted this arrangement. In support of this argument it is pointed out that these plaintiffs joined with some hundreds of other persons liable under the decree in praying the Collector to take action to save the property from sale by taking it under his management. It is also said that had he known of the true position of these plaintiffs, the decree-holder would have insisted on immediate sale. Neither of these matters appears to me to have any weight. The assent of the person against whom the decree was being executed to the Collector taking their properties into his hands, was unnecessary and superfluous, such assent not being necessary, and as to the decree-holder not insisting on an immediate sale, it is sufficient to say that it was not in his power so to insist, everything depending on the discretion of the Collector. As to the abandonment of half his claim by the decree-holder, I am unable to see that his action in that matter was in any way influenced by the belief that these plaintiffs (who are only two among some hundreds) were liable to him under the decree of March 1877. Indeed it appears that it was pressure from the Collector, and not any such belief that induced the decree-holder to forego half his claim. For I find it recorded by [322] the Collector in the preamble to the conveyance by which he sold 13 villages to the Maharaja for Rs. 75,000 that on inquiry it was found that the profits were not sufficient for the satisfaction of the decree, and the sale of the whole property must take place, the amount due exceeding 15 lakhs of rupees. The document then proceeds :-- "After discussion I induced the decree-holder to consent to agree to a transfer in his favour of the undermentioned mahals belonging to the judgment-debtors in consideration of Rs. 75,000 and to payment to him in 19 years or earlier of Rs. 6,50,000 out of the profits of their other property, which should be placed under the Collector's superintendence, by annual instalments of Rs. 34,210-8-5 from 1293 Fasli." This deed is dated February 22nd 1886, and is record No. 409 in First Appeal No. 103 of 1896. So it seems to me that

that which really induced the decree-holder to abandon half his claim was pressure put on him by the Collector and the knowledge that it was not possible to obtain full satisfaction of the decree, and not the facts that these plaintiffs had not disclosed their true position. That it was impossible to satisfy the decree in full is shown by the fact that at the sale on August 20th 1896, the attached property, when put up to auction, fetched little more than six lakhs. The relinquishment of nearly half his claim under the decree of course was no longer effectual when the management of the estate by the Collector had to be abandoned owing to the contumacious resistance offered to the collection of rents by the judgment-debtor.

Further, I would add that our attention was not invited to any evidence on the record tending to show that the decree-holder as a matter of fact temporarily abandoned half his rights under the decree because he believed that these two respondents were liable to him under that decree. We were asked to infer that such was the case. I am not prepared to draw such an inference. I see no sufficient materials for it anywhere on the record. I do not believe that if the decree-holder had known of the true position of these plaintiffs he would [323] for that reason have refused to abate his demands under the decree. The reason why he did so was, I believe, (1) because the Collector pressed him to do so, and (2) because he saw no chance of his ever being able to get 15 lakhs out of the judgment-debtor's property. And I would add that even if these respondents were aware of their true position during the execution proceedings (which, in my opinion, is most improbable), I fail to see that it was incumbent on them to have informed the Maharaja of it. They owed him no such duty. It was he who had improperly forced them into Court as representatives of a non-existent judgment-debtor for the purpose of compelling them by seizure of their property to discharge a non-existent debt.

I do not think it necessary to enter into the question as to whether by law an estoppel could arise under the above circumstances. I find as a matter of fact that there was no estoppel.

For the above reason I am of opinion that this appeal fails. I would dismiss it with costs.

Blair, J.—I concur.

Appeal dismissed.

NOTES

[See also (1905) 32 Cal., 296 ; (1902) 26 Bom., 317, as regards sale in execution, and (1905) 2 N.L.R., 34, as regards estoppel.]

[31 All. 323]

The 29th April, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Beni Prasad Kunwar.....Defendant

versus

Lukhna Kunwar and others.....Plaintiffs.*

Execution of decree—Sale in execution—Suit to recover property sold on grounds which might have been made grounds for appeal against the original decree—Representative of judgment-debtors—Civil Procedure Code, section 244.

When a party to a decree and subsequent proceedings in execution thereof has suffered execution to proceed and property to be sold without appealing, he cannot sue to recover the property so sold on grounds which might have been taken in appeal from the decree or from orders in execution.

Held also, that the question whether a person alleged to be a representative of a deceased party to a suit is such representative and also the question whether property against which execution is sought in the hands of the [324] representative of a deceased party was in fact the property of such deceased party and not the separate property of the representative, are questions to be decided under section 244 of the Code of Civil Procedure and not by separate suit. *Rajrup Singh v. Ramgolam Roy*, (1888) I. L. R., 16 Cal., 1; *Chowdhry Wahed Ali v. Mussamat Jumaee*, (1872) 11 B. L. R. 149; and *Seth Chand Mal v. Durga Dei*, (1889) I. L. R., 12 All., 313, referred to.

THE facts of this case appear from the judgment in this case and in F. A. No. 81 of 1896, *supra* p. 316.

The Hon'ble Mr. Conlan, Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the Appellant.

Munshi *Gobind Prasad*, for the Respondents.

Burkitt, J.—This is one of the many cases now pending in appeal before us between the Maharani of Dumraon on the one side and the Narhi taluqa people on the other. The history of the litigation will be found in the judgment in F. A. No. 81 of 1896. (See p. 316 *supra*).

This suit was instituted by a large number of plaintiffs to recover possession of their interest in the property which was sold by public auction on August 20th 1896, and also to recover their shares in the 13 villages sold by the Collector to the decree-holder on February 22nd 1896.

The claims of a large number of the plaintiffs were dismissed by the lower Court. This appeal is against the decrees given to some of them. The learned counsel for the appellant abandons the appeal as to Nos. 23, Musammat Lukhna Kunwar, and 25, Din Dyal, but supports it against the others. The first case is that of No. 24, Swarath Rai. This man, it appears, was not a party to the litigation up to 1866, though his elder brother, Ahlad, was a party to it. It is admitted, however, that Swarath was impleaded in the proceedings for ascertainment of mesne profits which terminated in the decree of March 1st 1877, that he was one of the parties against whom that decree was passed,

* First Appeal No. 76 of 1896, from a decree of Rai Kishun Lal, Subordinate Judge of Ghazipur, dated 7th December 1895.

and that he continued to take part in all the execution proceedings subsequent to the decree of March 1st 1877. But it is contended that that decree was wrongly passed against him, in that he was impleaded [326] personally, and not as representing any of the parties to the decree of 1866, in the proceeding for ascertainment of mesne profits which culminated in the decree of March 1st 1877. Further it is alleged that that decree was passed *ex parte* against him, as no notice of the proceedings for ascertainment of mesne profits has been served on him. It is contended that for this reason the decree of March 1877 is bad and can be set aside by a regular suit. Further it is contended that all the execution proceedings taken on the decree of March 1st 1877 are bad under the following circumstances.

When the amount due for mesne profits was finally ascertained on March 1st 1877, the Court ordered the decree-holder to pay in the sum of Rs. 2,000 deficient Court-fee duty payable on the ascertained amount of mesne profits for which execution was about to issue, to be paid into Court within three days. The decree-holder failed so to pay, and the case was struck off on March 15th, but was reinstated a few days afterwards on payment of the deficient court-fees, and execution then proceeded. It is contended for the respondent that the Court had no power to reinstate the execution proceedings, and that under section 11 of the Court Fees Act, No. VII of 1870, the Court had no option in the matter, the deficient duty not being paid within the time limited by its order, and was bound to have dismissed the suit, *i.e.*, to have rejected the execution application. As an authority for this contention the case of *Kewal Kishan Singh v. Sookhari*, (1896) I. L. R., 24 Cal., 173, is relied on.

I am of opinion that none of the points set forth above can be raised in a separate suit. It is admitted that the decree of March 1st 1877, was passed against Swarath among a host of others. If he were improperly made a defendant in the case in which that decree was given, his remedy was by an appeal against the decree, an appeal which must have been successful if, as he says, he was not one of the parties whose liability to contribute to the mesne profits had been declared by the decree of 1866. Again, if it be, as he says, that the decree was passed against him *ex parte* without [326] notice, then the law provides machinery by which the decree could be set aside. But this respondent Swarath neither appealed from the decree against him which now has become final, nor has he made any attempt to have it set aside as being *ex parte*. In my opinion a suit to set aside the decree of March 1877, which is really the object of the present suit, cannot be maintained, the proper procedure being by appeal against that decree. The plea raised on section 11 of the Court Fees Act is open to the same objection. It is one which Swarath should have taken in appeal. If that plea, and also the plea as to want of notice of the proceedings be well founded, they would have lent most valuable support to an appeal against the decree of March 1st 1877, but they are pleas which should have been taken in appeal against that decree and not by separate suit against proceedings taken in execution of that decree years after it had become final. The case cited from 24 Cal., 193, in no way can be considered an authority in favour of the respondent, for though the judgment does hold that the suit ought, under the circumstances, to have been dismissed, it must be noticed that the appeal which the High Court was hearing was an execution appeal against an order passed in the course of the execution of the decree. Had the respondent here instituted an appeal from the order of the Court reinstating the proceedings on payment of the deficient Court fees duty, very probably he would have been successful. But as he did not institute such an appeal, I am of opinion that he cannot now urge that matter in a suit brought practically to set aside the decree of March 1st

1877, a decree which he might have disputed, and probably with success, by appealing. In my opinion for the above reason the decree of the lower Court is wrong as to this respondent Swarath. I would allow the appeal as against him with costs and direct his suit to stand dismissed.

Pargas No. 46.—This respondent was brought into the execution proceedings in 1884 as representative of one Ram Hit, deceased, who admittedly was a party to all the litigation including the decrees of 1856 and 1877. It is contended that he was improperly [327] made a representative of Ram Hit. That probably is so, as Ram Hit left male issue, and Pargas is only a distant relative. But the question as to whether he was or was not properly impleaded as Ram Hit's representative is one which cannot be raised by a separate suit. It is a question which must be decided under section 244 of the Code of Civil Procedure in the manner laid down by the last clause of that section. It is perfectly clear that Pargas, when he was impleaded as representative of Ram Hit, did not raise any question as to the propriety of the order impleading him as such. There was therefore no occasion for the execution Court either to decide any question itself or to stay the execution pending its decision in a separate suit. This suit is not the separate suit referred to in section 244, as it has not been instituted to decide the question as to who is Ram Hit's legal representative, but has been instituted after execution had been exhausted to set aside the decree on which that execution was had. It is urged on behalf of Pargas that he is liable only at most for any assets of Ram Hit which he may have received (section 234 of the Code of Civil Procedure), and that the property which has been attached and sold is his own individual property, and that he did not obtain it as heir of Ram Hit. To this plea the answer is that the question as to whether Pargas held the property in dispute as his own property, and so not liable to be taken in execution to satisfy a decree against Ram Hit, or whether he held it as assets belonging to Ram Hit's estate, and therefore liable to be taken under the decree, is a question which must be decided under section 244 by the Court executing the decree and not by a separate suit.

The law on this point has been very clearly and unmistakeably laid down by the Calcutta High Court in the case of *Rajrup Singh v. Ramgolam Roy*, (1888) I. L. R., 16 Cal., 1, which is founded on the judgment of their Lordships of the Privy Council in *Chowdry Wahed Ali v. Mussamut Jumae*, (1872) 11 B. L. R., 149, and in a Full Bench decision of this Court in *Seth Chand Mal v. Durga Dei*, (1889) I. L. R., 12 All., 313, [328] which follows and approves of the case in 16 Cal., 1, and overrules certain cases to the contrary in this Court. In those cases it is laid down that it has been settled by a series of cases that questions arising between the decree-holder and the representative as to whether the attached property has come to the representative as such, and so is liable to be taken in execution, or is the representative's own property derived from some other source, and therefore not liable to be taken in execution, must (under section 244 of the Code of Civil Procedure) be decided in the execution proceedings and not by a separate suit. I must therefore hold that Pargas cannot be allowed in this suit to plead that the property sold as against him as representative of Ram Hit was his own property and not derived from Ram Hit. I would for the above reasons allow this appeal against Pargas with costs and would direct that his suit be dismissed.

I next take up the case of No. 52, Aprup Rai, No. 53, Nanku Rai, No. 54, Deoki Rai, and No. 55, Musammatt Ghurbasi Kunwar. These persons are exactly in the same position as the respondents in F. A. No. 81 of 1896. They were brought on in the execution proceedings as representatives of one Radha Rai. The latter was a party to the decree of 1866, but not to the decree of

March 1st, 1877. No one representing him was a party to the latter decree. Therefore for the reasons given by me in F. A. No. 81 of 1896, I would dismiss the appeal with costs against these respondents as far as their interest in the property sold at the auction sale of August 20th, 1896, is concerned as to their interest in the 13 villages transferred to the decree-holder by the conveyance of February 13th, 1886, executed by the Collector on their behalf with their consent, the appeal must be allowed, and that portion of their claim dismissed. Before they could succeed in this matter it is necessary that these respondents should have obtained a decree, formally setting aside the conveyance to which they had assented.

Blair, J.—I concur.

Decree modified.

[329] *The 3rd, May, 1899.*

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Muhammad Munawar Ali..... ..Defendant

versus

Rasulan Bibi.....Plaintiff.*

Muhammadan Law—Waqf—Illusory dedication—Settlement for benefit of descendants of the settlors.

Held, that a mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the settlors in perpetuity and not dedicated in substance to charitable uses is not sufficient to constitute a good and valid waqf. *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry*, (1894) L. R., 22 I. A., 76, at p. 87; *Kaleloola Sahib v. Naseeruddeen Sahib*, (1894) I. L. R., 18 Mad., 201, and *Sheik Mahomed Ahsanulla Chowdhry v. Amarchand Kundu*, (1889) I. L. R., 17 I. A., 28, at p. 37, referred to.

THE facts of this case are fully stated in the judgment of BURKITT, J.

The Hon'ble Mr. T. Conlan, Mr. B. F. O'Connor and Pandit Sundar Lal, for the Appellant.

Maulvi Ghulam Mujtaba and Babu Satya Chandar Mukerji, for the Respondent.

Burkitt, J.—This is an appeal from a decree of the Subordinate Judge of Jaunpur in favour of the respondent for recovery of her share according to Muhammadan law in the properties left by her father and her mother. The defendant appellant is her elder brother. The facts out of which this case arose are as follows:—

Syed Muhammad Kaim Ali, father of the parties, and Musammat Aliyat-un-nissa Bibi, their mother, executed on March 9th, 1881, an instrument called a waqf-namah, the nature and effect of which will be considered further on. The mother died on April 19th, 1881, leaving her surviving as her heirs her husband, her two sons and four daughters. Her husband survived till February 9th, 1895, when he died leaving the same heirs, except one daughter,

* First Appeal No. 30 of 1897, from a decree of Babu Brijpal Das, Subordinate Judge of Jaunpur, dated the 16th September 1896.

Musammat Asma, who pre-deceased him. On the death of Syed Kaim Ali, his elder son, the appellant, took possession as mutawalli of all the properties mentioned in the waqf-namah [330] and of other small properties not included in it. The present suit instituted on February 14th, 1896, is one of several suits instituted against him by his younger brother, by his sisters, and by a purchaser from the husband of the deceased sister to recover the shares in that property to which the Muhammadan law entitles them. In her plaint the plaintiff in this suit, Musammat Rasulan, denied that the waqf-namah was a valid deed of endowment, and described it as "a deed of arrangement which he (Syed Kaim Ali) had executed to preserve his reputation and dignity to prevent a partition of the property among the persons entitled, and to reserve to himself his personal interest." The plaint further alleges that during the life time of the settlors "there was no indication of any real charitable endowment." These contentions are explained in detail in the 5th and 6th paragraphs of the plaint. The defendant in reply set up the waqf-namah as a bar to the suit. He also pleaded that the suit for a share in Musammat Aliyat-un-nissa's property was barred by limitation, she having died more than twelve years before the suit, and also that before such a suit could be maintained the waqf-namah must be formally set aside. He also raised a plea of estoppel.

The Subordinate Judge gave the plaintiff a decree, holding that no valid and legal waqf of the entire corpus of the property had been executed so as to prevent its being inherited by the heirs according to their legal shares. Hence this appeal. Several pleas were taken in the written memorandum of appeal. At the hearing the only matters contended for were that the waqf-namah was a good and effectual endowment of the property mentioned in it, and that a suit to recover a share of the property which had been of Musammat Aliyat-un-nissa in her lifetime was barred by the limitation rule contained in Art. 144 of the second schedule to the Limitation Act. The plea that section 91 of the Limitation Act barred the suit was expressly abandoned at the hearing by the appellant's learned counsel, and it was also stated for the appellant that no question of estoppel was pressed in the [331] appeal. There was also a plea as to the movable property, but that matter, though not expressly abandoned, was but feebly pressed. There is really nothing in it, the evidence being quite worthless. We overrule it.

I take up first the principal question, namely, is the document on which the defendant relies a good and valid waqf-namah? It will be necessary to set out in some detail the objects and provisions of that instrument. It commences with an invocation of God, and then sets out the names of the waqifs or settlors. The object aimed at is next declared in the clearest and most unequivocal language. The settlors, after reciting that they are cousins as well as husband and wife, and that they are advanced in age, proceed as follows:—"It is absolutely necessary in order to secure the love of each individual among friends in this world and to earn merit in the next world that sufficient provision be made for the thorough management of the entire property and of the imlaks belonging to the executants and the income and the profits therefrom (which, taken as a whole, form a small estate), so that the property itself and the principal wealth of the estate may always be preserved from all manner of partition, division, transfer, and succession, and the management thereof in whole and in part should remain for ever in the hands of one person, whereby (our) *name and memory and the pomp and dignity of the estate may continue.*" Now these words cannot be taken to have any meaning other than that the intention of the settlors was to establish a perpetuity, so that their estate should not be divided among their heirs but should always remain

unimpaired. But Syed Kaim Ali being a practising vakil of some reputation, probably knew that that object could not be effected under the ordinary law. This is frankly admitted in the next sentence which runs as follows :—“Whereas the attainment of the above object is impossible except by a waqf as directed by the Muhammadan law, we the executants, of our free will and consent, without coercion or pique, and while in a sound state of body and mind, execute this deed of waqf or endowment as follows.” Then comes a detail [332] of the property belonging to the two waqfs, from which it appears that the great bulk of it belonged to the wife and very little to the husband. Next we come to the endowment clause in paragraph 4, which provides :—“Out of the entire imlaks and property mentioned above we, both the executants, make waqf of the whole of the immovable property owned by us the executants specified in clauses 1 and 2 of the first paragraph of this document—in favour of our respective selves and after the death of one of us the executants, in favour of the surviving executant alone and thereafter in favour of our descendants generation after generation, so long as they exist, and in favour of the servants and dependents of the riasat aforesaid, in favour of the poor, the beggars, of the needy, for ever in the manner detailed below.” This paragraph ends with an intimation that the settlors’ direction as to the appointment of a mutawalli and as to the manner in which the disbursements of the income of the “waqf” are to be made will be found recorded further on, evidently referring to the words “in the manner detailed below” of the preceding sentence.

The next paragraph 5 provides in clause (a) that the executants shall remain in possession of the endowed property during their joint lives “simply as persons in whose favour a waqf or endowment is made, and appropriate in every way the income and profits thereof.” The effect of this provision is that though the settlors’ purport to divest themselves of their proprietary character, they nevertheless put all the “income and profits” of the waqf property into their own pockets, to be used at their own will and pleasure. Clause (b) of the same paragraph is important. In it the female executant, Musammât Aliyat-un-nissa, after singing her husband’s praises at great length and reciting that she has remitted her dower-debt to him, goes on to provide that in addition to being a person in whose favour the endowment is made, the husband shall also be the “mutawalli of the property, the entire management in every respect being in his hands according to his choice and pleasure.” The lady [333] then goes on to provide that the profits remaining after the disbursements have been provided for shall during her lifetime “be appropriated by both of us, the executants, according to the discretion of the said mutawalli. If he survive me, he will continue to appropriate the entire income and profits from the whole of the property aforementioned, without the interference of any person in the way he thinks proper as long as he lives.” The effect of this provision is that on the death of his wife, her children who by law would be entitled to three quarters of her property are entirely excluded, and the whole of her property goes to the husband to be appropriated by him and used by him at his own uncontrolled discretion. Clause (c) of the same paragraph provides that during their joint lives the names of both the settlors are to be used in litigation as long as the mutawalli wishes, and sets forth the name which is to be given to the estate.

Clause (d) of this paragraph empowers the husband as mutawalli to appoint a successor in office and to fix his remuneration with a provision restricting that office to a lineal descendant of Musammât Aliyat-un-nissa, and the next clause provides for the appointment of future mutawallis. In the next clause (f) the lady carefully provides for her own interests in case if she should survive

her husband. In that event it is provided that one of the sons shall act as mutawalli, but shall hand over to his mother the entire income and profits from the waqf estate, to be appropriated by her and to be disbursed under her orders. The following clause (g) is unimportant.

So far this instrument deals with what is to happen during the lifetime of the waqfs and of the survivor of them, it is noteworthy that, though under paragraph 5 (a) the settlors profess to hold the property in future as trustees of an endowment, there is not the slightest change made in their position. They (and especially Kaim Ali, the husband), remain in complete uncontrolled possession of the endowed property without any obligation on them to devote one rupee to religious or charitable purposes, or even to continue their usual contribution to such objects. They do not [334] even deprive themselves of the power of selling or otherwise alienating any portion of the property, and had they thought fit to sell the whole and put the proceeds in their pockets it is difficult to see how they could have been prevented. In short, the first five paragraphs of this document leave the husband and wife absolute uncontrolled masters of the so-called endowment to deal with it as they please. They are not called on to exercise any self-denial, and, in the language of their Lordships of the Privy Council in the case of *Abul Fata Mahomed Ishaq v. Russomoy Dhur Chowdhry*, (1894) L. R., 22 I. A., 87, they take back with one hand what they appear to put away with the other. There is no dedication of the property to charitable or to religious uses. The only dedication is in favour of the settlors and their descendants generation after generation so long as they exist; and in favour of an undefined class called the "servants and dependents of the estate" and "in favour of the poor, the beggars, and the needy for ever." Strictly construed these words amount to an immediate settlement of the property on all classes of the beneficiaries simultaneously in the manner and to the extent subsequently declared. But if it were intended by the settlors that the whole estate should devolve on "the poor, the beggars, and the needy," that event could not happen till after the failure of all descendants of the settlors' two sons and four daughters, and till after the failure of the "servants and dependents" of the estate. There being nothing to indicate that by "servants and dependents" were meant only those in existence at the date of the waqf, this class, a varying uncertain class, changing from time to time, would effectually exclude the last class "the poor, the beggars and the needy." The deed, moreover, as to this last class does not provide for the poor of any particular locality, e.g., Sarai Kheta, where the settlors lived, thus leaving it uncertain who were the persons whom the settlors intended to benefit. And especially it is to be borne in mind that clause 4, the so-called endowment clause, provided that the benefits of the waqf were to be enjoyed by the [335] beneficiary "in the manner detailed below." I have already shown what that manner was to be during the joint and several lives of the settlors. I now turn to the provisions to be observed after their death. First of all the mutawalli is directed to pay annuities amounting in all to Rs. 2,400 to the six children of the settlors. The annuitants were to have a power of appointment among their descendants, and in the absence of such appointment the annuities were to descend to their heirs according to the rules of Muhammadan law for ever. The most extensive and arbitrary powers are given to the mutawalli in the matter of granting and of withholding these annuities at his discretion and any one of the beneficiaries who, like the plaintiff-respondent, in this appeal, repudiated the waqf or questioned the authority of the mutawalli, was *ipso facto* to forfeit his annuity. It was next provided that a sum of Rs. 1,100 per annum should be spent for purposes which the learned counsel for the

appellant earnestly contended were religious and charitable uses. Several of the objects enumerated, however, would not be considered religious or charitable objects within the meaning of the rule laid down by the Madras High Court in the case of *Kalebula Sahib v. Naseer-ud-deen Sahib*, (1894) I. L. R., 18 Mad., 201.

The mutawalli is directed to devote a sum of Rs. 600 per annum to the support of a hospital at Sarai Kheta which the female settlor had established in March 1875, and which had since then been regularly supported by her and her husband. Then Rs. 20 per annum are provided for bringing water from the well Zamzam at Mecca, and a list is given of the persons who are to obtain spiritual benefit from this act. Rs. 36 per annum is to be spent in having the Koran recited for the benefit of the souls of the father and mother of the female settlor, the person who does the recitation being bound to transfer to those persons the spiritual benefit he had acquired from the recitation. Another reciter of the Koran was to be appointed on similar pay, and he was to transfer the spiritual benefit of his recitations to the benefit [336] of the souls of the settlers. The mutawalli is then directed to devote Rs. 150 per annum to charitable doles to be given to the poor every day at the principal gate. This is a continuance of the practice previously observed by the settlers. Then provision is made for the repair of the mosque at an annual cost of Rs. 50 and of the tomb of the settlor's ancestors at Sarai Kheta at a cost of Rs. 24. These matters again only perpetuate an existing custom. The next two clauses provide for the continuance of the existing customs of holding a meeting at an annual cost of Rs. 40 to commemorate the birth of the Apostle and of distributing at a cost of Rs. 60 in the Muharram food and sharbat for the benefit of the souls of the two imams. Finally, provision is made for the appointment of a person to teach the Koran and the principles of jurisprudence at Sarai Kheta. With one small exception which will be noticed further on these are all the provisions made for religious or charitable purposes, and the amount devoted to those purposes is certainly less than Rs. 1,000 per annum. The net income of the estate is between Rs. 9,000 and Rs. 10,000 per annum. But although charitable and religious objects do not benefit by quite Rs. 1,000, we find the waqfs providing for the pomp and dignity of the family by allotting Rs. 1,200 per annum for ringing the bell and maintaining the guard attached to the estate. A subsequent paragraph provides for the occupation of the houses on the estate and for the mutawalli's powers therein, while paragraph 8 deprives the beneficiaries of all power of alienation of their annuities and puts the latter out of the power of the law by declaring that they shall not be saleable in execution of a decree against the annuitant. From paragraphs 9 and 10 it would seem that the settlers were apprehensive that the beneficiaries had no power of enforcing payment of their annuities, and so all the descendants of the settlers and the well-conducted and learned Muhammadans of the Hanafi sect are prayed for "God's sake" to see that the payments be made even by having recourse to the help of the authorities. Paragraph 11 refers to the appointment of mutawallis after the death of the settlers and "provides for a [337] perpetual succession of some of the male members of the family as mutawallis.

The last paragraph, which it is necessary to notice, is No. 13. This provides that when any one of the beneficiaries is appointed mutawalli, his annuity is to lapse and fall into the income of the endowment, that such mutawalli is to hold possession of the estate and make collections, and that after paying the Government revenue and the annuities and other expenses, he is to take the surplus (minus one-tenth) for himself, his family and his

dependents. The one-tenth is to accumulate till it reaches the sum of Rs. 1,000, when it is to be invested in immoveable property or in some profitable business, and the annual income of that property or business is to be spent by the mutawalli in relieving the poor.

It is contended for the appellant that this last mentioned provision, coupled with those set forth in an earlier portion of this judgment, amount to a dedication of a substantial portion of the income of the estate to charitable purposes, and that therefore the waqf is good.

I am unable to concur in that contention. The first question to be considered is what was the real object of the settlors when they executed the waqf-namah. Did they intend to dedicate the property to religious and charitable uses with a charge for the support of the members of the family engrafted on it, or did they use the form of a waqf as a veil, under cover of which they attempted to do that which the law would not permit them to do openly? As to that matter the settlors leave no room for doubt. They state in the frankest manner that their object was to preserve the estate from diminution by partition, transfer or the like, and to keep it always in the hands of one person so that thereby their name and memory, "and the pomp and dignity of the estate may continue." Not one word is said as to any desire to benefit the poor, as to any intention to constitute them the ultimate beneficiaries. The only object avowed is the preservation of the estate intact that its pomp and dignity may continue. The settlors admit [338] that they cannot attain that object except by the device of a waqf "as directed by the Muhammadan law," and then proceed to settle the estate on themselves and on their descendants so long as any exist, on the servants and dependents of the estate, and on the poor and needy. As to the last mentioned class there is nothing within the four corners of the waqf-namah to indicate that the settlors intended that that class should obtain any benefit beyond that given by paragraphs 4 and 13. I cannot but consider a document containing such a settlement to be but the merest simulation of an endowment for charitable or religious purposes. Its object is not to benefit the poor, but to preserve the name and estate of the settlors. The gift to the poor, if, as a fact, there is any dedication or gift over to them, which I very much doubt, most probably would not take effect for hundreds of years, and even then it would probably be void for uncertainty, there being nothing to show who were the poor, the beggars, and the needy intended to be benefited. In my opinion the settlors did not suppose that any gift or ultimate dedication of the estate to charitable or religious uses was necessary to validate a waqf. I cannot but think that they were under the impression that a family settlement entailing the family property in perpetuity on its members and their descendants was a good waqf under Muhammadan law, a view which found some support a few years ago, but which has now been disapproved of by their Lordships of the Privy Council.

As to the charitable gifts mentioned in paragraphs 6 and 13 of the waqf-namah, I think the opinion of the Court below is right. No specified part of the waqf property has been charged with their payment. The second clause of the 6th paragraph does no more than direct the mutawalli to make certain payments "out of the profits of the waqf," and the same may be said as to the 13th paragraph with reference to the one-tenth of the surplus. No means are provided for compelling the mutawalli to make any of those payments. In fact the present mutawalli as to that matter is in the same position as his father Syed Kaim Ali was. [339] The latter of his own free will subscribed to the charitable objects to which he directed his son to continue the same amount of subscriptions, and they are no more than a devout and wealthy

Muhammadan gentleman might find it becoming to spend in that way. This case by no conceivable argument be brought within the rule of which their Lordships of the Privy Council approved in *Sheik Mahomed Ahsanullah Chowdhry v. Amarchand Kundu*, (1889) L. R., 17 I. A., 37. In fact it is to some extent the converse of the case therein cited with approval, as in this case I am asked to hold that a mere charge for some charitable purposes (which probably could not be enforced), on the profits of an estate strictly settled on the family of the settlors in perpetuity and not dedicated in substance to charitable uses is sufficient to constitute a good and valid waqf. To that contention I cannot accede. I fully concur in the opinion of the Subordinate Judge that "the little expenditure on religion and charity provided by the deed was no more than a charge on the property; it did not create a legal and valid waqf of the entire corpus of the property so as to prevent it being inherited by the heirs according to their legal shares." I would therefore affirm the decision of the lower Court that this is not a valid waqf.

There is one other point remaining for decision in this appeal. The plaintiff, respondent claims her legal share in the property left by her mother Musammât-Aliyat-un-nissa, which under the terms of the waqf-namah, was handed over to the husband Syed Kaim Ali, as mutawalli, and which remained in his possession up to the day of his death. The defendant-appellant pleads that that claim is barred by limitation, as he alleges that Kaim Ali, and the defendant after him, held adverse possession of that property from the lady's death in 1881 up to date of suit in 1896. Appellant relies on Art. 144 of the second schedule to the Limitation Act No. XV of 1877. This matter is not really one of much importance to this plaintiff-respondent. On the finding that the waqf is bad there can be no doubt that Musammât Aliyat-un-nissa's property [340] formed in one way or another part of the property left by Syed Kaim Ali at his death. The plaintiff therefore, even assuming that property was the absolute property of Kaim Ali to which he had acquired a prescriptive title, would, as daughter of Kaim Ali, admittedly be entitled to her legal share in it by Muhammadan law.

In my opinion the respondent has failed to prove any adverse possession in Syed Kaim Ali. It is admitted for the appellant that no question of estoppel arises. But it is contended that the waqf being bad, Syed Kaim Ali held possession of his wife's estate after her death as a trespasser, and so by adverse possession had acquired a prescriptive title to it before his death in 1895. Now there can be no doubt that his possession of that estate in the interval between the execution of the waqf-namah and his wife's death was permissive, and he professed to take it, not in any personal right, but as mutawalli under the terms of the waqf-namah, and for the purposes set forth in that instrument. I fail to see any change in the nature of his possession from that time up to his death. By the terms of the waqf-namah on the abandonment of their proprietary rights by his wife and himself he took possession as mutawalli or trustee to carry out the terms of the waqf-namah. He did not at any time profess to have, nor did he set up any personal title in himself. The fact that the waqf is not valid in law does not, in my opinion make any difference in the nature of his possession. That fact did not clothe him with any adverse title to possession, but left him as trustee for the rightful owners of the property, namely, his wife and her heirs after her. In all his acts in the administration of the waqf he professed to act as trustee or mutawalli of the endowed property. In my opinion the waqf having failed he held the property as trustee for those entitled, under a legal obligation to hand it over to them on demand. Had such a demand been made and refused there would

be good ground for holding his subsequent possession was adverse to the true heirs. Nothing of the kind is alleged; there is not an atom of evidence to show any change in the nature of Syed Kaim Ali's possession from the day [341] when he assumed possession of his own and his wife's property as mutawalli in 1881 down to his death in 1895. I am therefore of opinion that the appeal on this point fails and that the decree of the Subordinate Judge is right. I would dismiss this appeal with costs.

Blair, J —I concur.

Appeal dismissed.

NOTES.

[This was affirmed by the Privy Council in (1905) 27 All., 320. See also (1905) 8 O. C., 379; (1909) 31 All., 136.

The Mussalman Waqfs Validation Act, 1913, now validates a good many waqfs which by reason of provisions for donor's family would have been deemed invalid.]

[21 All. 341]

FULL BENCH.

The 25th April, 1899.

PRESENT :

**SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX, AND
MR. JUSTICE BURKITT.**

The Secretary of State for India in Council.....Defendant

versus

Sukhdeo.....Plaintiff.*

*Cause of action—Pleadings—Plaint disclosing no cause of action—Discovery
at the stage of an appeal under the Letters Patent of defect in the plaint—
Dismissal of suit—Practice.*

Where in an appeal under section 10 of the Letters Patent it was brought to the notice of the Court that the plaint in the suit disclosed no cause of action against the defendant named therein, the Court entertained the plea and dismissed the suit.

THIS was a suit brought by one Sukhdeo against the Secretary of State for India in Council to recover certain property, which had been seized by a Magistrate in satisfaction of a fine imposed on his son Natthe, or in the event of such property having been sold, its value, Rs. 10.

The facts of the case, briefly stated, were that Natthe had been convicted by a Magistrate of the 1st class of an offence under section 417 of the Indian Penal Code and sentenced to pay a fine of Rs. 200. In satisfaction of the fine certain articles were seized by the Police as being the property of Natthe. Sukhdeo raised an objection before the Magistrate who had succeeded the Magistrate by whom the fine had been imposed, but his objection was rejected, and the articles in question were sold. Sukhdeo thereupon preferred the present suit.

[342] The Court of First Instance decreed the claim. On appeal the Lower Appellate Court modified the first Court's decree. The defendant appealed to the High Court. The appeal coming on for hearing before a Division Bench, the Judges composing the Bench differed in opinion, and the decree of the

* Appeal No. 50 of 1892, under section 10 of the Letters Patent.

Lower Appellate Court was accordingly upheld.* The defendant thereupon filed the present appeal under section 10 of the Letters Patent.

Babu Satya Chandra Mukerji (with whom were Munshi Gulzari Lal and Munshi Jai Bihari Lal) for the respondent raised a preliminary objection that no appeal lay in this case under section 586 of the Code of Civil Procedure nor under section 10 of the Letters Patent. The plaintiff's suit was a suit of the nature cognizable by a Court of Small Causes, as it was a suit for the recovery of moveable property or the value thereof, and the amount sought to be recovered was below five hundred rupees. There was no doubt that the suit as framed was one of the nature cognizable by a Court of Small Causes, and exemption from such cognizance was sought by seeking to include it within the description of suits mentioned in clauses (2), (21) or (23) of the second schedule of Act No. IX of 1887.

[STRACHEY, C.J.—Clauses (21) and (23) do not seem to me to be in point; but what do you say to clause (2)? You will observe that the wording of clause (2) is very wide. Is not the present suit one concerning an act purporting to be done by a Judicial Officer acting in the execution of his office?]

Clause (2) does not apply. This suit is not a suit concerning an act of a public officer. For a case exactly in point see *Bunwari Lal Mookerjee v. The Secretary of State for India*, (1889) I. L. R., 17 Cal., 290. What has to be looked to in this connection is the relief that is asked for. It may be that the granting of that relief would have the effect of setting aside some order of some other public officer; but if that order is not sought to be cancelled in so many words, the suit would not be taken out of the category of Small Cause Court suits.—Videthe observations of FURRAN, C.J. and STRACHEY, J. in *Raghunath Mukund v. Sarosti K. K. Kama*, (1898) I. L. R., 23 Bom., 266; also the case of *Makund Ram v. Bodh Kishan*, Weekly Notes, 1897, p. 198.

[STRACHEY, C.J.—Before we decide your preliminary objection will you show us from your plaint how you establish your cause of action against the defendant? You do not even allege in your plaint how the Secretary of State is liable in this matter.]

The defendant has not taken that objection in his written statement nor in his grounds of appeal to the Lower Appellate Court, and it is too late to take that objection now.

[BURKITT, J.—The defendant put you to the proof of your claim. He did not admit it. You must show that you have a cause of action against him.]

The plaint is no doubt defective in that respect, but that defect should be overlooked at this late stage.

Strachey C. J.—This is a suit in which the plaintiff claims to recover from the Secretary of State for India in Council certain articles, or, in the event of their having been sold, the sum of Rs. 10 as their value.

Now the allegations of the plaint, with reference to the cause of action against the Secretary of State, are as follows:—"On the 21st April 1894, Natthe was found guilty by Mr. O.G. Arthur, Magistrate, 1st class, in the case of *Queen-Empress v. Natthe*, under section 417 of the Indian Penal Code, and was ordered to pay a fine of Rs. 200 to Government. In order to realize the aforesaid fine the following articles were seized through the police of Muttra, and the said articles were estimated by the police to be worth Rs. 10-5-0. The aforesaid articles belong to the plaintiff. He raised an objection before Munshi Narain Singh, who succeeded Mr. Arthur, that the aforesaid articles

* See Weekly Notes, 1896, p. 173.

might be released. But the said officer rejected the said objection without taking any evidence on 16th June 1894. The cause of action accrued on 16th June, the day the objection was rejected, within the limits of the jurisdiction of this Court. Although the aforesaid convict is the son of the plaintiff, he has been living separate from him for a long time. He had no right and interest in the seized articles detailed below. The plaintiff is therefore entitled to receive back the said articles, or if they have been sold by auction, Rs. 10 may be awarded, no matter for what price they were sold." That is all the substantial part of the plaint.

The Court of First Instance decreed the claim. On appeal the Lower Appellate Court modified the first Court's decree. There was hence a Second Appeal by the appellant to this Court. The learned Judges who heard that appeal differed in opinion. Mr. Justice BLAIR was of opinion that the suit was not maintainable against the Secretary of State, and that the suit should be dismissed. Mr. Justice AIKMAN, on the other hand, was of opinion that the decree of the lower Court was right. Under section 575 of the Code of Civil Procedure, the judgment of Mr. Justice AIKMAN prevailed, and this appeal against his decision has been brought by the defendant under the Letters Patent.

One of the grounds taken in the memorandum of the second appeal to this Court was that the plaintiff had shown no cause of action. That point was not raised in the defendant's written statement, but that written statement did not admit any cause of action by the plaintiff, and thereby put the plaintiff to the proof of his whole case. The learned Judges of this Court stated that in consideration of the importance of the point at issue they would allow the appellant to support his appeal by any argument which lay within the scope on his grounds of appeal. The whole of both judgments is substantially occupied with the discussion of the question whether the plaintiff had shown any cause of action against the Secretary of State in Council. Considering that that question lay at the root of the whole suit, we think there can be no doubt that the learned Judges were right in allowing it to be raised and argued. The same ground of appeal is stated in the memorandum of appeal to us under the Letters Patent.

[345] To our minds, however, the question whether any cause of action is shown presents itself in a somewhat different form from that in which it appeared to the learned Judges. What they discussed was rather the question whether any cause of action had been established in the sense of a liability in the Secretary of State in respect of such acts as the seizure and sale of the goods claimed by the plaintiff. But in our view there is a preliminary question, that is, whether, on the face of the plaint, any cause of action against the Secretary of State is even alleged by the plaintiff. We have come to the conclusion that the plaint discloses no such cause of action. What it discloses is that in order to realize a fine imposed upon a third person, certain goods belonging to the plaintiff were wrongfully seized by the police, and that, while these articles were in the custody of the Court, the Magistrate rejected an application by the plaintiff for their release. That is the whole of what the plaint describes as the cause of action. The plaint stops with the Magistrate's rejection of the application, and consequently with the retention of the articles in the hands of the Court. There is nothing more. No action by the Secretary of State or by any person for whom he could be deemed responsible is referred to or even hinted at. After stating these facts the plaintiff goes on to claim the articles, or, if they have been sold, Rs. 10 as their value, from the Secretary of State, who is not alleged ever to have been in possession of them, or to have

any connection with them in any way whatever. In this state of the case it appears to us wholly unnecessary to consider any of the questions which were so elaborately discussed in the judgments on the appeal. Upon the short ground which I have mentioned, namely, that the plaint discloses no cause of action against the Secretary of State in Council, we are of opinion that this appeal must be allowed and the suit dismissed. As regards costs we order that, having regard to the fact that the plaintiff had no notice until a late stage of the case of the objection which is fatal to his suit, each party pay his own costs in each of the Courts.

Appeal decreed.

NOTES.

[This was followed in (1911) 8 A. L. J., 922 : 12 I. C., 111.]

[346] APPELLATE CIVIL.

The 5th May, 1899.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE AIKMAN.

Ganesha Singh.....Plaintiff

versus

Mundi Forest Company.....Defendant.*

Company—Suit against unregistered company—Form of suit.

Where a company is not registered under Act No. VI of 1882 a plaintiff bringing a suit against such company must make each individual member of the company a defendant to the suit, and he cannot escape from this obligation by stating in his plaint that he has been unable to discover who the individual members of the company are. *Koylash Chunder Roy v Mr. Edward Ellis, Manager on behalf of the Bengal Indigo Company of Khalbolia Factory*, (1867) 8 W. R., C. R., 45, considered. *The N.-W. P. Club v. Sadullah*, (1898) I. L. R., 20 All., 497, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Durga Charan Banerji, for the Appellant.

Mr. W. Wallach, for the Respondent.

Knox and Aikman, JJ.—The suit out of which this appeal has arisen was a suit brought by one Ganesha Singh against a defendant whom he describes as the Mundi Forest Company through W. Martin Towell, partner and agent, resident of camp Umballa. A written statement was put in signed by one E. W. Graham Roe, who describes himself as agent, Mundi Forest Company, Aligarh. That written statement was filed on the 10th of September 1897. It is admitted on both sides that before that date W. Martin Towell had died and there has been no application even up to the present date to bring any person on the record in his place. The written statement put in sets out that the Mundi Forest Company is not a legal corporation, and it has not been registered under Act No. VI of 1882, and on that ground it was pleaded that the suit would not lie. The learned Subordinate Judge sustained the plea and dismissed the suit. In appeal before us it is contended that the learned Subordinate Judge should before dismissing the suit have given the appellant an opportunity to amend the plaint.

* First Appeal No. 19 of 1898, from a decree of Maulvi Ahmad Ali Khan, Subordinate Judge of Aligarh, dated the 13th of September 1897.

[347] The amendment, which, it is contended, should have been allowed, is the addition of a statement that the plaintiff was unable to discover the names and addresses of the individual members of the Mundi Forest Company. The object of inserting this amendment is to rely upon an expression of opinion contained in the case of *Koylash Chunder Roy v. Mr. Edward Ellis, Manager on behalf of the Bengal Indigo Company of Khaltolia Factory*, (1867) 8 W.R., C. R., 45. In that case Sir BARNES PEACOCK held "that in case of unregistered companies the proper course would be to sue the individual members in the same way as the individual members of any other firm, not being incorporated or registered, would have to be sued, but where it appeared that the plaintiff did not know of what persons the company in question is composed, he was of opinion that the plaintiff might sue the company in the name under which they were carrying on their business and contracted with him, provided he had stated in the plaint that he was unable to give any better description of the defendants than that." This view, so far as we can ascertain, does not appear to have been acted upon in any reported case, and it is opposed to what was said by this Court in the case of *N.-W. P. Club through G. B. Goyder v. Sadulla*, (1898) 1. L. R., 20 All., 497. We quote the following words from the judgment:—"The question remains as to whether the action can rightly be said to have been brought against the North-Western Provinces Club; that is what the case mentioned above calls an abstract entity unknown to the law. To hold that an action lay against it and to give judgment in such action would be to hold that an action lay against a great number of individuals who had not been cited in the action, who had no opportunity of appearing, but who should have been so cited, and who should have had such opportunity given to them to appear and contest the action." We cannot therefore sustain the contention raised. The learned vakil went on to ask that he might be granted permission to amend by adding the names of such of the partners as he could ascertain. Even if [348] we were disposed to grant the prayer, there would still be a fatal objection that the suit as against every person who might now be added, even if he were added to-day would be barred by limitation. The appeal fails and is dismissed with costs.

Appeal dismissed.

[21 All. 348]

The 5th May, 1899.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

T. E. Strachey.....Plaintiff

versus

The Municipal Board of Cawnpore.....Defendant.*

Act No. XV of 1873 (N.-W. P. and Oudh Municipalities Act), section 15—

Act No. XV of 1883 (N.-W. P. and Oudh Municipalities Act), sections 29,

42, 44—Municipal Board—Powers of taxation—Procedure—Consideration of objections to proposed tax—Final imposition of tax—Special meeting—

Act No. I of 1877 (Specific Relief Act), chapter VIII—Injunction.

The N.-W. P. and Oudh Municipalities Act, 1883, not conferring the powers given by Act No. XV of 1873 to "cancel or vary" a tax imposed, the procedure to be adopted for the

* First Appeal No. 192 of 1896, from a decree of E. J. Gill, Esq., District Judge of Cawnpore, dated the 8th June 1896.

enhancement of an existing tax must be the same as that prescribed for the imposition of a new tax.

In imposing a new tax the procedure laid down in section 42 of Act No. XV of 1883 must be strictly followed. Where therefore neither the special meeting of the Board at which an assessee's objections to a proposed tax were considered, nor the special meeting at which the tax was finally imposed, were properly constituted within the meaning of section 29 of Act No. XV of 1883, it was held that the imposition of the tax was invalid. *The Municipality of the City of Poona v. Mohan Lal*, (1884) I. L. R., 9 Bom., 51, approved.

Held also that there is nothing in Chapter VIII of the Specific Relief Act to prevent the High Court from granting an injunction against a Municipality as part of the remedy in a regular suit. *Moran v. The Chairman of Motihari Municipality*, (1889) I.L.R., 17 Cal., 329, considered. *Ganga Narain v. The Municipality of Cawnpore*, (1897) I. L. R. 19 All., 313, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Messrs. *W. K. Porter* and *W. Wallach*, for the Appellant.

The Officiating Government Advocate (Mr. *E. A. Ryves*), and afterwards the Government Advocate (Mr. *E. Chamier*), for the Respondent.

[349] **Banerji and Aikman, JJ.**—This appeal and the connected First Appeal No. 291 of 1896 have arisen out of a suit brought by Theodore Edward Strachey, a Barrister practising in Cawnpore, against the Municipal Board of Cawnpore, in which he seeks to recover the sum of Rs. 200, which, he alleges, was illegally levied from him by the Municipal Board as license tax, with Rs. 8 interest thereon, and also prays for an injunction restraining the defendant Board from levying or recovering any assessment from him by virtue of the resolution and notice under which the tax was assessed. The learned District Judge has given the plaintiff a decree for the money claimed, but has refused the prayer for the injunction. Both parties have appealed to this Court. This is the appeal of the plaintiff against that part of the decree of the lower Court which refused the injunction. It appears that under the provisions of section 15 of Act No. XV of 1873 a tax upon trades and professions in the Cawnpore Municipality was imposed by the Municipal Committee. The rules made by the Committee for the collection of the said tax and confirmed by the Lieutenant-Governor are contained in Government Notification No. 160A, dated the 2nd May 1876, to be found at page 575 of the Government Gazette of that year. For the purpose of the tax all professions, trades and callings were arranged under three classes. Class I specifies bankers and several other professions and trades. Class II sets forth a still longer list of callings. Under Class III are included all dealers or persons practising any trade or profession not mentioned in the above classes or in a list of explanations appended. As the profession of barrister-at-law was not specified either in Class I, Class II, or the list of explanations, it is clear that barristers-at-law fell under Class III. According to the rules the highest tax which could be imposed upon persons falling under Class III was Rs. 12 per annum.

Up to the year 1887 no tax had been levied from barristers-at-law practising at Cawnpore. At a special meeting of the Municipal Board held on the 27th of June 1887, it was resolved [350] that persons practising as barristers should be included under Class I, thereby rendering them liable to a maximum tax of Rs. 200 per annum. At the time this resolution was passed Act No. XV of 1883 was in force. Section 42 of that Act prescribes the procedure which has to be followed in imposing taxes for the purpose of the Act. Section 44 of the Act gives the Municipal Board the power to abolish or reduce any tax imposed under the preceding sections. It is noticeable that this section confers no power upon the Municipal Board to enhance a tax already imposed, and in this respect

it differs from the former Act, No. XV of 1873, which, by section 15, gave the Committee the power to "cancel or vary" any tax which it had imposed. As the existing Act gave the Municipal Board no power to enhance an existing tax which was the object they had in view when they determined that barristers should be included in Class I, they adopted the only course which appears to have been open to them, that is, they treated the matter as if it were the imposition of a new tax.

Assuming that the procedure was under section 42 of the Act, as it purports to be, the plaintiff contends that there were in the procedure of the Board such defects as rendered the imposition of the tax upon him illegal. When a Board wishes to impose a tax for the purpose of the Act, it is required by sub-section (1) of section 42 that the resolution to impose the tax should be passed at a special meeting, the necessary quorum for which must, according to section 29, sub-section 1, be one-half of the whole Board. In order to enable us to determine the questions raised before us, we found it necessary to ask the lower Court for a finding as to the number of members constituting the whole Board between the 27th of June 1887 and the 25th of August 1887. The finding of the Court below is that between those dates the Municipal Board of Cawnpore consisted of twenty-one members, *i.e.*, 18 elected and 3 appointed. We find that the meeting at which the preliminary resolution under section 42 for the inclusion of barristers in Class I was passed, was a [381] properly constituted special meeting. After the passing of this resolution, the next thing required of the Board is the publication of "a notice defining the persons or property proposed to be taxed, the amount or rate of tax to be imposed and the system of assessment to be adopted." It was objected on behalf of the plaintiff that the notification published on the 30th of June 1887 under this sub-section was defective, inasmuch as it failed to define the amount or rate of the tax to be imposed and the system of assessment to be adopted. This contention is not devoid of force. It is impossible to say that the notification complies with the strict letter of the law, but it may be, as contended by the learned counsel for the respondent, a mere defect in form which would be covered by the provisions contained in section 43 of the Act. To proceed: sub-section (3) provides that any inhabitant of the Municipality objecting to a proposed tax may within a time fixed submit his objection in writing to the Board, which is bound to take the objection into consideration at a special meeting. The plaintiff did submit an objection, which was taken into consideration on the 27th of July 1887, at a meeting which is described as an "adjourned special meeting." The number of members present at the meeting was 7, which was only one-third of the whole Board. It is true that under the proviso to section 29 no quorum is necessary for an adjourned special meeting, but the proviso requires that at such adjourned meeting only such business should be brought before and transacted at the adjourned meeting which would have been brought before the original meeting if there had been a quorum present.

The question we have to consider is whether the objection to the imposition of a tax on barristers could legally be considered at the adjourned meeting held on the 27th July 1887. We must answer that question in the negative. The so-called adjourned special meeting held on the 27th of July 1887, had been adjourned from the 19th of July 1887, which again had been adjourned from a meeting of the 11th of July 1887, which last [382] meeting had been adjourned from the 27th of June 1887. At none of these meetings was a consideration of objections to the imposition of taxes on barristers a business to be brought forward. Consequently the adjourned special meeting of the 27th July, 1887

was not competent to consider the plaintiff's objection to the imposition of the tax. In the case of *The Municipality of the City of Poona v. Mohan Lal*, (1884) I. L. R., 9 Bom., 51, it was held that the consideration by the Municipality of objections to a tax was an essential part of the machinery provided by the corresponding section of the Bombay District Municipality Act for the legal imposition of the tax and a decree of the lower Court awarding to the plaintiffs whose objections had not been duly considered the amount of the tax which had been levied from them was sustained. The Court declined to accept the contention on behalf of the Municipality that the consideration of objections of the inhabitants was merely a formal act, the omission of which did not invalidate the tax. But there remains a more formidable objection to the procedure of the respondent Municipal Board. Section 42, sub-section (7), provides that when the proposals of a Municipal Board for the imposition of a tax have been sanctioned by the Local Government, the Board may at a special meeting direct the imposition of the tax in accordance with those proposals. The Cawnpore Municipal Board, in order to comply with the provisions of this sub-section, held what purports to have been a special meeting on the 25th of August 1887, at which it was formally resolved that barristers should be assessed in accordance with the proposals set forth above, which had received the sanction of Government. At this meeting only ten members were present, so that according to the finding on the issue referred by us, there was not present at that meeting the quorum required by law for a special meeting. We are constrained to hold that this defect entirely invalidates the resolution for the imposition of the tax under which the amount claimed was levied from the plaintiff. To hold otherwise would [353] lead to the result that one or two members of a Municipal Board (not being an adjourned special meeting) could by calling themselves a special meeting direct the imposition of a tax upon the whole of the inhabitants. The learned Judge did not decide the case on the ground of the defects to which we have referred above, but made a decree for the amount claimed on the ground that there had been a breach of rule 6 of the rules for the imposition of license tax, inasmuch as the sub-committee by which the tax on the plaintiff was assessed was not duly constituted. This is an additional ground for sustaining the decree which has been granted to the plaintiff.

As we said at the outset, this is the plaintiff's appeal against the part of the decree dismissing his prayer for an injunction. The learned District Judge, although he framed an issue as to whether he had jurisdiction to grant the injunction asked for, did not decide that issue, but contented himself by decreeing the money part of the claim. For the respondent it was contended that this Court was not competent to make a decree for an injunction, and the case of *Moran v. Chairman of Motihari Municipality*, (1889) I. L. R., 17 Cal., 329, was relied on. It is true that the learned Judges who decided that case were of opinion that the power to compel corporations to do their duties and to restrain them from doing that which it is not within their province to do had been reserved to the High Court in its ordinary original jurisdiction with respect to the presidency towns, but had been withheld in respect of any of the Municipalities in the mufassil. What was apparently in the minds of the learned Judges when they expressed the above opinion was Chapter VIII of the Specific Relief Act. That chapter, it is true, does by implication withhold from High Courts the power to make orders save as to corporations within the local limits of their ordinary original civil jurisdiction. But a consideration of the terms of the chapter will render it clear that the orders referred to therein are orders passed upon applications, and not decrees in suits. The order referred to in [354] that chapter may be made *ex parte* on a mere application supported

by an affidavit. There is nothing in that chapter to take away from Courts the power to grant injunctions in a suit when a sufficient ground is made out for doing so. Injunctions against Municipalities have been granted by this Court, *vide*, *Ganga Narain v. The Municipality of Cawnpore*, (1897) I. L. R., 19 All., 313. We therefore overrule the respondent's plea and allow the appeal. We vary the decree of the Court below by granting an injunction restraining the defendant Board from levying or recovering any tax from the plaintiff by virtue of the resolution of the 25th August 1887. The appellant will get his costs of this appeal, and such costs as were refused him in the Court below.

Appeal decreed.

[21 All. 364]

The 8th May, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Sheo Rattan Rai and others.....Objectors

versus

Mohri.....Applicant.*

*Act No. 1 of 1894 (Land Acquisition Act), Sections 18, 19, 32 and 54—
Reference by Collector to Judge—Appeal from Judges' order—Court fee—
Decree or order.*

Held that an appeal will lie to the High Court from an order of the District Judge made upon a reference by the Collector under sections 18 and 19 of the Land Acquisition Act 1894, as to the disposal of compensation awarded for land taken up by Government under the Act. *Balaram Bhramaratar Ray v. Sham Sunder Narendra*, (1896) I. L. R., 23 Cal., 526, followed.

Held, also, that in an appeal from the order of the District Judge above referred to, the memorandum of appeal must be stamped as an appeal from an original decree.

IN this case certain land, which was in the possession of the respondent, holding a life estate as a Hindu widow or daughter, was taken up under the provisions of the Land Acquisition Act, 1894. There appears to have been no objection to the amount of the compensation awarded, but certain reversioners to the estate came before the Collector with an objection that the whole of the compensation ought not to be made over [365] directly to the respondent, inasmuch as she was only entitled to a life interest in the property taken up, and there was danger of their reversionary rights being lost. The Collector thereupon, under sections 18 and 19 of the Act, referred the disposal of the compensation to the District Judge. The District Judge, disallowing the objections of the reversioners, ordered the compensation money to be paid to the respondent. From this order the objectors appealed to the High Court. At the hearing of the appeal two preliminary objections were taken, which were disposed of by the following order:—

Blair and Burkitt, JJ.—Two preliminary objections have been raised to the hearing of this appeal. The first is as to whether section 54 of the Land Acquisition Act, No. 1 of 1894, gives an appeal to this Court. Upon that matter we see no reason to differ from the reasoning and conclusion of the learned Judges of the Calcutta High Court in *Balaram Bhramaratar Ray v. Sham Sunder Narendra*, (1896) I. L. R., 23 Cal., 526.

The second point is, whether the appellants here ought to stamp their memorandum of appeal as an appeal from an order or an appeal from an original

* First Appeal No. 104 of 1898, from an order of Kunwar Bharat Singh, District Judge of Ghazipur, dated the 5th August 1898.

decree. We are of opinion that it is an appeal from an original decree and must be stamped as such.

We therefore refer this case to the Taxing Officer for his decision and report as to what stamp should be paid on this appeal, if it be considered as an appeal from an original decree.

[The report called for having been supplied and the deficiency in the Court fee stamp having been made good, the appeal was put up for final disposal.]

Maulvi Ghulam Mujtaba and Babu Jiwan Chandar, for the Appellants.

Munshi Gobind Prasad, for the Respondent.

Blair and Burkitt, JJ.—This case arises under the Land Acquisition Act, No. I of 1894. Land had been taken in which the respondent here had a life estate. Whether that of a [356] Hindu widow or a daughter we are not informed. In neither case had she the power to alienate except for legal necessity. The District Judge, in the face of an objection by the reversioners, has ordered the purchase-money to be paid to the Musammats. This order cannot stand. The case is manifestly one provided for by section 32 of Act No. I of 1894. We set aside the order of the Court below, and direct that, under the provisions of section 32, the money shall be invested in the purchase of other lands, to be held under the like title and conditions of ownership as the land in respect of which such money shall have been deposited was held, or, if such purchase cannot be effected forthwith, then in such Government or other approved securities as the Court shall think fit. Payment of the rent or other proceeds of such investment will be made to Musammats Mohri as the person for the time being entitled to the possession of such land. The Judge will further strictly comply with the other provisions of section 32. We make no order as to costs.

Appeal decreed.

NOTES.

[This was followed in (1901) 24 All., 189; (1912) 14 I. C., 724; 39 Cal., 906. See also (1908) 31 Cal., 214; (1902) 26 Mad., 287.

As regards appealability, however, see also (1912) 17 I. C., 117 (Mad.); (1905) 32 Cal., 921.]

[21 All. 356]

The 9th May, 1899.

PRESENT:

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Hira Lal Sahu.....Decree-holder

versus

Parmeshar Rai.....Objector.*

Execution of decree—Decree for sale on mortgage—Powers of court executing decree—Hindu law—Joint Hindu family—Objection by son that his interest in the property mortgaged is not saleable in execution of a decree obtained against his father.

Held, that it is not open to a son in a joint Hindu family, who has been made a party as the legal representative of his father to proceedings in execution of a mortgage

* Second Appeal No. 910 of 1896, from a decree of H. D. Griffin, Esq., District Judge of Azamgarh, dated the 25th August 1896, modifying a decree of Munshi Ahmad Ali Khan, Subordinate Judge of Azamgarh, dated the 15th May 1896.

decree against the father, to raise an objection in those execution proceedings that the decree against the father is not binding on him in his personal capacity by reason of his not having been made a party to the suit in which the decree was passed. *Bhawani Prasad v. Kallu* (1895) I.L.R., 17 All., 537, referred to. *Sanwal Das v. Bismillah Begam* (1897) I.L.R., 19 All., 480, and *Liladhar v. Chatarbhuji*, (1899) I. L. R., 21 All., 277, approved. *Lochan Singh v. Sant Chandar*, Weekly Notes, 1899, p. 24, not followed.

[367] THE facts of this case sufficiently appear from the judgment of BANERJI, J.

Messrs. *W. M. Colvin* and *D. N. Banerji*, for the Appellant.

Maulvi *Ghulam Muftaba*, for the Respondent.

Banerji, J.—The appellant obtained a decree for sale under section 88 of the Transfer of Property Act, 1882, against the father of the respondent. The decree directed the sale of the property comprised in the mortgage. This appeal arises out of an application made by the decree-holder for an order absolute for sale under section 89 of the Act. That application was made against the respondent by reason of the mortgagor having in the meantime died. The respondent objected to the order under section 89 being passed in respect of the whole property, on the ground that it was ancestral property, and that as he, the respondent, was not joined as a party to the suit in which the mortgagee decree-holder had obtained his decree, that decree could not affect his interests, and those interests were not liable to sale in execution of that decree. Both the Courts below have allowed the objection and exempted a one-third share of the mortgaged property, which they have declared to be the share of the respondents, from liability under the decree. The decree-holder mortgagee has preferred this appeal, and the question which we have to determine is whether the Courts below were competent to consider the objection raised by the respondent, the decree being one for sale under a mortgage, and directing that the whole of the mortgaged property should be sold. It is urged, and with reference to the rulings of this Court, rightly, that an application under section 89 of the Transfer of Property Act is an application in execution of the decree for sale. The Court which dealt with that application was therefore dealing with a matter which must be taken to have arisen in connection with the execution of a decree. There can be no doubt that a Court executing a decree is bound to give effect to the decree as it finds it, and is not competent to vary or alter it in any way. The decree in this case directs, as stated above, the sale of the whole of the mortgaged [358] property. That being so, could the Court executing the decree consider the question whether any portion of that property was exempt from liability under the decree? No doubt according to the ruling of the Full Bench in *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, the son of a Hindu mortgagor who had not been joined as a party to the mortgagee's suit for sale, is competent to sue for the exemption of his interests in the mortgaged property from sale on the single ground that he was not a party to the suit in which the decree was passed; but that is not a question which, it seems to me, can be raised in execution proceedings by the son of the mortgagor, if he happens to be made a party to those proceedings in his character of legal representative of his father. The determination of such a question would lead to a determination of the question of the validity of the decree passed against the father. Such a question is beyond the scope of the powers of a Court executing a decree. This was the principle of the ruling in the case of *Sanwal Das v. Bismillah Begam*, (1897) I. L. R., 19 All., 480, and the same view was apparently taken in the case of *Liladhar v. Chatarbhuji*, (1899) I. L. R., 21 All., 277. No doubt in the case of *Lochan Singh v. Sant Chandar*, Weekly

Notes, 1899, p. 24, sitting with my brother AIKMAN, I held that it was open to a son who had been made a party to the execution proceedings as the legal representative of his father to raise an objection on the ground that the decree against the father was not binding on him in his personal capacity by reason of his not having been made a party to the suit in which the decree was passed; but on reconsideration that view seems to me to be erroneous. I may observe that in a later case a doubt was expressed by my brother AIKMAN, and myself as to the correctness of the view taken in the case of *Lochan Singh v. Sant Chandar*. A Court executing a decree, as I have said, is bound to give effect to the decree as it stands. If the decree orders the whole of the property mortgaged by the father to be sold, the Court executing the decree cannot consider the question whether the decree was validly made against the [359] interests of the son. If a son, although a party to the execution proceedings, in his capacity as legal representative of his father, could be allowed to raise the question of the binding effect of the decree on his interests, and if the Court executing the decree be permitted to give effect to such objection, the result would be that such Court might be in a position to vary the decree. This certainly a Court, in the exercise of its powers relating to the execution of decrees, is not competent to do. Upon reconsideration, I think that the view which was taken in the case of *Sanwal Das v. Bismillah Begam* was the right view. I would allow the appeal, and, setting aside the orders of both the Courts below, remand the case to the Court of First Instance, with directions to make an order under section 89 of the Transfer of Property Act in respect of the whole of the property comprised in the decree under section 88, and then to proceed with the application for execution. I would allow the appellant his costs here and in the Courts below.

Strachey, C. J.—I am of the same opinion.

Appeal decreed, and cause remanded.

NOTES.

[This was followed in (1904) 32 Cal., 265.]

[21 All. 359]

The 9th May, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE,
AND MR. JUSTICE BANERJI.

Narain Singh and another.....Plaintiffs
versus

Jaswant Singh.....Defendant.*

Civil Procedure Code, section 43—Application for leave to sue in forma pauperis—Application rejected—subsequent suit not barred—Civil Procedure Code, section 413.

Held, that section 43 of the Code of Civil Procedure would not apply so as to bar a subsequent suit where the so-called previous suit was not a regular suit but an application for leave to sue *in forma pauperis* which was rejected.

THIS was a suit to enforce as against the property of the defendant a lien for contribution arising out of a mortgage entered into by the plaintiff Narain

* Second Appeal No. 887 of 1896, from a decree of G. A. Tweedy, Esq., District Judge of Farrukhabad, dated the 27th June 1896, confirming a decree of Maulvi Anwar Husain Khan, Subordinate Judge of Farrukhabad, dated the 20th December 1895.

Singh and the defendant jointly, on the allegation that the plaintiff's property had been sold in [360] execution of a decree obtained by the mortgagee on the mortgage, while the property of the defendant co-mortgagor had been exempted from sale. The principal plea raised by the defendant was that the suit was barred by the operation of section 43 of the Code of Civil Procedure inasmuch as the plaintiff had formerly made an application for leave to sue *in formā pauperis* for contribution in respect of the same cause of action. This application related merely to the claim for money, that is, it was not a claim for enforcement of lien, and was rejected.

The Court of First Instance (Subordinate Judge of Farrukhabad) dismissed the suit holding it to be barred by the provisions of section 43 of the Code of Civil Procedure. The plaintiff appealed, and the Lower Appellate Court (District Judge), taking the same view of the law, dismissed the appeal. The plaintiff thereupon appealed to the High Court.

Pandit *Sundar Lal*, for the Appellants.

Munshi *Ram Prasad*, for the Respondent.

Strachey, C. J.—We think that the learned Judge was wrong in holding that section 43 of the Code of Civil Procedure barred the present suit. Section 43 only applies where there has been a suit, and the plaintiff omits in that suit to make a particular claim which he is entitled to make in respect of the cause of action. Now prior to this suit the plaintiff did not bring any suit having reference to the cause of action alleged in the present suit. What he did was to make an application for leave to sue *in formā pauperis*, but that application was rejected. Section 410 of the Code clearly shows that it is only when such an application is granted that it becomes the plaint in a suit, and therefore if the application is rejected, it never becomes a suit, and section 43, which is limited to suits, cannot apply so as to bar any subsequent suit. There is nothing in this view inconsistent with section 413. All that section 413 shows is that an order of refusal to allow the applicant to sue as a pauper bars any subsequent application for leave so as to sue in respect of the same right. It does not bar any suit brought in the ordinary way. The [361] words "but the applicant shall be at liberty to institute a suit in the ordinary manner in respect of such right," do not imply that the applicant is not at liberty to institute a suit in the ordinary manner in respect of any other right than that to which the application related. In the present case the application for leave to sue as a pauper was merely in respect of the personal remedy of contribution, and there was no claim to enforce the charge created by section 95 of the Transfer of Property Act. The present suit is a suit to enforce that charge, and there is nothing in section 413 which could be held to bar it. That is all that is necessary to say about section 43 of the Code. As to the question of limitation the learned Judge is right in holding that Art. 132 is applicable. As we disagree with the learned Judge's view of the effect of section 43 on which his decree is based, we must allow this appeal. We set aside the decrees of both the lower Courts and remand the suit to the Court of First Instance for disposal on the merits. Costs of the appeal in the Lower Appellate Court and in this Court will be paid by the respondent. The costs of the first Court will abide the event.

Appeal decreed and cause remanded.

[21 All. 361]
FULL BENCH.*The 15th May, 1899.*

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX, MR.
JUSTICE BLAIR, MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Bakar Sajjad.....Judgment-debtor

versus

Udit Narain Singh.....Decree-holder.*

Execution of decree—Construction of decree—Act No. IV of 1882 (Transfer of Property Act), sections 86, 88, 89—Decree for sale on a mortgage—Interest allowable after date fixed by decree for payment of the mortgage money.

A Court executing a decree the terms of which are ambiguous should, where it is possible, put such a construction upon the decree as would make it in accordance with law. *Amolak Ram v. Lachmi Narain*, (1896) I.L.R., 19 All., 174; *Pirbhu [362] Narain Singh v. Rup Singh*, (1898) I. L. R., 20 All., 397, and *The Maharaja of Bhartpur v. Rani Kanno Dei*, Weekly Notes, 1898, p. 164, *quoad hoc* approved.

But in construing a decree for sale upon a mortgage, the terms of which are susceptible of being construed either as allowing interest only up to the date fixed by the decree for payment of the mortgage-debt or as allowing interest also after that date until realization, the proper construction, to make the decree in accordance with law, is that interest is allowed up to the date of realization and not merely up to the date fixed by the decree for payment of the mortgage-debt. *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174; *Nain Dat v. Harihar Dat*, (1897) Weekly Notes, 1898, p. 57, and *The Maharaja of Bhartpur v. Rani Kanno Dei*, Weekly Notes, 1898, p. 164, as to this point overruled.

Achalabala Bose v. Surendra Nath Dey, (1897) I. L. R., 21 Cal., 766, and *Subbaraya Ravuthamindi Nainar v. Ponnusami Nadar*, (1897) I. L. R., 21 Mad., 364, referred to. *Rameswar Koer v. Mahomed Mehdi Hossein Khan*, (1898) I. L. R., 26 Cal., 39, followed.

THIS was an appeal arising out of an application for execution of a decree under section 88 of the Transfer of Property Act. The facts of the case will be found set forth in detail in the judgment of the Chief Justice, and it is only necessary to state here that the question before the Full Bench was whether the Lower Court was right in allowing the decree-holder respondent's claim for interest up to the date of the application, that is to say, interest after the date fixed by the decree for payment of the mortgage money, and in disallowing the judgment-debtor appellant's objection that interest was only payable under the decree up to the said date.

Munshi Gulzari Lal, for the Appellant.

The decree in this case under section 88 of the Transfer of Property Act only provides for payment of the sum found due with interest at the rate mentioned therein on 31st December 1892, the date fixed by the Court for payment. The decree is silent as to payment of any interest after that date. A Court executing the decree cannot by a mere process of interpretation add to the terms of the decree—*Forester v. Secretary of State for India*, (1877) L. R., 4 I. A., 137.

The terms of the order absolute, dated 29th June 1873, awarding interest after the date fixed for payment are immaterial because the

* First Appeal No. 96 of 1898, from an order of Rai Pandit Indar Narayan, Subordinate Judge of Farrukhabad, dated the 15th January 1898.

decree to be executed is still the decree under section 88 of [363] the Transfer of Property Act—*Raj Kumar v. Bisheshar Nath*, (1894) I. L. R., 16 All., 270; *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174; *Kashi Prasad v. Sheo Sahai*, (1896) Weekly Notes, 1897, p. 12; *Oudh Bihari Lal v. Nageshar Lal*, (1890) I. L. R., 13 All., 278. A Court in passing an order absolute for sale has only to see whether the amount payable under the decree has been paid or not, and to order sale. Interpretation of the terms of the decree is beyond its scope, especially in a case like the present, where no payment has been made. Anything contained in the order absolute for sale cannot have the effect of *res judicata* in future execution proceedings *Shib Charan v. Raghu Nath*, (1895) I. L. R., 17 All., 174. The point now raised was never raised and determined by the Court directly between the parties after due notice—*Sheik Budan v. Ramchandra Bhunjaya*, (1887) I. L. R., 11 Bom., 537; *Ram Lal v. Narain*, (1890) I. L. R., 12 All., 539; *Shafaat Begam v. Hurmat Sultan Begam*, Weekly Notes, 1895, p. 15; *Madho Prasad v. Daryai Bibi*, Weekly Notes, 1895, p. 108; *Nathu Ram v. Muhammad Ali Khan*, Weekly Notes, 1895, p. 119.

Mr. E. Chamier, for the Respondent.

The decree *nisi* provides for future interest, but does not state clearly up to what date such interest shall be paid. The decree *nisi* should, if possible, be construed as a decree prepared in accordance with law, see *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174, and *Pirbhu Narain v. Rup Singh*, (1898) I. L. R., 20 All., 397. As to what interest a decree under section 88, Act IV, 1882, should provide for, see the decision of the Privy Council in *Rameswar Koer v. Mahomed Mehdi Hossein Khan*, (1898) I. L. R., 26 Cal., 39, also *Achalabala Bose v. Surendra Nath Dey*, (1897) I. L. R., 24 Cal., 766, and *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar*, (1897) I. L. R., 21 Mad., 364. The decision of this Court in *Amolak Ram's* case is no longer of authority in view of the decision of the Privy Council. The decree *nisi* now in question is capable of being construed as making provision for interest up to the date of realization and should be so construed.

[364] Next it is the duty of the Court which prepares the order absolute under section 89 of Act No. IV of 1882 to construe the decree *nisi* and from the order absolute accordingly—the order absolute cannot be challenged at any later stage of the proceedings in execution, see *Badshah Begam v. Musammat Hardei*, (1897) Weekly Notes, 1898, p. 17, and *Pirbhu Narain Singh v. Rup Singh*, (1898) I. L. R., 20 All., 397. The order absolute in this case clearly provides for future interest and was never challenged till the publication of the decision in *Amolak Ram's* case. The principle of explanation II to section 13, Civil Procedure Code, applies.

The order absolute was prepared after notice to the judgment-debtors; notice was again issued to them under section 287, Civil Procedure Code, previous to the preparation of the proclamation, see clause (d) of that section. The matter is now *res judicata*. *Ram Kirpal Shukul v. Rup Kuari*, (1883) L. R., 11 I. A., 37, *Mungul Pershad Dichit v. Gria Kant Lahiri Chowdhry*, (1881) L. R., 8 I. A., 123. The case of *Sheikh Budan v. Ram Chandra*, (1887) I. L. R., 11 Bom., 537, is distinguishable.

Lastly, the judgment-debtor, appellant, has obtained adjournments of the sale, at the same time agreeing that the proclamation shall stand and has filed petitions admitting evidently that the amount due includes interest up to the date of realization. He is now estopped from raising the question of interest. He cannot rip open the proceedings of six years. See *Girdhari Singh v. Hurdeo*

Narain Singh, (1876) L. R., 3 I. A., 230, and *Arunachellam v. Arunachellam*, (1888) L. R., 15 I. A., 171.

Munshi *Gulzari Lal* in reply. In *Rameswar Koer v. Mahomed Mehdi Hossein Khan*, (1898) I. L. R., 26 Cal., 39, their Lordships of the Privy Council never meant to decide the point which is now under discussion. The question before their Lordships simply related to the rate of interest to be allowed in a mortgage-decree between the date of the institution of the suit and the date fixed for payment. They held that interest at the contractual rate was [366] to be allowed. "Date of realization" in the judgment of the Privy Council must mean the "date fixed for realization" as put in the head note to the ruling as reported in the Indian Law Reports. In saying that, "if the High Court has allowed something less the mortgagee makes no complaint" their Lordships evidently referred to "rate of interest" in the previous sentence, and not to the period for which it was to be allowed, which was not in question in the case. The rate of interest was 12 per cent. compound interest and not simple interest as awarded by the High Court. It was to this that the Privy Council alluded and to nothing else. It is thus that the Privy Council ruling has been interpreted by the Judicial Commissioner of Oudh in a very recent case—*Allahabad Bank v. Syed Mohamad Jawad*, (1899) Oudh Cases, 1899, p. 37. The terms of sections 86, 88 and 89 of the Act clearly support this view. Form No. 128 in Schedule IV of the Code of Civil Procedure makes no mention of any interest after the date fixed for payment. Compare the form for an order for sale in Seton on Decrees and Orders, Vol. III, page 1587. As far as a decree for foreclosure or sale under the Transfer of Property Act is concerned, the Court can calculate interest on the mortgage debt as such only up to the date fixed for payment. It was so held even by the Calcutta High Court in *Surya Narain Singh v. Jogendra Narain Roy Chowdhury*, (1892) I. L. R., 20 Cal., 360. The recent ruling in *Achalabala Bose v. Surendra Nath Dey*, (1897) I. L. R., 24 Cal., 766, apparently overlooks the old practice of the Calcutta High Court. The interest at 4 or 6 per cent. which is generally allowed by the Calcutta High Court after the date fixed for payment is not under the provisions of the Transfer of Property Act. Section 209, Civil Procedure Code, has nothing to do with the matter as it cannot apply to a mortgage decree. The ruling of *Amolak Ram v. Lachmi Narain* does not stand alone in this Court. The same view was held in *Tarachand v. Dina Nath*, Weekly Notes, 1895, p. 76.

[366] **Strachey, C. J.**—This was an application for execution of a decree for sale of mortgaged property under section 88 of the Transfer of Property Act, 1882. The question is whether the Court below was right in allowing the decree-holder's claim for interest up to the date of the application and disallowing the judgment-debtor's objections that interest was payable under the decree only up to the 31st December 1892. The decree was passed on the 30th June 1892. It recites the relief claimed in the plaint that the defendants may be ordered to pay to the plaintiff Rs. 13,771-8, principal and interest, together with interest accruing during the pendency of the suit and future interest on the date to be named by the Court, and that, in case of default, the mortgaged property might be sold in satisfaction of the debt, with relief against the person and other property of the defendants. The operative part of the decree is as follows:—

"It is decreed and hereby declared that on the 31st December 1892, the sum of Rs. 14,848-6 will be payable to the plaintiff, viz., Rs. 13,817-6 for principal and interest on the mortgage, dated the 21st day of March 1883, i.e., Rs. 13,771-8, the amount claimed and Rs. 45-14 *pendente lite* interest, and

Rs. 1,031 for his costs of this suit, and it is hereby ordered that upon the defendants paying to the plaintiff or into Court on the 31st December 1892, aforesaid the said sum with interest at annas 8 per cent. per mensem, the plaintiff shall deliver up to the defendants, or to such person as they appoint, all documents in his possession or power relating to the property specified below, and shall transfer the property to the defendants free from all incumbrances created by the plaintiff, or any person claiming under him, or by those under whom he claimed and shall put the defendants in possession of the property. But if such payment be not made as aforesaid on or before the aforesaid 31st day of December 1892, then it is ordered that the said property, or a sufficient part thereof, be sold, and that the proceeds of the sale (after defraying thereout the expenses of the sale) be paid into Court and applied in payment of the sum [367] found due to the plaintiff, and that the balance, if any, be paid to the defendants or other persons entitled to receive the same. And it is further ordered that each of the mortgagors, Ahmad Sajjad and Bakar Sajjad, can redeem 5 biswas of mauza Babapur Patti on payment of the amount decreed in equal shares."

The judgment-debtors not having paid the amount decreed, an order absolute for sale of the mortgaged property under section 89 of the Transfer of Property Act was passed on the 29th June 1893, after notice to them. They did not appear on the date fixed by the notice, and the order absolute for sale was therefore passed *ex parte*. The material part of the order was as follows:—"It is decreed and ordered that the property detailed below be sold on a date to be fixed hereafter and the sale proceeds, after defraying the expenses of sale, be paid into Court and applied in paying Rs. 16,046, with usual future interest, which has been found to be due to Raja Udit Narain Singh, decree-holder." This Rs. 16,046 included interest calculated up to the 20th June 1893. As the property to be sold was ancestral property, the Court proceeded to order, in accordance with the rules prescribed by the Local Government under section 320 of the Code of Civil Procedure, that the record should be transmitted to the Collector for execution of the decree. It does not appear whether any proceedings in execution were taken by the Collector before the 20th September 1894. On that date the property was proclaimed for sale, the amount due under the decree being notified in the proclamation as Rs. 16,046, that is, the amount stated in the order absolute. No sale, however, took place. The sale was first adjourned by the Collector upon an application by the judgment-debtors, who represented that they were making arrangements with the decree-holder for a private disposal of the property. After this it was adjourned several times pending an application made by one of the judgment-debtors, the present appellant, to the Court of the Subordinate Judge, on the 10th December 1894, dismissed by that Court in September 1895 and finally dismissed by the High Court in appeal on 8th December [368] 1896. In that application, the object of which was to have satisfaction of the decree recorded by reason of an alleged compromise, the appellant stated the "amount due by the judgment-debtor" to be Rs. 8,642, which is half the Rs. 16,046 mentioned in the order absolute and interest thereon at 6 per cent. from the date of that order. On the 11th January 1896, the decree-holder applied for execution of the decree, claiming interest up to the date of the application, but as the judgment-debtor's appeal to the High Court from the order dismissing his application of the 10th December 1894, was then pending, the application for execution was not proceeded with. On the 1st November 1897, the present application for execution was made. In it the decree-holder claimed interest up to the 30th October. Notice was issued under section 248 of the Code to the judgment-debtor, who then for the first

time objected that the decree-holder was not entitled to interest beyond the 31st December 1892, the date fixed by the decree for payment. The Court below disallowed the objection, and ordered execution to issue for the full amount claimed. In this appeal by the judgment-debtor we have to decide whether the lower Court's order was right.

It is clear from the order absolute, the Collector's proclamation, and the appellant's application of the 10th December 1894, that until the appellant raised his objection to the present application, both the Court and the parties thought that the decree-holder was entitled to interest after the 31st December 1892. In the argument before us there has been much discussion of the questions whether, and in what sense, the Court, when passing the order absolute, was competent to construe the decree of the 30th June 1892, or to add to its provisions as to interest; whether, having regard to the terms of the notice to the judgment-debtors upon which that order was passed, the order had the effect of making the question of interest until realization *res judicata* and whether the appellant is estopped from raising his present contention by anything else which occurred in the execution proceedings. In the view which we take of the case, it is not necessary to [369] decide any of these questions. The only question which we need consider is up to what date the decree upon its true construction awards interest. Now the decree begins by reciting the claim in the plaint for interest after decree as well as interest before suit and interest *pendente lite*, and then fixes the 31st December 1892, as the date for payment of (i) Rs. 14,848-6 made up of (a) the principal sum and interest claimed in the plaint as due up to the date of suit, (b) interest from the date of suit to the date of the decree, (c) costs, and (ii) future interest on the Rs. 14,848-6 at annas 8 per mensem. Then it directs, in accordance with section 88 of the Transfer of Property Act, 1882, that if payment is not made on or before the 31st December 1892, the property or a sufficient part of it is to be sold and that the proceeds after defraying the expenses of sale are to be paid into Court and applied in payment of the sum found due to the plaintiff. Thus the decree clearly makes future interest payable, and the only question is until when? It does not expressly state when the interest thus set running is to stop. The only possible dates at which the Court passing the decree can have intended it to stop are the 31st December 1892, the date fixed for payment, and the date of actual payment or realization. To which of these dates does the decree awarding interest impliedly refer? Upon principle, and apart from authority, statutory or otherwise, it is difficult to see why the mortgagee should not have interest on his money so long as the debt remains unpaid. The 31st December 1892, is only named in the decree as the date on which payment is to be made, and after which, if payment is not made, the property is to be sold. It is not named with any special reference to interest. However, in the absence of any express direction as to the date to which interest is payable, the decree is certainly not free from ambiguity on the point.

In *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174; *Pirbhu Narain Singh v. Rup Singh*, (1898) I. L. R., 20 All., 397, and *The Maharaja of Bhartpur v. Rani* [370] *Kanno Dei*, Weekly Notes, 1898, p. 164, this Court has laid down the principle that a Court executing a decree, the terms of which are ambiguous, should, where it is possible, put such a construction upon the decree as would make it in accordance with law. The principle is, I think, undoubtedly sound: the only question is as to its application. The decree of the 30th June 1892 is, as just shown, capable of two different constructions. Which of the two would make the decree in accordance with law. The

construction that it awards interest only up to the date fixed for payment or the construction that it awards interest up to realization? The question depends upon the interpretation of sections 86, 88 and 89 of the Transfer of Property Act, 1882, read with section 90, 94 and 97 of the same Act, and with section 209 and forms 109 and 128 of the fourth schedule of the Civil Procedure Code. Upon this point there is a conflict of authority. On the one hand it was held by this Court in *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174, *Nain Dat v. Harihar Dat Singh*, (1897) Weekly Notes, 1898, p. 57, and *The Maharaja of Bhartpur v. Rani Kanno Dei*, Weekly Notes, 1898, p. 164, that in a decree for sale of mortgaged property the Court has no power, under section 88 read with section 86 of the Transfer of Property Act, 1882, to allow interest beyond the date fixed by the decree for payment of the mortgaged money. On the other hand, the Calcutta High Court in *Achalabala Bose v. Surendra Nath Dey*, (1897) I. L. R., 24 Cal., 766, and the Madras High Court in *Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar*, (1897) I. L. R., 21 Mad., 364, have dissented from the decision in *Amolak Ram's* case, and held that the Court has power in a decree under section 88 to award interest subsequent to the decree and the date fixed by the decree for payment, until realization. It is not necessary for us to examine these decisions or to consider which of them we should have followed in the absence of superior authority. Since the latest of them was given, the question has been considered by the Judicial Committee of the Privy Council in *Rameswar Koer v. Mahomed Mehdi Hossein Khan*, (1898) I. L. R., 26 Cal., 39, in [371] a judgment which appears to us to settle it in the sense of the Calcutta and Madras rulings. There the Subordinate Judge passed a decree for sale of mortgaged property awarding interest at the mortgage rate of 12 per cent. down to the date of the institution of the suit, and thereafter at 4 per cent. until realization, with directions for sale in case of non-payment in six months. On an appeal by the defendants to the High Court, the plaintiff mortgagee filed objections to the decree under section 561 of the Code, one of which was that "the Subordinate Judge is wrong in making up the accounts in directing that the amount due should, from date of suit to date of payment, bear only 4 per cent. interest instead of the rate of interest stipulated for in the bond." The decree of the High Court as regards this point is incompletely stated at page 41 of the report. We have been favoured by the Registrar of the Calcutta High Court with a copy of the printed book of appeal to the Privy Council, from page 105 of which it appears that the decree was as follows:—"It is ordered and decreed that the decree of the lower Court, so far as it directs that the amount due should, from the 7th August 1891 to 15th March 1893, being the date of payment fixed by the lower Court, bear interest at 4 per cent., be set aside, and in lieu thereof, this Court doth direct that interest do run on the amount due at 12 per cent. from the 7th August 1891 up to the 15th March 1893, the date fixed by the lower Court for the payment of principal and interest, and thereafter at the rate of 4 per cent. until realization, and it is further ordered and decreed that, save and except as aforesaid the said decree be and it hereby is dismissed, and it is further ordered and decreed that the appellant do pay to the respondent Rs. 1,454-6-0 (as per details at foot) being the amount of costs incurred by them in this Court, with interest thereon at the rate of 6 per cent. per annum from this date to the date of realization." That is to say the High Court, while agreeing with the Subordinate Judge in awarding interest until realization, thought that the mortgage rate of 12 per cent. should be paid not only to the date of the institution of the suit, but to the date [372] fixed by the decree for payment, and that only from that date onwards until realization should the rate be reduced to 4 per cent. From the decision of the High Court the defendants appealed to the Privy Council, one of the

grounds of appeal being that the High Court "was wrong in allowing interest at 12 per cent. per annum (the stipulated rate from the date of the suit till the date fixed for payment by the Subordinate Judge." No objection was taken that the Courts should not have allowed interest beyond the date fixed for payment. In the argument as reported it was apparently common ground that, whether the case was governed by the Transfer of Property Act, 1882, or not, interest until realization was properly awarded, and no question appears to have been raised as to the rate of interest awarded from date fixed for payment until realization. The only questions regarding interest were whether the Act applied, and whether the rate of interest from the date of the suit to the date fixed for payment should be the stipulated rate or something less. The judgment of the Privy Council, after stating the effect of the Subordinate Judge's decree, goes on to say, "the High Court varied the decree by ordering 12 per cent. interest instead of 4, and with that exception affirmed it." The terms of the High Court's decree above quoted show that it would have been exactly correct to say that the High Court varied the decree by ordering 12 per cent. interest instead of 4 up to the date fixed by the Subordinate Judge for payment instead of up to the date of suit, and with that exception affirmed it. Upon the general question their Lordships say : — "The High Court founded their order on sections 86 and 88 of the Transfer of Property Act, which indicate clearly enough that the ordinary decree in a suit of this kind should direct accounts allowing the rate of interest provided by the mortgage up to the date of realization. No peculiarity has been shown to exist in this case for cutting down the mortgage rate of interest. If the High Court has allowed something less, the mortgagee makes no complaint. The mortgagor cannot complain if he is made to pay no more than he contracted to pay." The appeal was accordingly **[373]** dismissed. The words "if the High Court has allowed something less," that is, less than the mortgage rate of 12 per cent. can only refer to the period from the date fixed for payment until realization. It is thus obvious that the question whether a decree under section 88 read with section 86 of the Transfer of Property Act should allow interest beyond the date fixed for payment and until realization was considered by the Privy Council and answered in the affirmative.

While therefore we must, in accordance with the principle stated in *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174, and the later decisions of the Court, construe the decree of the 30th June 1892, so as to make it in conformity with sections 86 and 88 of the Transfer of Property Act, we cannot follow those decisions in their application of the principle. To be in conformity with those sections as interpreted by the Privy Council the decree must be construed as awarding interest, not merely until the 31st December 1892, but until realization of the mortgage money, and in this view of the decree the Court below was right in disallowing the judgment-debtor's objection and in allowing execution for the full amount claimed by the decree-holder. The appeal must be dismissed with costs.

Knox, J.—I concur.

Banerji, J.—I am of the same opinion, and have nothing to add.

Aikman, J.—I concur in the judgment of the learned Chief Justice, and have nothing to add.

Blair, J.—As one of the Judges who was responsible for the decision in *Amolak Ram v. Lachmi Narain*, (1896) I. L. R., 19 All., 174, and as one of the Bench which referred this case with a view to its consideration by a Full Bench, I desire to say that I entirely concur with the view of the Chief Justice that the question is authoritatively decided for us by the ruling of the Judicial

Committee of the Privy Council in the case of *Rameswar Koer v. Mahomed Mehdi Hossein Khan*, (1898) 1 L. R., 26 Cal., 39. I agree that the appeal must be dismissed with costs.

Appeal dismissed.

NOTES.

[As regards the interpretation of interest being given till realisation, this was approved in (1900) 23 All., 181 P.C.; (1899) 22 All., 79; (1901) 29 Cal., 43; (1902) 6 C.W.N., 769; (1900) 23 Mad., 637; (1908) 35 Cal., 221 P.C. See also (1912) 16 I.C., 374 (Cal.).]

[374] *The 15th May, 1899.*

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BANERJI, MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Janki Prasad and another.....Defendants

versus

Ishar Das.....Plaintiff.*

Pre-emption—Wajib-ul-arz—Partition—Effect of partition on pre-emptive rights, no new wajib-ul-arz being framed—Cause of action—Extinction cause of action before suit brought.

In order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based, but that such cause of action should subsist at the time when the suit is brought. *Dalganjan Singh v. Kalka Singh*, Weekly Notes, 1899, p. 111, referred to.

THIS was a suit for pre-emption of a 4 biswansi 12 kachwansi 10 nanwansi share in mauza Rajora. The defendants were Kalyan, Kuar Sen and Naik Rai, the vendors, Janki Prasad and Raghubar Dial, the vendees, and Musammat Jai Debi, the plaintiff in an earlier suit for pre-emption arising out of the same sale. The suit was brought on the basis of the *wajib-ul-arz*, the plaintiff alleging that the vendors being owners of a share in patti No. 2 of the plaintiff's thoke had sold the same to strangers. The plaintiff also alleged that the price (Rs. 500) entered in the sale deed was fictitious, and that the true price was Rs. 375. Both vendors and vendees pleaded that by reason of a partition which had taken place in 1894-5 the plaintiff was not a sharer in the patti in which the share in question was sold and therefore had no right of pre-emption. Musammat Jai Debi pleaded a pre-emptive right superior to that of the plaintiff. The sale out of which the suit arose was effected by a deed executed on the 28th of February 1895. By virtue of proceedings which were completed on the 15th August 1895, the mahal in which originally both the plaintiff and the defendants vendors were sharers was broken up, so that the plaintiff ceased to be a sharer in the mahal in which the share sold was situated. No new *wajib-ul-arzes* were prepared for the new mahals which were formed on partition. The suit was filed on the 25th of February 1896.

[375] The Court of First Instance (Munsif of Shikohabad) decreed the plaintiff's claim for half the share sold, having regard to the pre-emptive rights of Jai Debi, and found the true sale price to be Rs. 400.

* Second Appeal No. 860 of 1896, from a decree of H. W. Lyle, Esq., Officiating District Judge of Mainpuri, dated the 7th July 1896, confirming a decree of Babu Jagat Narain, Munsif of Shikohabad, dated the 30th March 1896.

The defendants-vendees appealed, and the Lower Appellate Court (District Judge of Mainpuri) dismissed the appeal and upheld the decree of the Munsif on the grounds upon which that decree was based.

The defendants-vendees appealed to the High Court.

Pandit *Sundar Lal*, for the Appellants. The plaintiff cannot maintain the suit for pre-emption unless he can show that he continued a co-sharer at least until the day when he instituted his suit for pre-emption. The object of a suit for pre-emption is to exclude strangers and to prevent them from intruding into a coparcenary body. It would be defeating the object of pre-emption if a person who himself has ceased to be a co-sharer at the date of suit and has thus become a stranger is permitted to pre-empt. That would be permitting one stranger to step into the place of another.

The Muhammadan law requires that the pre-emptor's interest in the tenement, the ownership of which gives him a right of pre-emption, should be subsisting up to the time when the Qazi pronounces his decree for pre-emption—*Sakina Bibi v. Amiran*, (1888) I. L. R., 10 All., 472, Baillie's Digest of Moohummudan Law, Hanifeea, p. 505, Tagore Law Lectures, 1873, p. 535. The principle upon which this rule of Muhammadan law is based is applicable equally to pre-emption cases based on the *wajib-ul-arz*.

The *wajib-ul-arz* conferred a right of pre-emption on co-sharers of four classes. The plaintiff does not come within the first three of these classes. The fourth class within which he fell on the date of sale (*viz.*, that of co-sharers in the thok) had ceased to exist on the date of suit by reason of the thok itself having ceased to exist.

Babu *Satya Chandra Mukerji* (for Babu *Jogindro Nath Chaudhri*) for the Respondent.—This case differs in a material respect from *Dalganjan Singh v. Kalka Singh*, Weekly Notes, 1899, p. 111, which has [376] just been argued before this Bench. In this case the plaintiff was a co-sharer with the vendor at the date of sale, but, by reason of partition proceedings having been completed in the meanwhile, he had ceased to be a co-sharer at the date of suit. The question to be determined here is whether under such circumstances the suit is maintainable. It is submitted that it is. The crucial date to be looked at is the date on which the cause of action arose, which was here the date of sale. A complete cause of action which has once accrued can be enforced by a suit brought according to law and within the statutory period.

The plaintiff may waive his right to relief or defendant may discharge the cause of action which had accrued to the plaintiff by performance; but the plaintiff cannot lose his right to relief by something independent of his will. Here the plaintiff did not apply for partition and he cannot lose his right by some act of a third person which he was powerless to prevent. The principle contended for is supported by the decision of Mr. Justice BURKITT in Second Appeal 649 of 1895.* If the argument for the appellant were correct, a man has only to sell his share to a stranger and the stranger has the next day to apply for partition and get the property sold partitioned into a separate mahal. Would such a course defeat all rights of pre-emption? It is not an essential element of the plaintiff's cause of action that he was a co-sharer at the date of suit. He need only show that he was a co-sharer at the date when the cause of action arose.

[STRACHEY, C. J.—Supposing there had been a compulsory sale by process of law of the share of the plaintiff between the date of sale and the date of suit, would he still be entitled to bring his suit?]

* (Unreported.) This case has however been dissented from by EDGE, C. J., and BANERJI, J., in *Serh Mal v. Hukam Singh*, (1897) I. L. R., 20 All., 100.—ED.

No. Sale in execution of a decree stands on the same footing as a private sale. The compulsory sale by process of law follows some preceding act of the person against whom execution is enforced, and would be included in the principle of losing one's cause of action by waiver.

[377] [STRACHEY, C. J.—Supposing in a suit for an easement the dominant tenement is destroyed by lightning or earthquake before the suit is instituted, would the suit lie still?]

Yes, it would; the Court might not be able to grant relief by reason of the destruction of the dominant tenement; but it might grant other reliefs, such as for damages.

Strachey, C. J.—This case raises a question similar to that considered by this Full Bench in *Dalغانjan Singh v. Kalka Singh*, Weekly Notes, 1899, p. 111. It relates to the effect of a perfect partition upon the right of pre-emption recorded in the *wajib-ul-arz* of an undivided mahal, where no new *wajib-ul-arz* has been framed for the new mahals created by the partition. The village Rajora originally consisted of several thokes, one of which was shown as "thoke Ishar Das." That thoke was an undivided 3 biswas 16 biswansis 10 kachwansis share of the village. The *wajib-ul-arz* prepared at the last settlement contained a chapter, headed "Chapter II, about the right of co-sharers (*hissadars*) among themselves based on custom or covenant." Clause 4 was as follows:—"Custom (*dastur*) relating to pre-emption (*shafa*). —If any co-sharer (*hissadar*) wishes to transfer his share (*hissa*), then, having regard to the right of pre-emption, he should transfer his estate (*haqiyat*), that is, the claim to pre-emption shall accrue to, first, own brothers and brothers' sons, next to cousins, next to co-owners in the parcel sold (*sharik-i-haqiyat*), after them to co-sharers in the patti (*sharikian patti*), after them to co-sharers in the thoke (*sharikian thoke*).

In February 1895 the defendants Nos. 3 to 5 sold a share in thoke Ishar Das to the defendant-appellant Janki Prasad, a stranger to the village. The plaintiff-respondent was at that time a co-sharer with the vendors in thoke Ishar Das. At the time of the sale, proceedings for perfect partition of the village had been commenced and were still pending. After the sale the perfect partition was completed, and it became operative on the [378] 1st July 1895, when the sanction of the Collector was given. By the partition thoke Ishar Das was divided into several separate mahals. The property sold fell within one of the mahals shown as mahal Ganga Prasad. In that mahal neither the plaintiff nor the vendees owned any share. No new *wajib-ul-arz* was framed for any of the new mahals. The present suit for pre-emption was brought in 1896. It was based on the pre-emption clause of the old *wajib-ul-arz*. In this appeal two questions have been discussed. The first is whether, after the perfect partition, the plaintiff was still entitled to pre-emption under the old *wajib-ul-arz*. The second is, whether it makes any difference that the sale took place before the completion of the partition: in other words, whether, granting that the plaintiff at the time of the sale obtained a good cause of action, he was deprived of it by the completion of the partition before the institution of the suit.

The principles upon which the first question must be decided have been fully considered in *Dalغانjan Singh v. Kalka Singh*, Weekly Notes, 1899, p. 111. The *wajib-ul-arz* was not in my opinion abrogated by the perfect partition. The question is whether, upon the true construction of its provisions, the plaintiff is entitled to pre-emption. The pre-emption clause gives the right (1) to certain relatives of the vendor, (2) to *sharik-i-haqiyat* or co-owners in the parcel sold, (3) to co-sharers in the patti, (4) to co-sharers in the thoke. "Co-

sharers in the thoke" means co-sharers in the thoke which contains the property sold. No right is given to co-sharers in any other thoke or in any part of the village other than the thoke in which the vendor is a co-sharer. The plaintiff claims as one of this fourth class of pre-emptors, as a co-sharer in thoke Ishar Das. If he is a member of that class he is entitled to pre-emption: if he is not, his claim must fail. The effect of the perfect partition was to destroy the thokes into which the village Rajora had been divided, and thoke Ishar Das had, at the date when the suit was brought, ceased to exist. Neither the plaintiff nor any one else has, since the partition, been a co-sharer in thoke Ishar [379] Das, and no one, therefore, can now claim pre-emption as a member of the fourth class of pre-emptors mentioned in the *wajib-ul-arz*. That disposes of the first question.

Next, does it make any difference that, at the date of the sale, though not at the date of the suit, thoke Ishar Das still existed, and that the plaintiff could, before the partition, have successfully sued for pre-emption as one of the co-sharers in the thoke? In my opinion, it makes none. No case exactly in point has been cited, but the principle appears to me to be clear. To maintain a suit for pre-emption, the plaintiff must, I think show not only that the sale gave him a cause of action, but that the cause of action still subsisted at the date of the institution of the suit. It is not necessary to consider what would have been the effect of the partition if it had been completed after the institution of the suit but before decree. To hold that the plaintiff is entitled to a decree if he merely proves that he had a right of pre-emption and a good cause of action at the time of sale, and that it is unnecessary to show that the right and the cause of action still subsisted when the suit was brought, should result in all sorts of anomalies. Suppose, for instance, that the plaintiff, after the sale, ceased to be a co-sharer in the thoke, not by reason of a partition but in any other way, such as by selling his share, could he still sue as a co-sharer? The learned pleader for the respondent admitted that he could not, but suggested that in such a case there would be a waiver or relinquishment of the right by the pre-emptor's voluntary act. But suppose that the sale was not a voluntary one: suppose that it was in execution of a decree against him? The learned pleader could suggest no answer to that question. Again, suppose that, after the sale, the vendee sold the property to a co-sharer having an equal right with the plaintiff to pre-emption under the *wajib-ul-arz*. Could the plaintiff deprive the new purchaser of the benefit of his purchase, although the rights of the two were equal? In *Serh Mal v. Hukam Singh*, (1897) I. L. R., 20 All., 100, that question was [380] answered in the negative. The argument that "at the moment when the sale to the stranger was made, the plaintiffs obtained their cause of action," was not allowed to prevail.

For these reasons I am of opinion that the suit ought to have been dismissed by the Courts below, and that we ought to allow the defendants' second appeal and dismiss the suit with costs in all Courts.

Knox, Banerji, Burkitt and Aikman, JJ., concurred.

Appeal decreed.

NOTES.

[The Privy Council in (1915) 37 All., 129 approved the ruling in 22 All., 1 in respect of the authority of the *wajib-ul-arz* upon a partition.

See also (1902) P. R., 32; (1907) P. R., 124; (1909) P. R., 90; (1909) P. R., 91; (1904) 7 O. C., 61; (1908) 11 O. C., 290; (1909) 12 O. C., 229; (1909) 5 N. L. R., 136; (1904) 26 All., 389; (1908) 31 All., 111; (1909) 31 All., 530; (1909) 32 All., 45; (1914) 36 All., 60.]

[21 All. 380]

APPELLATE CIVIL.

The 16th May, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Yad Ram.....Plaintiff

versus

Umrao Singh and others.....Defendants.*

Mortgage—Suit for sale on a mortgage—Benamidar—Right of benamidar mortgagee to sue.

Held, that the mortgagee named in a deed of mortgage is competent to sue in his own name for sale on the mortgage, though he is admittedly only a benamidar for some third person. *Nand Kishore Lal v. Ahmad Ata*, (1895) I. L. R., 18 All., 69, followed. *Gopi Nath Chobey v. Bhugwat Pershad*, (1884) I. L. R., 10 Cal., 697; *Bhola Pershad v. Ram Lall*, (1896) I. L. R., 24 Cal., 34; *Sachitananda Mohapatra v. Baloram Gorain*, (1897) I. L. R., 24 Cal., 644; *Shangara v. Krishnan*, (1891) I. L. R., 15 Mad., 267; *Ravji Appaji Kulkarni v. Mahadev Bapuji Kulkarni*, (1897) I. L. R., 22 Bom., 672; and *Dagdu v. Balvant Ramchandra Natu*, (1897) I. L. R., 22 Bom., 820, referred to; *Hari Gobind Adhikari v. Akhoy Kumar Morumdar*, (1889) I. L. R., 16 Cal., 364; *Issur Chandra Dutt v. Gopal Chandra Das*, (1897) I. L. R., 25 Cal., 98, and *Baroda Sundari Ghose v. Dino Bandhu Khan*, (1898) I. L. R., 25 Cal., 874, dissented from.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Babu Jogindro Nath Chaudhri (for whom Babu Harendra Krishna Mukerji), for the Appellant.

Mr. D. N. Banerji and Munshi Ram Prasad, for the Respondents.

[381] **Strachey, C.J**—This is a suit for sale of mortgaged property brought by a second mortgagee offering to redeem the first mortgagees, who are parties to the suit. The first mortgage was a usufructuary mortgage. The only defendants who resisted the suit were the purchasers, subsequent to the plaintiff's mortgage, of the equity of redemption of part of the mortgaged property. Their main defence was that the plaintiff had no right to maintain the suit, as he was only a benamidar, the mortgage money having been advanced by the defendants, first mortgagees. The Court of First Instance decreed the suit. The Lower Appellate Court, without going into the merits, dismissed the suit on the ground that the plaintiff was merely a benamidar of the first mortgagees, and therefore was not competent to maintain the suit. That is the only question which we have to consider in this appeal. We must take it that the plaintiff, in whose favour the mortgage sued on was executed, was only a benamidar for the first mortgagees.

Now the question whether, and in what circumstances, a benamidar is competent to maintain a suit in his own name and without the beneficial owner being a party to the suit, has been discussed in a number of rulings in the various High Courts, and in regard to it a considerable conflict of authority prevails. In those cases which affirm the right of the benamidar so to sue the right has been based partly on the fact that he is the transferee named in the

* Second Appeal No. 21 of 1897, from a decree of T. C. Piggott, Esq., Additional District Judge of Aligarh, dated the 2nd October 1896, reversing a decree of Babu Bepin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 24th March 1896.

registered instrument constituting the transfer, and on the principle that the contract can be enforced by the parties who have entered into it, and partly on the view that the benamidar must be presumed to be suing on behalf of the beneficial owner, or, to put the same idea into other words, that the suit is really brought by the beneficial owner through, and in the name of, the benamidar. On the other hand, those rulings which are adverse to the right of the benamidar to sue are mainly based on the ground that a suit cannot be maintained by any person who fails to prove, if his title is challenged, that he has a real interest of his own in the subject-matter of the suit.

[382] Now I do not propose to discuss on principle which of these conflicting views I should follow if the question were *res integra*. I propose to deal with it simply on the authorities. In this Court the authority is all one way. In *Nand Kishore Lal v. Ahmad Ata*, (1895) I. L. R., 18 All., 69, it was held that a benamidar was competent to sue in his own name to recover possession of immovable property, and that such a suit must be deemed to have been instituted with the consent and approval of the beneficial owner. I think that we are bound to follow that decision, unless we entertain so strong a view that it is wrong that we consider it our duty to refer the matter to a Full Bench. When the cases subsequent to that case are examined, I think that they show a very decided preponderance of authority in its favour. The decision expressly dissents from that in *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar*, (1889) I. L. R., 16 Cal., 364, in which it was laid down that a benamidar cannot maintain a suit for recovery of land on title, even if the real owner disclaims or is a party to the suit. This Court's decision has again been dissented from, and the case reported in 16 Cal., p. 364, followed, in two recent decisions of the Calcutta High Court. In the first of these—*Issur Chandra Dutt v. Gopal Chandra Das*, (1897) I. L. R., 25 Cal., 98, it was held that a mere benamidar cannot maintain a suit for ejectment. The same was held in the case of *Baroda Sundari Ghose v. Dino Bandhu Khan*, (1898) I. L. R., 25 Cal., 874. Now these two decisions of the Calcutta High Court merely follow as correct certain previous decisions of that Court. They are not consistent either with the recent rulings of the Calcutta High Court itself, or with the rulings, not only of this Court, but of the Madras and Bombay High Courts. Taking first the decisions of the Calcutta High Court itself, in *Gopi Nath Chobey v. Bhugwat Pershad*, (1884) I. L. R., 10 Cal., 697, the principle was laid down generally that in the absence of evidence to the contrary, it is to be presumed that the benamidar has instituted the suit with the full authority of the beneficial owner; and if so, any decision would bind the [383] real owner as if the suit had been brought by the real owner himself. The suit there was a suit for malikana, but the principle is laid down in all its generality. In the 24th volume of the Calcutta Series of the Indian Law Reports, there are two cases not referred to in the most recent decisions of that Court, but wholly inconsistent with the view that the benamidar cannot maintain a suit. In *Bhola Pershad v. Ram Lall*, (1896) I. L. R., 24 Cal., 34, the suit was for enforcement of a mortgage bond. In the judgment it is observed:—"We are unable to say that a benamidar cannot under any circumstances sue. * * * Unless an objection be taken, a decree can be made in his favour. There is authority to show that the real owner is bound by a suit by the benamidar." In *Sachitananda Mohapatra v. Baloram Gorain*, (1897) I. L. R., 24 Cal., 644, the suit most closely resembled the present. It was a suit for foreclosure. It was held that a suit for foreclosure may be brought by the person named in the mortgage-deed, though he is only a benamidar, and that the suit should not be dismissed because the beneficial owner is

not a party. The ground of that judgment which refers to another decision in a very similar case, was that the contract could be enforced by the parties who had entered into it, and that, whoever supplied the money, the transfer of the mortgaged property was by the deed made to the plaintiff. There is therefore strong authority in the Calcutta High Court itself, not referred to in the decisions which dissent from the ruling of this Court in *Nand Kishore Lal v. Ahmad Ata*, that a benamidar is competent to sue in his own name for enforcement of a mortgage without the beneficial owner or the person supplying the funds being made a party.

Turning next to the decisions of the other High Courts, the authorities are to the same effect. In *Shangara v. Krishnan*, (1891) I. L. R., 15 Mad., 267, the suit was to recover possession of land. It was held, citing the case reported in 10 Cal., p. 697, that the beneficial owner was bound by a decree passed in a previous suit brought by the benamidar and which must be presumed to have been brought with the true owner's authority and consent, and the decision [384] implies that the benamidar was competent to maintain that suit. The most recent rulings are two decisions of the Bombay High Court. The first is the case of *Ravji Appaji Kulkarni v. Mahadev Bapuji Kulkarni*, (1897) I. L. R., 22 Bom., 672. In that case Mr. Justice RANADE referred to all the principal rulings on the subject, and observed that the Allahabad High Court in *Nand Kishore Lal v. Ahmad Ata*, (1895) I. L. R., 18 All., 69, had shown good reasons for its dissent from the ruling of the Calcutta High Court in *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar*. He adds,—here speaking apparently for Mr. Justice PARSONS as well as himself,—that they are inclined to agree with the Allahabad and Madras High Courts, and to hold that a benami certified purchaser can sue in his own name, even when the true owner's name is disclosed. That decision was followed in *Dagdu v. Balvant Ramchandra Natu*, (1897) I. L. R., 22 Bom., 820. The suit in that case was for redemption of mortgage; it was held that a benamidar may maintain a suit in his own name, but that the Court will put the defendant in the same position as if the real owner were the actual plaintiff. It was found in that case that the beneficial owner, who was not an agriculturist, was using the benamidar plaintiff, who was an agriculturist, for the purpose of suing without payment of the usual stamp fee, and of obtaining the benefit resulting from the provisions of the Dekkan Agriculturists' Relief Act in favour of agriculturists. The Court, while allowing the suit by the benamidar to proceed, imposed, for the purpose of defeating the contemplated fraud on the public revenue, the condition that it should only be allowed to proceed "on payment of the usual stamp fees although Kelkar was the nominal as well as the real plaintiff."

This review of the cases shows, I think, that, treating the matter purely as one of authority, the balance of authority is most distinctly in favour of the decision of this Court in *Nand Kishore Lal v. Ahmad Ata*. I think, therefore, that we ought to follow that ruling. The result of this view is that the decree of the Lower Appellate Court must be set aside and the case remanded [385] to that Court, and the Court directed to dispose of the case on the merits.

In so disposing of the case I think the Court should have regard to the principle laid down by the Bombay High Court in *Dagdu v. Balvant Ramchandra Natu*. It is alleged or suggested that the object of this benami transaction and of the suit brought by the benamidar is to obtain a decree for sale for the benefit of the second set of defendants, who, as usufructuary mortgagees, would not themselves be entitled to obtain a decree for sale in respect of their usufructuary mortgage. As to whether this is the object of the suit

we of course express no opinion: but in considering the question the Lower Appellate Court should, I think, bear in mind the observations of Sir CHARLES FARRAN in the case I have just mentioned.

The plaintiff will have the costs of this appeal. The other costs will abide the result.

Banerji, J.—I agree that the decree of the Court below should be set aside and the case remanded to that Court. The suit is one for sale upon a mortgage in which the plaintiff is named as the mortgagee. It has been found by the Lower Appellate Court, and that finding must be accepted in this second appeal, that the plaintiff is only a benamidar for certain other persons. The question therefore which has to be determined in this appeal is whether a benamidar is entitled to maintain a suit like this in his own name. The question, so far as this Court is concerned, is covered by the authority of the ruling in *Nand Kishore Lal v. Ahmad Ata*, (1895) I. L. R., 18 All., 69. That ruling has been approved by the Bombay High Court in the cases to which the learned Chief Justice has referred. It is in consonance with the decision of the Madras High Court in *Shangara v. Krishnan*, (1891) I. L. R., 15 Mad., 267, and it is supported by at least one of the cases decided by the Calcutta High Court—I mean the case of *Sachitananda Mohapatra v. Baloram Gorain*, (1897) I. L. R., 24 Cal., 644. The weight of authority is thus in favour of the view [386] taken by this Court, and I do not feel myself justified in departing from that view. On this short ground I would decree the appeal and remand the case under section 562 of the Code of Civil Procedure.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1905) 28 All., 44; (1915) 37 All., 113 (mortgage); (1915) 37 All., 14 (right to execute decree); (1915) 29 I. C., 892 (Burma); as regards Calcutta, however, see (1902) 30 Cal., 265; (1915) 22 C.L.J., 259 (partition).]

[21 All. 386]

The 18th May, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Dharamraj Kunwar.....Plaintiff

versus

Sumeran Singh and another.....Defendants.*

Act No. XII of 1881 (N.-W. P. Rent Act), section 44—Landholder and tenant—Improvements—Wells—Power of tenants to construct wells without consent of landholder.

Held, that having regard to section 44 of the N.-W. P. Rent Act, 1881, an occupancy tenant may, if such well be an improvement within the meaning of the section, construct either a kacheha or pacca well on his holding without any reference to the consent of the zamindar. *Raj Bahadur v. Birmha Singh*, (1880) I. L. R., 3 All., 85 and *Muhammad Rasa Khan v. Dalip*, Weekly Notes, 1892, p. 103, referred to.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Mr. B. E. O'Connor, for the Appellant.

* Second Appeal No. 170 of 1897, from a decree of J. J. McLean, Esq., District Judge of Jaunpur, dated the 7th December 1896, confirming a decree of Babu Bhawani Chander Chakravarti, Munsif of Jaunpur, dated the 25th August 1876.

Mr. J. Simeon, for the Respondents.

Strachey, C.J.—The plaintiff in this case claimed an injunction involving the demolition of a *pacca* well constructed by the defendants on land which the plaintiff claimed as his own. He claimed a right, as owner of the land, to have the well demolished. The defendants pleaded that they had constructed the well on land belonging to themselves. It has been found as a fact that the defendants are occupancy tenants of the land on which they constructed the well. It is common ground that they constructed it without the consent of the plaintiff, who is the zamindar. That is how the case stood in the Court of First Instance. The question as stated by that Court is:—"Can an occupancy tenant construct a well on his holding without the permission of [387] his landlord?" The answer given to that question by the first Court is, that an occupancy tenant can do so. The Court, in support of that view, referred to the case of *Muhammad Raza Khan v. Dalip*, Weekly Notes, 1892, p. 103. The Munsif says, first, with regard to that case that "the facts of the two cases are exactly alike." I understand him to mean that the suits in that case and the present were of exactly the same character; that the wells sought to be demolished were both masonry wells; that in each case the parties stood in the relation of landholder and occupancy tenant, and that in each the well was constructed by the occupancy tenant without the landholder's permission. Then the Munsif goes on to say that in the precedent cited, "in spite of the condition in the *wajib-ul-arz* that it can be done with the zamindar's permission, the ruling has laid it down that such permission need not be sought and obtained." I understand him to mean that the precedent is an *a fortiori* case, and shows that the landholder's permission for the building of the well is immaterial, even where there is a clause in the *wajib-ul-arz* prohibiting the construction of wells without the landholder's consent. I do not think that the Munsif was referring to any *wajib-ul-arz* produced in the case before him. Certainly no *wajib-ul-arz* is mentioned or relied on in the plaint, which bases the claim, not on any instrument of the kind, but on the plaintiff's right as owner to remove a construction improperly placed on his land. No *wajib-ul-arz*, and no evidence referring to any *wajib-ul-arz*, is to be found anywhere on the record. The plaintiff appealed to the District Judge, and in his second ground of appeal there is what appears to be the first reference to any *wajib-ul-arz* as applicable to this case. That plea in the memorandum of appeal referring to the *wajib-ul-arz* appears to have been suggested by the Munsif's allusion to the ruling reported in the Weekly Notes and to the *wajib-ul-arz* therein referred to, and the plea is that the ruling "is not applicable to the present case with reference to the conditions of the *wajib-ul-arz*." With reference to this plea the Lower Appellate [388] Court appears to have taken it for granted that there was a *wajib-ul-arz* in the present suit, the terms of which were exactly similar to those of the *wajib-ul-arz* in the case reported in the Weekly Notes, and that Court concurred with the first Court in dismissing the suit on the authority of that ruling. Now the plaintiff has presented a second appeal to this Court. The learned Judge before whom that appeal came has referred it to a Division Bench because he disagrees with the judgment of Mr. Justice MAHMOOD in the case cited. His view is that Mr. Justice MAHMOOD treated the occupancy tenant's power to make wells as being larger than the law allows or than would be reasonable. He expresses the opinion that so far from its being unreasonable and opposed to public policy, that an occupancy tenant should not be able to build a *pacca* well without the consent of the zamindar, it would be throwing an unreasonable burden on the zamindar if the occupancy tenant's rights were not conditional on the zamindar's consent being obtained. Now it is quite clear that

section 44 of the N.-W. P. Rent Act does recognize the right of an occupancy tenant to construct wells without the landholder's consent. The last paragraph of that section shows by necessary implication that an occupancy tenant is entitled to compensation in respect of improvements, including wells, made without the consent of the landholder, and can resist ejection from the land without payment of such compensation. It is not a question of reasonableness or of public policy: the occupancy tenant's right is distinctly conferred by statute. Even under section 44 of the N.-W. P. Rent Act, 1873, which contained no such provision as the last paragraph of section 44 of the present Act, the Full Bench of this Court in *Raj Bahadur v. Birmha Singh*, (1880) I. L. R., 3 All., 85, gave effect to the same right by dismissing a suit brought by a landholder against an occupancy tenant for an injunction restraining the defendant from constructing a well on his occupancy holding. Mr. Justice PEARSON, with whom the rest of the Court concurred, said:—"I am of opinion that section 44 [389] of the Rent Act implicitly authorizes tenants of all classes to construct wells for the improvement of the land held by them." In this case, as in that, "it is not pretended that the well constructed by the defendant is not calculated to benefit the land." The effect of the last paragraph of section 44 of the present Act is to confirm the view taken by the Full Bench, and to make it clear that, in the case of tenants at fixed rates and occupancy tenants, the well, if an improvement, as defined by the section, may be made without the landholder's consent. The learned Judge remarks that Mr. Justice MAHMOOD's decision would throw an intolerable and enormous burden on a zamindar in compelling him to make compensation for so-called improvements. I think, with all respect, that he has overlooked the explanation to section 44, which shows that for a merely "so-called" improvement the landlord would not be liable to pay compensation. Unless the well or other work fulfils the definition of "works by which the annual letting value of the land has been and at the time of demanding compensation continues to be increased," it is not an improvement within the meaning of the section at all, and the landlord can eject the tenant without paying compensation for it. The section only compels compensation where the landlord has received a real *quid pro quo*, and only prevents the landlord from appropriating the land without compensating the tenant for the real and permanent improvements in it which he owes to the tenant's industry. Now in the case decided by Mr. Justice MAHMOOD, that learned Judge held that the right conferred by section 44 on the occupancy tenant would not be taken away by a clause in the *wajib-ul-arz* of the village, recording a custom which required the zamindar's consent,—which the section itself dispenses with,—on the ground that such a custom would be unreasonable and opposed to public policy. On the facts of this case it is not necessary for us to express any opinion on that portion of Mr. Justice MAHMOOD's judgment, though I entirely agree with his view of section 44 and of the Full Bench ruling of this Court. We have been asked to send [390] down an issue in this case with reference to the *wajib-ul-arz* to which the Lower Appellate Court refers in its judgment. On consideration I think that we ought not to do so. The plaintiff's claim, as I have shown, was not, as brought, in any way based on any *wajib-ul-arz*, and to allow him now to take his stand on any custom or contract recorded in the *wajib-ul-arz* apart from the general rights of the zamindar would, in my opinion, be allowing him to change the whole foundation of his suit. I think that the appeal should be dismissed with costs.

Banerji, J.—I am of the same opinion. Section 44 of the Rent Act recognizes the right of an occupancy tenant to make improvements, including

the construction of a pacca well, without the consent of the landlord. The last paragraph of the section clearly implies that it is only in the case of a tenant other than a tenant at fixed rates or an occupancy tenant that the consent of the landlord to the making of the improvement is necessary so as to entitle the tenant to compensation on ejectment. The section therefore confers on an occupancy tenant an unlimited right to make improvements in the shape of pacca wells. What the effect of a condition in the wajib-ul-arz making the right of an occupancy tenant to build a well dependent on the consent of the landlord will be on the provisions of section 44 it is not necessary, in my opinion, to consider in this case. The case as set up in the plaint had no reference to any provisions of the wajib-ul-arz. The case alleged in the plaint was that the land on which the well had been built belonged to the plaintiff: that the defendants had no concern with that land, and that they had therefore no right to construct the well. It was not alleged by the plaintiff that by reason of the provisions of the wajib-ul-arz the defendants were precluded from building a well without the plaintiff's consent. It was upon this case that the parties went to trial in the Court of First Instance, and it was this case which the Court of First Instance decided against the plaintiff. It was for the first time in the appeal before the Lower Appellate Court that the plaintiff urged that, having regard [391] to the provisions of the wajib-ul-arz, the defendants were incompetent to build the well. In my opinion the Lower Appellate Court ought not to have allowed the plaintiff to put forward a case in appeal which she had not set up in the Court of First Instance. The consideration of any question having reference to the provisions of the wajib-ul-arz does not therefore arise in the appeal before us. As the learned Chief Justice has pointed out, the fact of an occupancy tenant being allowed to construct a well without the consent of the landlord would not, having regard to the provisions of section 44, impose on the landlord any "intolerable or enormous burden." The decree of the Court below is, in my opinion, right, and I agree in dismissing the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in 6 Bom. L.R., 550 ; (1911) 18 I. C., 284 (Sindh).]

[21 All. 391]
FULL BENCH.*The 27th May, 1899.*

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
AND MR. JUSTICE BANERJI.Queen-Empress
versus
Hori.*

Act No. VIII of 1897 (Reformatory Schools Act), section 16—Rules of the Local Government framed under section 8, sub-section (3) of the Act.—
Order sending a boy of the Dalera caste to a Reformatory School—
Jurisdiction of High Court to interfere with orders under
section 16—Interpretation of statutes.

Held, that the High Court has power to interfere in appeal or revision with an order for detention in a reformatory school passed in substitution for transportation or imprisonment when such order is made without jurisdiction and is not an order warranted by Act No. VIII of 1897.

Section 16 of Act No. VIII of 1897 only precludes the interference of a superior Court with the original Court's order so far as it (1) determines the age of a youthful offender or (2) directs the substitution of detention in a reformatory school for transportation or imprisonment, where such substitution is not made without jurisdiction and is not otherwise illegal, having regard to the provisions of the Act. *Queen-Empress v. Himai*, (1897) I. L. R., 20 All., 158, and *Queen-Empress v. Gobinda*, (1897) I. L. R., 20 All., 159, [392] overruled. *Queen-Empress v. Billar*, (1897) I. L. R., 20 All., 160; *Queen-Empress v. Kaidya Husain*, (1899) 1 Bombay Law Reporter, 162; *Deputy Legal Remembrancer v. Ahmad Ali*, (1897) I. L. R. 25 Cal., 333; *Queen-Empress v. Ramalingam*, (1898) I. L. R., 21 Mad., 430; *Roop Lall Das v. Manook*, (1898) 2 Cal. Weekly Notes, 572; *Queen-Empress v. Partap Chunder Ghose*, (1898) I. L. R., 25 Cal. 852; *Ex parte Bradlaugh*, (1878) L. R., 3 Q. B. D., 509, and *The Colonial Bank of Australasia v. Willan*, (1874) L. R., 5 P.C., 417, at p. 442, referred to.

In interpreting statutes the more literal construction ought not to prevail if it is opposed to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated. *Caledonian Railway Company v. North British Railway Company*, (1881) L. R., 6 App. Cas., 114, at., p. 122, referred to.

IN this case a boy named Hori, about the age of 12 years, had been convicted by a Magistrate of the first class of the offence of theft, under section 379 of the Indian Penal Code, and sentenced to six months' rigorous imprisonment; but in view of the boy's age the Magistrate directed that, instead of undergoing the sentence, he should be sent to a reformatory school for five years. The accused appealed against the conviction to the Sessions Judge of Farrukhabad, who dismissed the appeal. An application was thereupon filed by the Local Government for revision of this order on the ground that "the order of detention in a reformatory school of a Dalera," to which caste the boy Hori was said to belong, "is illegal, being opposed to the rules framed by the Local Government under the Reformatory Schools Act."

The Government Advocate (Mr. E. Chamier) in support of the application.

* Criminal Revision No. 117 of 1899.

Section 16 of the Reformatory Schools Act should be construed, if possible, in such a manner as to give effect to the intention of the Legislature. Construed literally, as in *Queen-Empress v. Himai*, (1887) I. L. R., 20 All., 158, and *Queen-Empress v. Gobinda*, (1897) I. L. R., 20 All., 159, this section would oust the jurisdiction of the High Court in every case in which detention in a reformatory had been substituted for transportation or imprisonment whether the Court passing the order had jurisdiction or not.

[393] It is submitted that section 16 of the Act can, without doing violence to its language, be construed as barring interference in two matters only, i.e., a finding as to the age of the offender and the lawful exercise by a lower Court of its discretion in substituting detention in a reformatory for transportation or imprisonment. Various illegal orders in cases under the Act have been set aside by the Calcutta, Bombay, and Madras High Courts—see *Deputy Legal Remembrancer v. Ahmad Ali*, (1897) I.L. R., 25 Cal., 333; *Queen-Empress v. Ramalingam*, (1898) I. L. R., 21 Mad., 430, and *Imperatrix v. Bhan Singh*, decided by PARSONS and RANADE, JJ. (unreported).

An order passed by a Magistrate without jurisdiction or in violation of the rules made by the Local Government not being justified by the Act is not protected by section 16.

Similarly orders purporting to have been passed under section 143, Code of Criminal Procedure, but not warranted thereby have been held to be liable to revision, notwithstanding the terms of section 435 (3) of the same Code—*Queen-Empress v. Partab Chandar Ghose*, (1898) I. L. R., 25 Cal., 852.

Strachey, C. J.—The object of this application by the Local Government is to obtain a reconsideration of the decisions of this Court in *Queen-Empress v. Himai*, (1897) I. L. R., 20 All., 158, and *Queen-Empress v. Gobinda*, (1897) I. L. R., 20 All., 159, in which it was held that by reason of section 16 of the Reformatory Schools Act (VIII of 1897), this Court is in no case competent to interfere in appeal or revision with an order for detention in a reformatory school passed in substitution for transportation or imprisonment, even though the order is made without jurisdiction or is otherwise illegal. In the present case, a Magistrate of the first class convicted the accused, Hori, a boy about 12 years old, of theft under section 379 of the Penal Code, and sentenced him to six months' rigorous imprisonment, but in view of the boy's age directed that instead of undergoing the sentence, he should be sent to a reformatory school for five years. The accused appealed against the conviction [394] to the Sessions Judge of Farrukhabad, who dismissed the appeal. The present application by the Local Government is for revision of the orders of the Courts below on the ground that "the order of detention in a reformatory school of a Dalera is illegal, being opposed to the rules framed by the Local Government under the Reformatory Schools Act." The rule referred to is rule 4 of the rules made by the Local Government and published at pages 167, 168 of the *North-Western Provinces and Oudh Government Gazette*, Part VI, 3rd July 1897. It provides that "no boy belonging to any of the undermentioned tribes, whether such tribe has or has not been formally proclaimed in these Provinces under the Criminal Tribes Act, 1871, should be sent to a reformatory school." Among the tribes mentioned are the Daleras, to which tribe the accused is said to belong. The rule was made under section 8, sub-section (3) of the Reformatory Schools Act, 1897, which authorizes the Local Government to make rules for defining what youthful offenders should be sent to reformatory schools, having regard to the nature of their offences or other considerations; and sub-section (1) shows that the power given to certain Courts to direct youthful offenders to be sent to and

detained in reformatory schools instead of undergoing their sentences is subject to any rules so made. If therefore the accused Hori was a Dalera, the order of the Magistrate directing that instead of undergoing his sentence he should be sent to a reformatory school was illegal. There is on the record no evidence that the accused is a Dalera. He did not before either of the Courts below state that he was one, and the fact does not appear to have been discovered by the Local Government until after the decision of the Sessions Judge. In a petition to this Court, acknowledging notice of the present application, the accused prays that he may be released from the reformatory school "because I am a Dalera by caste, and none of my caste fellows is here." Assuming that he is a Dalera, the question is whether this Court is competent in revision to alter or reverse the illegal order for his detention in a reformatory school, having regard to section 16 of the Reformatory Schools [395] Act, and to the decision in *Queen-Empress v. Gobinda*, (1897) I. L. R., 20 All., 159, which is exactly in point.

Section 16 is as follows:—"Nothing contained in the Code of Criminal Procedure, 1882, shall be construed to authorize any Court or Magistrate to alter or reverse in appeal or revision any order passed with respect to the age of a youthful offender, or the substitution of an order for detention in a reformatory school for transportation or imprisonment."

The section is not well drawn; but apart from obvious verbal criticisms its object is clear enough. It does not exclude the exercise of appellate or revisional jurisdiction under the Code in all cases where a subordinate Court has ordered an offender to be detained in a reformatory school. The exclusion is limited to two specified matters, in regard to which the Legislature considered the Court trying a youthful offender better placed for arriving at a sound conclusion than an appellate or revisional Court could be. The first of these is the age of the youthful offender, a finding on which is, under section 11, a necessary condition precedent to every order for detention in a reformatory school, which might often be difficult to determine, and in determining which a subordinate Court which saw the offender would have a considerable advantage over a superior Court which did not. The second is "the substitution of an order for detention in a reformatory school for transportation or imprisonment." These words are no doubt very general, and, if read with absolute literalness, would protect the most illegal orders substituting detention for imprisonment from any sort of interference. So to read them would, I think, defeat the plain intention of the Legislature. It appears to me that they only refer to the propriety or suitableness of such a substitution in the particular case, having regard to all the circumstances. They do not include the legality of the substitution directed or the competency of the Court or Magistrate to direct it. The Legislature may well have thought that, upon the question whether a particular [396] offender would benefit by detention in a reformatory school, or whether under the circumstances imprisonment would be more suitable, as well as upon the question of age, the Court having the youthful offender before it, and observing his appearance and demeanour would be more likely to be right than a superior Court not having that advantage. But there the advantage ends. Upon questions as to which the subordinate Court has no advantage at all by reason of personal observation or otherwise, and especially upon questions of jurisdiction or law arising upon the construction of Act VIII of 1897, there could be no more reason than in any other class of cases for making its orders final. Section 16 cannot have been intended to enable the most junior Magistrate in the country to make at pleasure orders substituting detention in a reforma-

tory school for imprisonment in any case whatever, for prisoners of any age, or class or of either sex, for any period of time in absolute disregard of the Act, without possibility of correction. If this view is right, the words in section 16 protecting from appellate or revisional interference the substitution of an order for detention in a reformatory school for transportation or imprisonment must not be read with absolute literalness. The substituted orders to which the section refers are orders made under section 8, section 9, or section 10, not orders made outside the Act and wholly unauthorized by it. If the order is an order for substitution within the meaning of those sections, then section 16 applies, and it cannot be altered or reversed in appeal or revision. If it is not an order for substitution within the meaning of those sections, then section 16 does not apply, and it may be altered or reversed like any other illegal order. I do not think that this construction does violence to the terms of section 16. It cannot be said that the section is unambiguous, and in such a case we are at liberty to put on it a construction in accordance with the intention of the Legislature. "The more literal construction," said Lord SELBORNE in *Caledonian Railway Company v. North British Railway Company*, (1881) L. R., 6 App. Cas., 114, at p. 122, "ought not to prevail if it is opposed [397] to the intention of the Legislature as apparent by the statute, and if the words are sufficiently flexible to admit of some other construction by which that intention will be better effectuated."

The decisions in *Queen-Empress v. Himai* and *Queen-Empress v. Gobinda* are based upon the literal construction of section 16 without reference to the object which the Legislature in passing Act VIII of 1897 had in view. They interpret the section as prohibiting interference in appeal or revision with any order whatever of a subordinate Court substituting detention in a reformatory school for transportation or imprisonment, even if the order is passed without jurisdiction or violates every provision of the Act. The following are some of the consequences which such a construction involves. A Magistrate having no power whatever to make any order under the Act, directs that a youthful offender, instead of undergoing his sentence of imprisonment, shall be sent to a reformatory school. His order, being the substitution of an order for detention in a reformatory school for imprisonment, cannot be set aside. A Magistrate orders an adult offender or a girl, who cannot legally be sent to a reformatory school at all, to be detained there instead of undergoing his or her sentence of imprisonment for a period of ten years, being more than the maximum period allowed by section 8. The illegal order cannot be interfered with. A Magistrate in violation of the rules made by the Local Government and having the force of law under section 8, substitutes detention in a reformatory school for transportation in the case of an offender convicted of murder, or substitutes detention for imprisonment in the case of an offender belonging to a criminal tribe, or convicted of an unnatural offence, "or whose antecedents afford reasonable grounds for assuming habitual immorality." Effect must be given to the illegal order, and the provisions and policy of the whole Act defeated in order to comply with the letter of section 16. In such cases there would be no remedy. The Local Government [398] could, of course, under section 14, order any youthful offender to be discharged from a reformatory school. But as the Government has not, under Act VIII of 1897, the power which it possessed under section 11 of the repealed Act V of 1876, to order a youthful offender discharged before the expiration of his sentence to undergo the residue of it, such a discharge would not restore the operation of the sentence; and the Government would thus be in the dilemma of allowing an illegal order for detention to be carried out or allowing the offender to

escape all punishment. Again, section 16 itself clearly shows that the legality of an order for detention in a reformatory school may in some cases be questioned, and the order set aside in appeal or revision. For instance, if without first passing any sentence of transportation or imprisonment a Court or Magistrate makes an order for detention, that order, not being in substitution for transportation or imprisonment, is not protected by the section: *Queen-Empress v. Billar*, (1897) I. L. R., 20 All., 160; *Queen-Empress v. Kaidya Husain*, (1899) 1 Bombay Law Reporter, 162. Can the Legislature have intended that a superior Court should be competent to set aside an illegal order for detention where the illegality merely consisted in an omission by the Magistrate to formally record a sentence of imprisonment which he intended immediately to supersede, but that it should not be competent to interfere where the Magistrate, having gone through that form, proceeded to order detention without having received authority under the Act to pass such orders, or ordered the detention of an adult, a girl, or any other person wholly outside the scope of the Act, or of a youthful offender for a term far in excess of the maximum allowed by the Act? In other words, was it intended that the mere formal record of a sentence of imprisonment for which detention is substituted should absolutely protect from interference every sort of illegality in the order, while in the absence of such formal record the appellate and revisional jurisdiction under the Code might be freely exercised? Again, if the literal construction of the second part of section 16 is adopted, the earlier part protecting [399] "any order passed with respect to the age of a youthful offender" is superfluous. These words refer to the finding as to age required by section 11 before any youthful offender can be sent to a reformatory school under the previous sections, but that finding is not an independent and substantive order: it is only a necessary preliminary to any substitution of retention for imprisonment; and if every such substitution, legal or illegal, is protected, the preliminary finding is, of course, protected as part of it, and requires no separate protection. Further, there is nothing in section 16 which takes away the power of a superior Court to set aside in appeal or revision the conviction and consequently the sentence of imprisonment in substitution of which the order for detention in a reformatory school was made. In such a case the order for detention would necessarily become inoperative. If the superior Court maintained the conviction, but altered the sentence to one, such as whipping, for which detention in a reformatory school could not, under the Act, be substituted, the same result would follow. This shows that section 16 cannot be read with absolute literalness, for in such cases the substituted order for detention is undoubtedly altered or reversed.

Section 16 does not appear to have been discussed by any of the other High Courts in any reported case. In practice those Courts do not act on the view that they have no power to alter or reverse in appeal or revision an illegal order substituting detention in a reformatory school for transportation or imprisonment. Thus in *Deputy Legal Remembrancer v. Ahmad Ali*, (1897) I. L. R., 25 Cal., 333, the Calcutta High Court in revision set aside as contrary to law an order of a Magistrate substituting detention in a reformatory school for two years for a sentence of imprisonment, the main grounds being that the least period for which the detention could be ordered under section 8 of the Act was three years, and that there was no clear finding as to the age of the offender as required by section 11. In *Queen-Empress v. Ramalingam*, (1898) I. L. R., 21 Mad., 430, the Madras High Court in revision altered an order of a Magistrate [400] substituting detention in a reformatory school for imprisonment so as to make the period of detention in accordance with the rules made by the Local

Government under the Act. In an unreported case in the Bombay High Court (*Imperatrix v. Bhan Singh*, Criminal Reference No. 43 of 1897, decided on the 17th June 1897), Mr. Justice PARSONS and Mr. Justice RANADE set aside the Magistrate's order as illegal under Act VIII of 1897, on the ground that it did not appear from the record that the accused was under the age of 15 years. There is some analogy to section 16 of Act VIII of 1897 in section 435 (3) of the Code of Criminal Procedure, which provides that orders made under sections 143 and 144 are not proceedings the record of which the High Court may call for and examine for the purpose of satisfying itself as to the correctness, legality or propriety of any finding, sentence or order recorded or passed, and as to the regularity of the proceedings. It has been held that where an order, though purporting to be made under section 143 or 144, is not authorized by them and is clearly made without jurisdiction, the prohibition does not apply and the High Court can interfere. The reason is that what the Legislature intended to protect from interference in revision was orders legally passed under the sections in question, not any illegal order which a Magistrate might profess to pass under them. "If this were not so Magistrates might by affecting to act under section 144, when the case was not within that section, oust the jurisdiction of this Court to interfere :"—*Roop Lall Das v. Manook*, (1898) 2 Cal. Weekly Notes, 572, and see *Queen-Empress v. Partab Chunder Ghose*, (1898) I. L. R., 25 Cal., 852, and the cases there cited. It is on similar grounds that sections in special Acts of Parliament expressly providing that convictions, orders or other proceedings "shall not be removed into the High Court by certiorari or otherwise," have been construed as not depriving the High Court of power to issue a certiorari where the order has been passed without jurisdiction. Thus in *ex parte Bradlaugh*, (1878) L. R., 3 Q. B. D., 509, the Act provided in [401] the most general terms that no information, conviction or other proceeding before or by any of the said Magistrates shall be quashed, or set aside, or adjudged void or insufficient for want of form, or be removed by certiorari into Her Majesty's Court of Queen's Bench. It was, however, held that a section in an Act of Parliament taking away the certiorari did not apply in the case of total absence of jurisdiction. MELLOR, J., said :—"It is well established that the provision taking away the certiorari does not apply where there was an absence of jurisdiction. The consequence of holding otherwise would be that a metropolitan Magistrate could make any order he pleased without question." See also *The Colonial Bank of Australasia v. Willan*, (1874) L. R., 5 P. C., 417, at p. 442. "The prohibition obviously applied only to cases which have been entrusted to the lower jurisdiction": Maxwell on Statutes, p. 180. So here I think that section 16 of the Reformatory Schools Act, 1897, does not apply where there was an absence of jurisdiction, and that the consequence of holding it to apply where the order substituting detention for transportation or imprisonment is illegal, would be that a Magistrate could make any such illegal order he pleased without question.

Even if I am wrong in this view, still section 16 in terms refers only to the interference of the superior Courts under the Code of Criminal Procedure, and the High Court could alter or reverse any such illegal order in the exercise of its powers of superintendence under section 15 of the High Courts Act, 1861, which is in no way touched. That provision is not referred to in the judgments in *Queen-Empress v. Himar*, and *Queen-Empress v. Gobinda*. But for the reasons which I have given, I think that under the Code, as well as under the High Courts Act, this Court is competent to interfere in such a case, and that the decisions to the contrary are wrong and must be overruled. Before passing any order upon the present application we must ask the Sessions Judge for a

finding as to whether the accused Hori is a Dalera as alleged both by the accused himself and by the Local Govern-[402] ment. The application will be disposed of after the receipt of the finding.

Knox, J.—I fully concur with the learned Chief Justice that the policy and object of the Legislature in enacting section 16 of the Reformatory Schools Act, 1897, was to exclude the interference of Courts, whether by way of appeal, or by way of revision with (1) any finding by the trying Magistrate under section 11 of the Act, which states what such Magistrate considers the age of a youthful offender before him to be, and (2) any order passed under section 8 of the Act, whereby, instead of undergoing a sentence of transportation or imprisonment, such youthful offender is directed to be sent to a reformatory school. The probability is that, as pointed out by the learned Chief Justice, in determining these two matters, the Legislature considered the trying Magistrate to have such advantage over a Court of appeal or revision that any interference would be inexpedient. So far we are bound to promote in the fullest manner the policy and object of the Legislature. We are told in the preamble that the object, or one of the objects, of the Act was to make further provision for dealing with youthful offenders, but not with all youthful offenders. The youthful offenders intended were only those boys who had been convicted of any offence punishable with transportation or imprisonment, and who at the time of conviction might be under the age of 15 years. The Legislature further intended and provided that, even in the case of such offenders, all such should not be sent to a reformatory school, but only such of them, whom, by rules made for this purpose, having regard to the nature of their offence or other considerations, the Local Government might consider fit subjects for detention in a reformatory. It was not the intention or policy of the Legislature that any boy whom the Local Government did not, by rule made for the purpose, consider fit should be taken out of the ordinary jurisdiction of Courts of appeal or of revision. The power of superior Courts to question the finding of guilty or not guilty was not removed, and was never intended to be removed, by [403] section 16, whether the person found guilty or not guilty were a youthful offender as understood by the Act or not a youthful offender. All that was excepted was the order with respect to age and the order of detention substituted. Where a Court found an offender to be at the time of conviction 18 years and still passed an order of detention substituted for imprisonment, we are, I hold, entitled to find that the offender is not a youthful offender, and therefore one to whom the order of detention substituted for imprisonment was never intended to apply, could not apply, and was null and void. So also if the offender in such case be a girl, or, in these Provinces, a Dalera, this Court is entitled to exercise its ordinary power of appeal or revision. It is necessary first to have a determination whether the accused is or is not a Dalera, and I accordingly concur in the order proposed.

Banerji J.—I am of the same opinion as the learned Chief Justice, but out of respect for the learned Judges from whose judgments we are differing, I deem it proper to state briefly my views on the question before us. That question is, whether section 16 of Act No. VIII of 1897 precludes this Court from altering or reversing in appeal or revision an order for detention in a reformatory school passed in substitution for an order for transportation or imprisonment, however illegal that order may be. It seems to me that the interpretation put on the provisions of that section in *Queen-Empress v. Himai*, (1897) I. L. R., 20 All., 158, and *Queen-Empress v. Gobinda*, (1897) I. L. R., 20 All., p. 159, is somewhat too narrow, and, as pointed out by the learned Chief

Justice, calculated to defeat the intention of the Legislature. According to well-known canons of construction, an Act of the Legislature should be so interpreted as consistently with the language used by it to give effect to its intention. I do not think we should be justified in assuming that in placing upon the powers of a Court of appeal or revision the restriction which section 16 imposes, the Legislature intended to create or overlooked the anomalies referred to by the learned Chief Justice, [404] which must be the inevitable result of the strict and literal interpretation placed upon that section in the two rulings mentioned above. In my opinion the order referred to in section 16, which a Court or Magistrate has no authority to alter or reverse in appeal or revision, must be an order which the officer who made it was competent to make, and which he made in compliance with the provisions of Act No. VIII of 1897. Where a Court or Magistrate has jurisdiction to make an order for detention in a reformatory school in substitution for an order of transportation or imprisonment, and in the exercise of that jurisdiction the Court or Magistrate has made an order for detention in consonance with the provisions of section 8, 9 or 10, such order is not open to interference in appeal or revision and is final. But where the order passed is not one justified by the Act and transgresses the provisions of the Act or the rules framed by the Local Government under the Act, section 16 does not protect it from interference in appeal or revision. The protection afforded by the section only extends to the lawful exercise of the discretion vested in a Court or Magistrate to substitute in certain cases an order of detention in a reformatory school for an order of transportation or imprisonment. There cannot be any doubt that the order of conviction is open to appeal or revision. If the conviction be set aside, the order of detention must of necessity fall to the ground. But if section 16 be considered to bar interference with an order of detention in any case, that order will stand good, although the conviction no longer subsists. Such a result could not certainly have been intended by the Legislature in enacting section 16. I agree with the learned Chief Justice in making the order proposed by him.

BY THE COURT. —Let the record be sent down to the Sessions Judge for a finding as to whether the accused Hori is a Dalera.

[Subsequently, on the return by the Sessions Judge of a finding that Hori was a Dalera, the order under discussion was set aside.]

[405] APPELLATE CIVIL.

The 9th June, 1899.

PRESENT:

MR. JUSTICE KNOX AND MR. JUSTICE AIKMAN.

Aulia Bibi and others.....Decree-holders

versus

Abu Jafar.....Judgment-debtor.*

*Civil Procedure Code, sections 273, 268—Execution of decree—Attachment—
Decree of Revenue Court not capable of attachment and sale under section
273 in execution of a Civil Court decree.*

Held, that though a decree of a Court of Revenue is not liable to attachment and sale in execution of a decree of a Civil Court under section 273 of the Civil Procedure Code, such

* First Appeal No. 261 of 1898, from an order of Maulvi Muhammad Abdul Ghafur, Subordinate Judge of Jaunpur, dated the 20th August 1898.

decree stands in the position of an ordinary debt and may be dealt with under section 268 of the Code. *Onkar Singh v. Bhup Singh*, (1894) 1. L. R., 16 All., 496, and *Prince Gholam Mohamed v. Indra Chand Jahuri*, (1871) 7 B. L. R., 318, referred to. *Takiya Begam v. Siraj-ud-daula*, Weekly Notes, 1885, p. 123, and *Sultan Kuar v. Gulzari Lal*, (1879) I.L.R., 2 All., 290, distinguished.

CERTAIN decree-holders, holding a decree of a Civil Court, applied for execution of their decree by attachment and sale of a Revenue Court decree which had been passed in favour of their judgment-debtor. The Court executing the decree at first issued an injunction to the Revenue Court which had granted the decree sought to be attached, but, upon argument, dissolved that injunction, holding, with reference to the case of *Onkar Singh v. Bhup Singh*, (1894) 1. L. R., 16 All., 496, that as a Civil Court it was not competent to order the attachment and sale of a Revenue Court's decree. The decree-holders appealed to the District Judge, who upheld the order of the Subordinate Judge. The decree-holders accordingly appealed to the High Court.

Mr. Karamat Husain, for the Appellants.

Pandit Sundar Lal and Maulvi Muhammad Ishaq, for the Respondent.

Knox and Aikman, JJ.—The question with which we have to deal in this appeal is whether a decree of a Revenue Court is property which is liable to attachment and sale in execution of a decree of a Civil Court. The Subordinate Judge [406] of Jaunpur relying on the precedent in the case of *Onkar Singh v. Bhup Singh*, (1894) 1. L. R., 16 All., 496, held that the decree of a Revenue Court did not fall within the provisions of section 273 of the Code of Civil Procedure. He accordingly upheld the objection which had been addressed to him that the decree could not be attached and sold by the Civil Court at all, and discharged an injunction which he had addressed to the Revenue Court of Jaunpur. The learned counsel for the appellants asks us to hold that a decree of a Revenue Court is liable to attachment and sale under the provisions of the Code of Civil Procedure, on the ground that the words in section 273, namely, a "decree for money passed by any other Court" are wide enough to include decrees of Revenue Courts. We are unable to follow him in this contention. The definition given to the word "decree" in section 2 of the Code of Civil Procedure is one which directs that subject to anything repugnant in the subject or context, the word "decree" in the Code means the formal expression of an adjudication upon any right, claim, or defence set up in a Civil Court. It is noticeable that in the corresponding definition in Act No. X of 1877, the word "civil," which is introduced in the Act of 1892, found no place. There is nothing in section 273 repugnant in the subject or context to the definition of "decree" in section 2 of the Code of Civil Procedure, and it must, therefore, be read as it stands into that section. The learned counsel, however, argued that it did not follow that if section 273 did not apply, decrees of the Revenue Courts were exempted from the general provision under which property was liable to attachment and sale. He relied upon the provisions of section 266, and contended that decrees of the Revenue Courts were certainly covered either by the word "debt" or by the words "all other saleable property, movable or immovable, belonging to the judgment-debtor, or over which or the profits of which he has a disposing power which he may exercise for his own benefit." In this view he is certainly supported by the precedent in the case of *Prince [407] Gholam Mohamed v. Indra Chand Jahuri*, (1871) 7 B. L. R., 318, in which it was held that a decree of a Court falls within the description of "other property." The argument in reply for the other side to the effect that had the Legislature intended decrees to be property liable to attachment and sale it would certainly have mentioned them, in section 266, is met at once

by the observation that the provisions of section 273 and of similar sections leave no doubt whatever but that it was intended that decrees should be liable to attachment. It was further argued that it had been held by this Court in Full Bench in the case of *Takiya Begam v. Siraj-ud-daula*, Weekly Notes, 1885, p. 123, and in an early case *Sultan Kuar v. Gulzari Lal*, (1879) I. J. R., 2 All., 290, that a decree for money could not be sold in execution. On looking into these cases we find that all that was held there was that as special provision had been made by section 273 for dealing with decrees which had been attached in execution, such decrees could not be sold. We have, however, held that in this case section 273 does not apply, and therefore the *ratio decidendi* of the cases relied on has no application here. The learned counsel for the appellants asks us to treat the decree as if it fell within the provisions of section 272. This section would have been applicable had the decree of the Revenue Court been executed and the proceeds deposited in Court. So far as we know, matters have not reached this stage. The decree, while still a decree, appears to us to stand in the position of an ordinary debt, to be dealt with under the provisions of section 268 of the Code of Civil Procedure. We decree this appeal, set aside the decree of the Court below, and remand the case to the Court below with directions to restore the application for execution to the file of pending applications, and to deal with it according to law. The appellants will have the costs of this appeal. The costs of the first Court will abide the result.

Appeal decreed and case remanded.

NOTES.

[See also (1900) 22 All., 182.]

[408] *The 13th June, 1899.*

PRESENT :

SIR ARTHUR STRACHEY, KT., CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Parsotam Saran.....Plaintiff

versus

Sanehi Lal.....Defendant.*

*Act No. IV of 1882 (Transfer of Property Act), section 52—Lis pendens—
Transfer pendente lite—Time when a suit becomes contentious.*

Held, that a suit becomes a "contentious suit" within the meaning of section 52 of the Transfer of Property Act, 1882, at the time when the summons is served on the defendant. *Radhasyam Mohapatra v. Sibn Panda*, (1888) I. L. R., 15 Cal., 647, and *Abboy v. Annamalai*, (1888) I. L. R., 12 Mad., 180, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Harendra Krishna Mukerjee) for the Appellant.

Mr. Abdul Majid for the Respondent.

Strachey, C.J. and Banerji, J.—This was a suit for sale of mortgaged property. The defendant-respondent was the purchaser at a sale in execution of a decree obtained by him upon a prior unregistered mortgage. The plaintiff's mortgage was a registered one, and it is found that he had no notice of

* Second Appeal No. 65 of 1897, from a decree of Pandit Raj Nath Sahib, Subordinate Judge of Moradabad, dated 7th December 1896, reversing a decree of Munshi Gokal Prasad, Munsif of Moradabad, dated the 4th September 1896.

the prior unregistered mortgage of the defendant-respondent. He is therefore *prima facie* entitled to priority for his mortgage and to enforce it against the property in the hands of the respondent. The respondent resists the claim upon the ground that the plaintiff-appellant's mortgage was executed pending the suit upon the prior unregistered mortgage, and that having regard to section 52 of the Transfer of Property Act, the property could not, pending that suit, be dealt with by the mortgagor so as to affect the rights which the respondent obtained under the decree subsequently passed upon his mortgage, and in execution of which he purchased the property. The respondent's suit was instituted on the 17th of April 1893. The plaintiff's mortgage was executed on the 20th of April 1893, that is, pending the respondent's suit. It is alleged on behalf of the plaintiff that at the time of the execution of the mortgage of the 20th of April 1893, no summons had been [409] served in the present respondent's suit upon the mortgagor, the defendant in that suit, and consequently, having regard to the ruling of the Calcutta High Court in *Radhasyam Mohapatra v. Sibn Panda*, (1888) I. L. R., 15 Cal., 647, and of the Madras High Court in *Abboy v. Annamalai*, (1888) I. L. R., 12 Mad., 180, the mortgage was made before the suit became contentious, and therefore was not affected by the rule contained in section 52 of the Transfer of Property Act. We are prepared to follow the rulings in question, to which there is nothing contrary in any of the decisions of this Court. There is, however, no finding as to the date of the service of summons in the present respondent's suit. We must have such finding before we can dispose of this appeal. We therefore refer the following issue to the Lower Appellate Court under section 566 of the Code of Civil Procedure:—On what date was the summons served upon the defendant mortgagor in the suit brought by the present respondent upon his mortgage of the 24th November 1891? The Lower Appellate Court may take such evidence as it may deem necessary for determination of this issue. Upon the return of the finding ten days will be allowed for objections.

Issue referred.

NOTES.

[This has been overruled, and it is not necessary that there should have been service of summons:—(1907) 29 All., 339; (1905) 28 All., 196; (1907) 31 Bom., 393.]

[21 All. 409]

The 14th June, 1899.

PRESENT :

MR. JUSTICE BURKITT.

Abdus Samad Khan and others.....Applicants
versus

Abdur Razzaq Khan.....Opposite Party.¹

Act No. IV of 1893 (Partition Act), section 10—Partition—Offer by a party to a partition suit of compensation—Decree in partition suit when final—Civil Procedure Code, section 396.

Held, that section 10 of Act No. IV of 1893 would apply to a suit for partition in the stage where an interlocutory decree for partition had been made, but that decree had not

¹ Second Appeal No. 3 of 1899, from a decree of Babu Nilmadhab Roy, Judge of Small Cause Court, with powers of Subordinate Judge of Cawnpore, dated the 28th September 1898, confirming a decree of Babu Banke Behari Lal, Munsif of Fatchpur, dated the 2nd July 1898.

become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose. *Shah Muhammad Khan v. Hanwant Singh*, (1898) I.L. R., 20 All., 311, and *Zubaida Jan v. Muhammad Taieb*, Weekly Notes, 1898, p. 99, referred to.

[410] THE plaintiff in this case sued the defendants for partition of certain immoveable property, and obtained an interlocutory decree declaring him to be entitled to possession of a certain share. He applied, framing his application as an application for execution of the decree, to be put into possession of a certain share of the property in suit. To this application the defendants filed several objections and, as regards a portion of the property, consisting of houses, asked that, instead of their being partitioned, he might be allowed to pay compensation to the plaintiff. The plaintiff declined to accept compensation, and the Court (Munsif of Fatehpur) held on this point that Act No. IV of 1893 did not apply where a decree had been passed. The defendants appealed to the Subordinate Judge who dismissed the appeal. The Subordinate Judge as to the defendants' plea under Act No. IV of 1893, recorded the following order:—"In this case a decree for partition has already been passed. A Court executing the decree is bound by its terms. No additions or alterations can be made in it. Section 2 of Act No. IV of 1893 cannot apply to this suit. The suit is no longer pending. A decree has already been passed."

The defendants appealed to the High Court.

Maulvi Ghulam Mujtaba, for the Appellants.

Mr. Abdul Majid, for the Respondent.

Burkitt, J.—The decision of the Subordinate Judge in this case is entirely wrong, and if the Subordinate Judge had taken the trouble of reading the cases of *Shah Muhammad Khan v. Hanwant Singh*, (1898) I L. R., 20 All., 311, and the subsequent case of *Zubaida Jan v. Muhammad Taieb*, Weekly Notes, 1898, p. 99, both of which were published some months before the judgment under appeal, he would have avoided falling into the mistake he has made in this case. The Subordinate Judge evidently is under the impression that a final decree in this partition case has been passed, in that he is wrong. A final decree has not been passed. As explained in the two cases referred to above, a decree declaring the rights of the parties, *i.e.*, a decree declaring that the applicant for partition is entitled on partition [411] to a specific share in certain immoveable property is all that has been done up to the present. The application now made to the Court has been wrongly made as an application for execution of that decree, and has been treated by the Court as an application for execution. The application ought to have been treated as an application to the Court to go on with and complete the decree declaring the rights of the parties by appointing an amin to prepare a scheme of partition for approval by the Court, as explained in the two cases mentioned above. It is only after a decree has been made by the Court expressing its approval of the partition scheme that there is any decree capable of execution as a partition decree. The Court below was therefore wrong in holding that the proceedings before it were proceedings in execution, and that it could do nothing more in the case. The present appeal is concerned with the refusal of the Courts below to accede to an application made under the provisions of Act No. IV of 1893. Under section 10 of the Act the application should have been entertained by the Court. This suit no doubt was instituted before the Act came into force, but section 10 of the Act provides that the Act shall apply to suits instituted before the commencement of the Act in which no scheme for the partition of the property has been finally approved by the Court. In this case no such scheme has been

approved, for the very good reason that, the Court not yet having drawn up the second portion of its decree, no such scheme has ever been prepared or submitted for its approval. The decision of the Lower Appellate Court is wrong, and badly wrong, from beginning to end.

I allow this appeal. I set aside with costs the decree of the lower Court, and I remand the case to that Court for decision on the merits.

Appeal decreed and cause remanded.

NOTES.

[See also (1913) 21 I. C., 908 (Mad.)]

[412] PRIVY COUNCIL.

The 18th and 22nd November, 1898 and the 11th March, 1899.

PRESENT:

LORDS HOBHOUSE, MACNAGHTEN, AND MORRIS, AND SIR RICHARD COUCH.

Bhagwan Singh and others.....Plaintiffs

versus

Bhagwan Singh, minor, and others.....Defendants.

[On appeal from the High Court for the North-Western Provinces.]

Hindu law -- Invalidity of the adoption of a sister's son, mother's sister's son, and of a daughter's son.

The adoption of a mother's sister's son by a Hindu of any of the three regenerate classes Brahman, Kshatriya, and Vaisiya, equally with the adoption of a daughter's son or a sister's son, is contrary to law and void. The ancient texts condemning such adoptions are not only admonitions, but have been judicially decided to be prohibitions of law for such a length of time that it is now not competent to a Court to treat them as open to question in this respect.

The judgment in *The Collector of Madura v. Mootoo Ramalinga Sathupathy*, (1868) 12 Moo., I. A. 437, gives no countenance to the conclusion that in order to bring a case under any rule of law, laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it.

APPEAL from a decree (27th June 1895) of the High Court, reversing a decree (23rd September 1892) of the Subordinate Judge of Cawnpore, and remanding the suit under section 562, Civil Procedure, for trial on the merits.

The suit out of which this appeal arose was brought by the appellants, zamindars of villa Cawnpore, on the 3rd May 1892. They claimed as rever-sioners entitled to the estate of Madho Singh, who died childless on the 27th July 1890, leaving the second defendant his widow, and having on the 23rd June of that year adopted the first defendant, a minor. Their claim was for a declaration that the alleged adoption of the appellant by Madho Singh was void and ineffectual on the ground that the boy, first defendant and now first respondent, was the son of the sister of Madho Singh's mother.

The parties were Thakurs, members of the regenerate class of Kshatriyas. It was not alleged that this adoption was valid by any custom prevailing in the caste or in the locality to which the [413] parties belonged. The question on this appeal was whether with reference to the Hindu law governing adoption

it was valid; and it was not disputed, but conceded in the appellate Court below, that the principles which applied to the question of the adoption of a daughter's son, or of a sister's son, or of a mother's sister's son, applied equally to the adoption of a son of any of the three. As regarded the above there was no divergence between the Mitakshara school and the other schools of Hindu law, the rules affecting the present question being alike applicable in the different schools. This was stated in the judgment of BANERJI, J.; and also that there was no difference as regarded the application of these rules between Brahmans, Kshatriyas, and Vaisiyas. The material defence was that the prohibition in the Hindu law was "merely directory." Its breach was reprehensible, but it was not such that the adoption would be invalidated when once made.

The Subordinate Judge decreed in favour of the plaintiffs on the ground that the adoption was altogether illegal. He referred to *Parbati v. Sundar*, (1885) I. L. R., 8 All., 1.

In appeal the question was referred by the Division Bench (TYRRELL and KNOX, JJ.) for the opinion of the Full Bench (EDGE, C. J., KNOX, BLAIR, BANERJI, BURKITT and AIKMAN, JJ.),—whether the adoption, by a Hindu, a Kshatriya, of one of the three regenerate classes, subject to the law of the Mitakshara, of the son of his mother's sister, was, according to that law, valid or invalid. The referring order stated that it was not alleged that the adoption was valid according to any special custom prevailing in the caste, or in the locality, to which the parties belonged.

The Full Bench delivered their judgments on the 27th June 1895. EDGE, C. J., and KNOX, BLAIR and BURKITT, JJ., were of opinion that the adoption in question was not shown to be "prohibited or illegal by the law of the Benares school, which applies in these Provinces and to the parties," and held that the adoption was not prohibited in the sense of its being illegal and void.

[414] On the other hand, BANERJI and AIKMAN, JJ., considered that the adoption of a mother's sister's son was contrary to the Hindu law applicable to the case, and had not been shown to be sanctioned by any special usage of the caste to which that son belonged. The two principal judgments were those of the Chief Justice and of BANERJI, J., and all the judgments are reported in the Indian Law Reports, 17 All., 294.

All were agreed that amongst Sudras such an adoption was permissible. But that in regard to its prohibition, if that were absolute, Brahmans, Kshatriyas and Vaisiyas, or the three twice-born classes, were subject to it. And that the Dattaka Mimamsa and the Dattaka Chandrika, both contained the injunction against it.

Mr. H. Cowell, for the appellant, argued that the judgments of the minority of the Full Bench were right. The prohibition of the adoption of a sister's son, and of the sons of other female relations of the adopter admitted to be in the like case had been established, as applicable to three regenerate classes, under early texts in the written Hindu law, repeated by the Commentators, and accepted by the Courts of law. The prohibition was acknowledged by all the different schools. The approval of the Judicial Committee had been intimated. The exceptions were in regard to proved custom to the contrary. The general rule had been enforced ever since 1815, when such an adoption had been contested. In Bengal the first decision to that effect was in *Kora Shunko Takoor v. Beebee Munnee*, (1815) 1 Morley Dig., No. 59, 18. Afterwards in the North-West came *Shib Lall v. Bishumber*, (1866) S. D. A. N.-W. P., 25; *Musammatt Battas Kuar v. Lachman Singh*, (1875) 7 N.-W. P., H. C. Rep., 117; *Parbati v. Sundar*, (1885) I. L. R., 8 All., 1. The following cases appeared to be contrary, but their effect could be explained away. The first was *Ramchunder Chatterjea*

v. *Sumboo Chunder Chatterjea*, (1810) 1 Morley Dig., No. 58, 18, a case in which the doctrine laid down was soon overruled, as shown in Sir F. Macnaghten's *Consid. on Hind. L.* 166, 168. The next was in 1808, case No. 12 in Sir W. Macnaghten's 2 *Hind. L.*, 85, regarded as a case in which the [416] parties were Sudras. The third was in 1837, the case of an adopted son in the Kritrima form, who was the son of the adopter's sister, (1837) 1 Morley Dig., No. 61, 19.

In Madras there were *Narasammal v. Bala Rama Charlupatia*, (1863) 1 Mad., H. C. Rep., 420; *Jivani Bhai v. Jivu Bhai*, (1865) 2 Mad., H. C. Rep., 462; *Gopalayyan v. Raghupatiayyan*, (1869) 7 Mad., H. C. Rep., 250; *Minakshi v. Ramanada*, (1886) 1. L. R., 11 Mad., 49; the decision of a Full Bench. Two cases allowing the adoption in question, *Eranjoli Illath Vishnu Nambudri v. Eranjoli Illath Krishnan Nambudri*, (1883) 1. L. R., 7 Mad., 3; and *Vayidinada v. Appu*, (1885) 1. L. R., 9 Mad., 44, were decided upon proof of a special custom in favour of it. The cases in Bombay were *Haebut Rao Mankur v. Gobind Rao Mankur*, (1821) 2 Borrodaile Rep., 106; *Gopal Narhar Safray v. Hanmant Ganesh Safray*, (1879) 1. L. R., 3 Bom., 273; *Bhargirathi Bai v. Radha Bai*, (1879) 1. L. R., 3 Bom., 298. Afterwards came the Full Bench decision in *Waman Raghupati Bova v. Krishnaji Kashiraj Bova*, (1889) 1. L. R., 14 Bom., 249. Looking to the Calcutta decisions would be found *Rajendro Narain Lahoree v. Saroda Soonduree Debee*, (1871) 15 W. R., 548; and *Uma Sunker Moitro v. Kali Komul Mozumdar*, (1880) 1. L. R., 6 Cal., 256; showing the two Mimamsas to be highly esteemed.

No judgment upon the question, raised directly on appeal, had been passed by the Judicial Committee yet; but there was a distinct intimation of their opinion upon the point in *Sundar v. Parbati*, (1889) L.R., 16 I.A., 186; 1. L.R., 12 All., 51, where the Committee, had it been necessary to determine it, would have had "probably little difficulty in accepting the opinion that a Brahman cannot lawfully adopt his sister's son." This point was treated as settled in *Lala Narain Das v. Lala Ramannu Dayal*, (1897) 1. L. R., 25 I. A., 46, 52; 1. L. R., 20 All., 209. He showed that in *Ramalinga Pillai v. Sadasiva Pillai*, (1864) 9 Moo. I. A., 510, where the adoption had been admitted, the question had arisen among Sudras, and not, as the report stated, among Vaisyas and referred to *Jivani Bhai v. Jiva Bhai*, (1822) 3 Select Ca., 144, 150.

[416] Even if the question should be treated as an open one, and his main argument was that it was not, after so many years of decision against such adoptions, the result left was that the whole controversy rested upon the effect of the Dattaka Mimamsa, section II, paras. 2, 71, 91, 91, 107, 108, and section V, paras. 16, 20; and of the Dattaka Chandrika, section I, paras. 11, 17, and section II, paras. 7, 8. The authority of Sakala was there given. On this there were the writings of Mr. Mandlik, pp. 8, 13 and 15; and of West and Bühler, p. 28. For the text of Saunaka, he referred to Manu, Instit. Chapter III, v. 16. And on this he cited *Ooman Dutt v. Kunhaya Singh*, (1822) 3 Sel. Rep., 201. Sakala's text was conclusive, even applying Jaimini's rule that giving a reason in the text was an indication of an admonition not amounting to law. The text of Saunaka had not been shown to have been misconstrued by the authors of the Mimamsas. In regard to the only authority suggested as supporting the disregard of the rule, that of Yama, he referred to that part of the judgment of BANERJI, J., which stated that the alleged text was not found in the Yama Smriti or Sanhita, or other Dharma Shashtra. He referred to the Sarasvati Vilasa, translated by Foulkes, edition of 1881, which, he said, did not contain this text. He referred also to Mandlik, p. 483, and to the Tagore Law lectures for 1888, p. 334. by the Shastri, Golap Chandra Sarcar.

Their criticisms, he argued, could not be altogether accepted. The two Mimamsas there criticized were considered in all the schools of Hindu law, and all over India, to be of great authority although comparatively modern. The general opinion of the Dattaka Mimamsa might be taken to be the same as that expressed in its favour by Sir F. W., and Sir W. H. Macnaghten, by Colerbrooke, Sutherland, and Strange, and by many native Judges in their judgments. Eight treatises written by native authors had been produced in the Court below supporting the opinion that the precept in the Shastras was a complete and legal prohibition against adopting a sister's son. And he referred to *Rangama v. Atchamra*, (1846) 4 Moo. I. A., 1; and *The Collector [417] of Madura v. Mootoo Ramalinga Sathupathy*, (1868) 12 Moo. I. A., 397, 437; as showing that the Dantaka Mimamsa was a work to which weight was attributed.

He submitted that no reason had been assigned for disregarding the text of Sakala: that no valid reason had been given for holding the text of Saunaka to have been misconstrued by Nanda Pandita: that the text of Yama, as to the point, had not been cited by any commentator, or shown to have been adopted by any school of Hindu law: and that no sufficient reason had been given for refusing to accept the authority of the Dattaka Mimamsa and the Dattaka Chandrika, which had been hitherto everywhere recognised.

Afterwards, on the 11th March 1899, their Lordships' judgment was delivered by **Lord Hobhouse**.

There are no facts in dispute in this case. The plaintiffs now appellants brought the suit to establish their title as reversionary heirs of Madho Singh as against the first defendant, a boy who was adopted by him in the dattaka form. The boy is the natural son of Madho's mother's sister. The sole question is whether the adoption of such a relation is allowed by Hindu law. The Subordinate Judge held that it is not allowed. A Full Bench of six Judges of the High Court has decided that it is allowed. Four Judges, *viz.*, Chief Justice EDGE, and Justices KNOX, BLAIR and BURKITT being of that opinion against Justices BANERJI and AIKMAN who are of the contrary opinion. Their Lordships are under the disadvantage of hearing the case without any help from the respondents who have not appeared. But this disadvantage is much lessened by the elaborate fulness of the reasons assigned by Chief Justice EDGE for the conclusion which he reached in favour of the respondent.

The question is of the same nature as that which has just been disposed of in the preceding cases from Madras and Allahabad. But it depends upon a different set of texts and the course of decision in India has been very different. It is agreed [418] on all hands that the prohibition contended for extends only to the three twice-born classes, and not to the most numerous class of all, the Sudras. The parties here are Kshatriyas governed by the Benares school of law. It is also agreed that, as regards capability to be adopted, the sons of sisters, sons of daughters, and sons of maternal aunts, stand on the same footing, and that the authorities which apply to any of these classes apply to all.

The oldest original texts bearing on the point are contained in the Dattaka Chandrika. In section I, para. 11 of that work the author quotes the ancient sage Sakala to the following effect. After mentioning certain relatives to whom preference should be given in adoption among the regenerate tribes, he says:—"If such exist not, let him adopt one born in another family, except a daughter's son and a sister's son and the son of the mother's sister."

In para. 17 of the same section the same work quotes the sage Saunaka who, after pointing out from what classes adoptions should be made, says:—"But a daughter's son and a sister's son are affiliated by Sudras. For the three superior tribes a sister's son is nowhere mentioned as a son."

In section II, paras. 7 and 8, after quoting from Saunaka the expression that the adopted boy should bear the reflection of a son, the author adds:—"The resemblance of a son, or in other words the capability to have been begotten by the adopter, through appointment and so forth."

Nanda Pandita, the author of the Dattaka Mimamsa, writing in the early part of the 17th century, some centuries later than the conjectured date of the Dattaka Chandrika, gives the same quotations from Sakala and Saunaka and similar comments upon them. (Section II, Articles 74, 107, 108; Section V, Articles 16 to 20).

Their Lordships have mentioned in the prior adoption cases the views of Mr. Justice KNOX as to the authority of the two Dattaka treatises just quoted. In the present case the learned Chief Justice EDGE takes even more disparaging views of their [419] authority; denying, if their Lordships rightly understand him, that these works have been recognised as any authority at all in the Benares school of law. If there were anything to show that in the Benares school of law these works had been excluded or rejected, that would have to be considered. But their authority has been affirmed as part of the general Hindu law, founded on the Smritis as the source from whence all schools of Hindu law derive their precepts. In Doctor Jolly's Tagore Lecture of 1883 that learned writer says:—"The Dattaka Mimamsa and Dattaka Chandrika have furnished almost exclusively the scanty basis on which the modern law of adoption has been based." Both works have been received in Courts of Law including this Board as high authority. In *Rangama v. Atchama*, (1846) 4 Moo. I. A., 97, Lord KINGSDOWN says: "they enjoy, as we understand, the highest reputation throughout India." In 12 Moore, p. 437, Sir JAMES COLVILLE quotes, with assent, the opinion of Sir William Macnaghten, that both works are respected all over India, that when they differ the Chandrika is adhered to in Bengal and by the Southern Jurists, while the Mimamsa is held to be an infallible guide in the Provinces of Mithila and Benares. To call it infallible is too strong an expression, and the estimates of Sutherland and of West and Bühler seem nearer the true mark; but it is clear that both works must be accepted as bearing high authority for so long a time that they have become embedded in the general law.

The learned Chief Justice then objects that the texts of the two Rishis are detached from their context and so are rendered of no value; and that as regards Sakala there is no information where the writer of the Chandrika obtained his text, and that its genuineness is doubtful. This objection is strengthened by the fact that the greatest of the sages do not mention any such prohibition; neither Manu nor Vashistha nor Yajnavalkya nor Narada; while one ancient sage called the holy Yama, expressly asserts the right to adopt a sister's son. Those objections must [420] receive the same answer. It may be true, though it is impossible now to say, that the Dattaka Chandrika is the sole authority for the texts there quoted and afterwards copied by Nanda Pandita: but it still remains the fact that the texts have been so quoted for several centuries and have so been received into the body of Hindu Law.

Taking then the texts as they are given, and adding to them such weight as the commentators possess, what is enjoined by them? The learned Chief Justice points out that Saunaka may mean a legal prohibition, or a moral admonition, or merely to state a fact, or to indicate a preference for daughters'

and sisters' sons among Sudras. Certainly, if the question were new, the learned Judge's argument would have to be very carefully weighed before it could be rejected. Much of the reasoning which has prevailed with their Lordships in the prior cases would apply to this case; and on some points, such as the silence of other great law-givers and the existence of a sacred text in an opposite sense, with greater force. But their Lordships find an antecedent difficulty; for they have to consider whether the present question can be treated as an open one.

It is not necessary to state in detail the course of decisions in India, because there is hardly any conflict in them and they are fully stated in the judgments below. In 1808 there was a decision on a case from Mirzapur in favour of the validity of these disputed adoptions; but it is probable that the parties were Sudras, as Sir WILLIAM MACNAGHTEN thought they were. There was a decision in 1810 between Brahmans where an adoption of a sister's son was held valid. But Sir FRANCIS MACNAGHTEN tells us that it was overruled in some subsequent proceeding which is not specified. In every other case that has since occurred, when the question has arisen between members of the three regenerate classes, and the adoption has been in the Dattaka form, the decision has been against its validity. The cases have occurred in all parts of India, and all the High Courts have agreed. In making this general statement their Lordships have not overlooked the case decided [421] by the Bombay High Court in 1867, (1867) 4 Bom. H. C. Rep., 130. Chief Justice EDGE considers that, though the parties really were Sudras, the learned Judges thought they belonged to one of the twice-born classes, and so lent their authority to an adoption of a mother's sister's son among one of those classes. But though there was some argument as to the true caste, their Lordships find nothing in the judgment to show that the Judges thought the caste to be other than it really was. Nor was the decision treated as standing in the way of a subsequent decision in 1879 by the same High Court, which affirmed the invalidity of such marriages in the regenerate classes.

The arguments by which the learned Chief Justice seeks to withdraw this case from so strong a current of decision rest entirely on the peculiarity which in his opinion attaches to the Benares school of law. He does indeed subject the decided cases to a minute and able examination with a view of ascertaining the precise bearing of each and of attenuating its force. But the general result at which he arrives does not substantially vary from that which is arrived at by the minority of the Court, and which is above stated. That being so he puts the case in this way:—

"The parties in this case are Kshatriyas and are governed by the Benares school of Hindu law. As Kshatriyas they belong to one of the three regenerate classes of Hindus. What we have to ascertain is, does the Hindu law, as accepted by the Benares school, prohibit the adoption by a Kshatriya of the son of his mother's sister, in the sense of making such an adoption illegal and void.

"It has not been suggested that there is any evidence in this suit of any usage in these provinces by which the adoption in the Dattaka form of the son of a sister of the mother of the adopter, or of his sister's son or of his daughter's son, amongst any of the three regenerate classes is either recognised as valid or prohibited as illegal. Neither side in this case has pleaded or relied upon any custom or usage."

[422] The learned Chief Justice then ties the plaintiffs down to the obligation of showing a custom to prohibit the adoptions in question; and on each decided case he puts the test question whether it is founded on proof of such a custom among the regenerate classes governed by the Benares school of

law. In this position he considers that he is supported by a passage in the judgment of this Board delivered by Sir JAMES COLVILLE in the case of the *Collector of Madura v. Muttoo Ramalinga*, (1868) 12 Moo. I. A., 436. It is as follows:—"The duty, therefore, of a European Judge who is under the obligation to administer Hindu law is not so much to inquire whether a disputed doctrine is fairly deducible from the earliest authorities as whether it has been received by the particular school which governs the district with which he has to deal, and has there been sanctioned by usage. For under the Hindu system of law clear proof of usage will outweigh the written text of the law." The principle deduced by the learned Chief Justice from this passage and applied to the present case would have very far-reaching consequences; and in their Lordships' opinion it is not a sound principle nor is it properly deducible from the language of this Board.

In that judgment Sir JAMES COLVILLE was dealing with the question whether a widow could adopt a son to her husband without his express authority. That is a point in the law of adoption on which legal authorities in different parts of India, all starting from the same sacred texts, have branched off into an extraordinary variety of conclusions; each marked enough and prevalent enough in its own sphere to be ascribed to some recognised school of law. Sir JAMES COLVILLE addresses himself first to show how these schools came into being, and secondly, to specify books of the highest authority in them. It is in the course of this exposition that the sentences just quoted occur, as also the opinion before quoted with reference to the authority of the Dattaka Chandrika and of the work of Nanda Pandita. The decision of the Board was that the power claimed for the widow was [423] conferred on her by the school of law dominant in the Dravida country from whence the appeal came. But that law was ascertained by the usual methods of ascertaining general law; by reference to authoritative text books, to judicial decisions, and to the opinion of pandits. These authorities were found to be sufficient proof of the general Hindu law prevailing over large tracts of country and populous communities. Anybody living among them must be taken to fall under those general rules of law unless he could show some valid local, tribal, or family custom to the contrary. It was necessary for this Board to refer to the differences of schools of law, because the authorities of the recognised Bengal school denied the power which those of Southern India affirmed. The whole passage is framed with reference to the fact that different schools were found to take different views of the general law on the point before the Board. But their judgment gives no countenance to the conclusion that in order to bring a case under any rule of law laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it. Special customs may be pleaded by way of exception, which it is proper to prove by evidence of what actually is done. In this case the learned Chief Justice tells us that there is no suggestion of a special custom. That being so he seems to have inverted the processes by which law is ascertained.

The rule of law asserted by the plaintiffs in this case is derived in the first place from the sacred texts which underlie all Hindu law; and, secondly, from books of high authority in the Benares school as well as in others. It has been affirmed by Courts of Justice in all parts of India and in many law suits in which the parties were subject to the law of the Mitakshara, which is of the highest authority in the Benares school. It has been so affirmed and applied in general terms, and not as confined to a particular school. It is not shown or even asserted that there is anything peculiar in the Benares school to make this rule [424] inconsistent with its principles. It seems to their Lordships

that to put one who asserts a rule of law under the necessity of proving that in point of fact the community living under the system of which it forms part is acting upon it, or defeat him by assertions that it has not been universally accepted or acted on, would go far to deny the existence of any general Hindu law, and to disregard the broad foundations which are common to all schools, though divergencies have grown out of them.

Their Lordships do not inquire whether the views so earnestly maintained by the learned Chief Justice upon the construction of the disputed texts might have been successfully maintained at the beginning of this century. For 80 or 90 years there has been a steady current of authority one way, in all parts of India. It has been decided that the precepts condemning adoptions such as the one made in this case are not monitory only, but are positive prohibitions, and that their effect is to make such adoptions wholly void. That has been settled in such a way and for such a length of time as to make it incompetent to a Court of Justice to treat the question now as an open one. Their Lordships will humbly advise Her Majesty to reverse the decree appealed from, and to restore that of the Subordinate Judge with costs in both Courts. The respondents must also pay the costs of this appeal. *Appeal allowed.*

Solicitors for the Appellants :—Messrs. *Ranken Ford, Ford, and Chester.*

NOTES.

[The sister's son, the mother's sister's son, and the daughter's son cannot be adopted among the *Durjas*, except by force of customary law to that effect :—(1901) 24 All., 195 ; (1906) 28 All., 488 P. C. ; (1908) P.L.R., 113 ; (1909) 11 Bom. L. R., 1172 ; (1908) 36 Cal., 780.

The rule of prohibition was limited to the above relationships in :—(1908) 32 Bom., 619 ; (1912) 36 Bom., 533 ; (1913) 21 I. C., 266 (Nagpur); and the rule of Viruddha sambandha was not adopted.

A widow may adopt her brother's son or grandson, the eligibility being tested by the relationship to the husband, as adoption is made to him :—(1915) 37 All., 359 P. C., approving (1904) 27 All., 417.

The rule of Hindu Law that a legal marriage must have been possible between the adopter and the mother of the adopted boy refers to the relationship prior to marriage :—(1915) 37 All., 359 P. C.]

[425] FULL BENCH.

The 29th May, 1899.

PRESENT :

SIR ARTHUR STRACHFAY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE
BANERJI AND MR. JUSTICE AIKMAN.

Ram Dayal.....Defendant

versus

Madan Mohan Lal.....Plaintiff.*

Res judicata—*Civil Procedure Code, section 13, Explanation III—Suit for possession of land and mesne profits past and future—*

Future mesne profits not granted—Subsequent suit for such future mesne profits not barred.

Held, that where a suit has been brought for possession of immovable property and for mesne profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not, by reason of section 13, Explanation III, of the Code of Civil Procedure, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. *Mon Mchun Sirkar v. The Secretary of State for*

* Second Appeal No. 920 of 1896, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 20th August 1896, confirming a decree of Pandit Girraj Kishor Dat, Munsif of Bareilly, dated the 27th June 1896.

India in Council, (1890) I. L. R., 17 Cal., 968, followed. *Jiban Das Oswal v. Durga Pershad Adhikari*, (1893) I.L.R., 21 Cal., 252; *Pratab Chandra Burua v. Rani Swarnamayi*, (1869) 4 B. L. R., 113; *Julius v. The Bishop of Oxford*, (1880) L. R., 5 App. Cas., 214; *In re Baker*, (1890) L. R., 44 Ch. D., 262; *Bhivray v. Sitaram*, (1894) I. L. R., 19 Bom., 532, and *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed*, (1881) I.L.R., 4 Mad., 308, referred to. *Ramabhadra v. Jagannatha*, (1890) I. L. R., 14 Mad., 328, discussed. *Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159, overruled.

THIS was a suit for the recovery of mesne profits of certain zamindari property for the year 1301 Fasli, i.e., from the 26th of September 1893 to the 14th of September 1894.

The facts of the case are as follows :—

The plaintiff had brought a previous suit against the same defendant on the 5th of December 1893 claiming possession of a share of zamindari property and of a dwelling house. He also claimed mesne profits as follows,—first, mesne profits for 1298 to 1300 Fasli, both years inclusive, and, secondly, future mesne profits, that is, mesne profits from the date of the institution of the suit up to the date when possession of the property should be [426] delivered to him. The decree in that suit was passed on the 6th of June 1894. It awarded to the plaintiff possession of both the properties claimed, and awarded mesne profits up to the 25th September 1893. Then followed the words :—“The rest of the claim is dismissed.” The plaintiff subsequently filed the present suit claiming mesne profits subsequent to the 25th of September as stated above. The defendant resisted the suit on the ground that the claim for future mesne profits was barred by the operation of section 13, Explanation III, of the Civil Procedure Code, the claim for future mesne profits in the former suit not having been dealt with, and therefore by implication having been refused. It should be noted, as stated hereafter in the judgment, that the order in the decree above quoted—“The rest of the claim is dismissed”—did not refer to the claim for future mesne profits but to a portion of the mesne profits claimed for a period before suit.

The Court of First Instance (Munsif of Bareilly) overruled the defendant's plea of *res judicata* and gave judgment for the plaintiff, though for a sum less than that which he claimed. On appeal the Lower Appellate Court (Subordinate Judge) upheld the decree of the Munsif and dismissed the appeal. The defendant thereupon appealed to the High Court.

Babu *Jogindro Nath Chaudhri*, for the appellant, contended that the present suit was barred by the rule of *res judicata*. In the former suit for possession between the same parties, the mesne profits between the date of suit and the date when possession of the property should be delivered to the plaintiff had been expressly claimed. The decree after giving certain reliefs went on to say :—“The rest of the claim be dismissed.” This was an express refusal of the relief relating to future mesne profits. Even if it be not so, Explanation III to section 13 would bar a claim like the present, because in the former suit it was a relief claimed in the plaint which was not granted by the decree and for the purposes of *res judicata* must be deemed to have been refused. This position is supported by a ruling of this Court [427] directly in point—*Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159,—where the learned Judges held that Explanation III to section 13, would bar a suit for mesne profits where in a former suit subsequent mesne profits had been asked for in the plaint and nothing was said about them in the decree. Section 211 and the last paragraph but one of section 244 of the Code in order to make them consistent with Explanation III to section 13 should be read as applying only to cases where the plaint does not claim mesne profits accruing after the institution of the suit. The same principle is also laid down in the

case of *Ramabhadra v. Jagannatha*, (1896) I. L. R., 14 Mad., 328. When *wasilat* is claimed without further specification, it means mesne profits up to the date of delivery of possession, see *Fakhar-ud-din Mahomed Ahsan Chowdhry v. Official Trustee of Bengal*, (1881) L. R., 8 I. A., 197, also *Puran Chand v. Roy Radha Kishen*, (1881) I. L. R., 19 Cal., 132.

A contrary view has been taken in *Mon Mohun Sirkar v. The Secretary of State for India in Council*, (1890) I. L. R., 17 Cal., 968, and in *Jiban Das Oswal v. Durga Pershad Adhikari*, (1893) I. L. R., 21 Cal., 252. The latter of these cases has no bearing on the present case as there no future mesne profits were claimed. The ruling in I. L. R., 17 Calcutta, is a doubtful one. On general principles a suit for future mesne profits would lie in cases where the plaintiff simply asks for possession, but in cases where future mesne profits are claimed and the decree expressly refuses them or is silent with reference to them no subsequent suit will lie. See also *Anund Chander Lal v. Punchoo Lal Soobalah*, (1870) 14 W. R., (F.B.), 33, at p. 36, Maxwell on the interpretation of statutes (2nd edition) p. 286, and *Julius v. The Bishop of Oxford*, (1880) 49 L. J., Q. B., 577, at pp. 588, 590.

Mr. S. Sinha, for the Respondent.

In the first place the clause in the decree—"the rest of the claim is dismissed,"—if construed in conformity with the judgment, clearly refers, not to any mesne profits after the date of the suit, [428] but to the mesne profits claimed for the period before suit in excess of the sum to which the Court, in the previous suit, considered the plaintiff to be entitled.

But even supposing that the clause refers, as contended by the other side, to the mesne profits that might have accrued after the date of suit, still the present suit cannot be held to be barred, as Explanation III to section 13 of the Code of Civil Procedure can have no reference to a case of this kind. The case of *Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159, relied upon by the appellants, does not lay down the law on the point correctly, and is in conflict with the decision of the Calcutta High Court in *Mon Mohun Sirkar v. The Secretary of State for India in Council*, (1890) I. L. R., 17 Cal., 968, and of the Madras High Court in *Ramabhadra v. Jagannatha*, (1890) I. L. R., 14 Mad., 328. The learned Judges who decided the case of *Narain Das v. Khan Singh* seem to have been led to hold as they have done, under the impression that but for their so holding there would be an inconsistency between sections 211 and 244 (penultimate paragraph) and Explanation III to section 13. That view, it is submitted, is not correct, on the ground—supported by the Calcutta and Madras cases above referred to—that the mesne profits after the date of the suit could not be said to form part of the plaintiff's cause of action, as he was not entitled to claim as a matter of right what had not accrued due at the date of the institution of the suit. In fact, had it not been for the provisions of section 211, which enables a plaintiff to claim mesne profits which might accrue in the future, and the object of which is merely to avoid multiplicity of suits, it would not have been open to the plaintiff to claim future mesne profits at all.

Now section 211 is not mandatory but merely an enabling and permissive section, which gives the Court only a discretionary power which it is free to exercise or not as it thinks fit, regard being had to the circumstances of each particular case. The case of *Julius v. The Bishop of Oxford*, (1880) L. R., 5 App. Cas., 214, relied upon by the [429] appellants, lays down that the party who contends that the power given to a Court by an enabling provision, such as the word "may" imports, is to be regarded as an imperative obligation should prove that contention. There is nothing to show that in enacting

section 211 the Legislature intended that the Courts were not free to exercise their discretion in granting or refusing a relief claimed in the plaint as to future mesne profits. That being so, the dismissal of a claim for future mesne profits cannot be said to be barred by reason of Explanation III to section 13, as the words "relief claimed" in the explanation can only be taken to apply to what has actually accrued to the plaintiff, that is, what the plaintiff could claim as a matter of right, as included in his cause of action, not to something which he could only claim as an appeal to the discretionary power of the Court, which might be granted or refused.

Strachey, C. J.—The plaintiff in this case claimed a sum of money in respect of the mesne profits of a zamindari property for the year 1301 Fasli, that is to say, from the 26th September 1893 to the 14th September 1894. The suit was instituted in June 1896. In defence to the suit it was pleaded that inasmuch as the mesne profits claimed in the suit had been expressly claimed in a previous suit, and had not been allowed in that suit, the claim was barred as *res judicata* by virtue of Explanation III to section 13 of the Code of Civil Procedure. That plea was overruled by both the lower Courts. It is again raised by the defendant in his Second Appeal to this Court. The only question which we have to decide is whether the Courts ought to have held the suit to be barred by section 13 of the Code.

The former suit was brought by the same plaintiff against the same defendant on the 5th December 1893. In the plaint the plaintiff claimed to recover possession of the same share of zamindari property, and of a dwelling-house. He also claimed mesne profits as follows—first, mesne profits for 1298 to 1300 Fasli both years inclusive; and secondly, future mesne profits that is, [430] mesne profits from the date of the institution of the suit up to the date when possession of the property should be delivered to him.

The decree in that suit was passed on the 6th June 1894. It awarded possession to the plaintiff of both the properties claimed. As regards mesne profits, it awarded to the plaintiff a sum of Rs. 1,882-9-11, out of Rs. 3,089-10-10 which were claimed in the plaint as mesne profits for the Fasli years prior to the suit. That is, it awarded mesne profits up to the 25th September 1893. Then followed the words—"The rest of the claim is dismissed." In the present suit the claim is for mesne profits for the year 1301 Fasli, that is, from the 26th September 1893, to the 14th September 1894, in other words, from the date up to which the decree in the first suit awarded mesne profits. The contention of the defendant is that as in the former suit the plaint included a prayer for future mesne profits subsequent to the institution of that suit and up to the date of delivery of possession, and as that claim must, in view of Explanation III to section 13, be deemed to have been refused, the plaintiff cannot now claim any profits subsequent to the institution of that suit.

Before dealing with this contention I must again refer to the terms of the decree of the 6th June 1894. The expression "the rest of the claim is dismissed" suggests at first sight that the dismissal expressly referred, and was intended to refer, to the claim for mesne profits after the institution of the suit. If it did so, then the prayer for such future profits was of course expressly refused. We are, however, entitled in construing the decree to look at the judgment, and when the judgment is looked at, I think it is clear that the Court in using the expression "the rest of the claim is dismissed" was referring, not, to any mesne profits after suit, but to the mesne profits claimed for the period before suit in excess of the Rs. 1,882-9-11, which was all that the Court considered the plaintiff entitled to for that period. The judgment further

shows that, for some unexplained reason the Court was not dealing at all with the claim for future mesne profits. It [431] either overlooked that claim or purposely refrained from dealing with it. However, if the argument of the learned advocate for the appellant is correct, the present claim is none the less barred by Explanation III to section 13, because in the former suit it was a relief claimed in the plaint which was not expressly granted by the decree, and which, therefore, for the purpose of *res judicata* must be deemed to have been refused.

This case has been referred to a Full Bench for the purpose of considering a ruling of this Court which is directly in point, according to which the argument for the appellant would be correct. That is the case of *Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159. In that case the learned Judges undoubtedly held that Explanation III to section 13 would bar a suit for mesne profits where in a former suit subsequent mesne profits had been asked for in the plaint and nothing was said about them in the decree. They appear to have thought that section 211 and the last paragraph but one of section 244 of the Code, in order to make them consistent with Explanation III to section 13, must be read as limited to cases where there is no prayer in the plaint for mesne profits accruing after the institution of the suit. The question is whether that view is right. The conclusion at which I have arrived is that Explanation III to section 13 does not apply to a case like this. It is necessary to see what was the nature of the claim in the first suit to the mesne profits asked for accruing due after the institution of that suit. Those mesne profits formed no part of the cause of action on which the plaintiff came into Court. The cause of action on which he came into Court was the trespass committed by the withholding from him of the possession of land to which he was entitled, and the mesne profits corresponding to that cause of action were the profits appropriated by the defendant during the continuance of that trespass, that is to say, mesne profits up to and ending with the institution of the suit. In the absence of any specific provision in the Code, that is where his [432] claim would have had to stop. He could not in that suit have anticipated any cause of action which might subsequently have accrued to him by the continuance of the trespass, or claimed further mesne profits by way of damages for such subsequent trespass. The object of section 211 was that, in order to avoid multiplicity of suits, a Court in a suit for recovery of possession of immoveable property yielding rent or other profit should be competent to provide in the decree, not only for the mesne profits for which the plaintiff is entitled to sue as forming part of his cause of action, that is, mesne profits prior to the suit, but also mesne profits which, but for section 211, he could not have claimed in the suit at all, mesne profits from the institution of the suit until the delivery of possession, or until the expiration of three years from the date of the decree, whichever event first occurs.

Now it appears to me that section 211 is a purely enabling section and gives the Court a discretion to award future mesne profits which it is free to exercise or not according to all the circumstances of the particular case. It was argued that in cases where a plaintiff expressly asks in his plaint for mesne profits after the institution of the suit, the Court, notwithstanding the enabling language of section 211, has no discretion in the matter, but is bound, if it awards possession of the property, to make a decree for future mesne profits in the terms of the section. I do not agree with this argument. In the decision of the Full Bench of the Calcutta High Court in *Pratap Chandra Burua v. Rani Swarnamayi*, (1869) 4 B. L. R., 113, at pp. 126 and 129, the Court had to consider the language of the corresponding section (section 196) of the Code of 1859, and it was there held that the section was enabling and permissive, and only gave

the Court a discretionary power. As shown by the case of *Julius v. The Bishop of Oxford*, (1880) L. R., 5 App. Cas., 214, and by the case of *In re Baker*, (1890) L. R., 44 Ch. D., 262, it lies upon the party who contends that the power or authority given to a Court by enabling language such as the [433] word "may" is coupled with an imperative obligation to use it, to prove that contention. There is nothing in my opinion, in section 211, or in the objects which the Legislature in passing that section had in view, to suggest that a Court acting under section 211 is not free to grant or to refuse a prayer in the plaint for mesne profits accruing after the institution of the suit.

Turning to section 244 I cannot agree that the penultimate paragraph of that section is limited to cases in which the plaint omits to ask for future mesne profits. The earlier part of section 244 refers to cases in which the decree deals with mesne profits (a) under section 212, (b) under section 211. In those cases, as well as in those falling under (c) the questions referred to can only be dealt with in execution, and a separate suit is expressly barred. The latter portion of the section, on the other hand, refers to cases of mesne profits accruing after the institution of the suit, which the decree does not deal with, and a separate suit is expressly authorized. The learned Judges in *Narain Das v. Khan Singh* adopted the construction to which I have referred, apparently because they saw no other way of reconciling section 244 with Explanation III of section 13. The reconciliation which I suggest is this. The words "relief claimed" in Explanation III apply only to something which forms part of the "claim" strictly so called, that is, something which the plaintiff may claim as of right, something included in his cause of action, and which, if he establishes his cause of action, the Court has no discretion to refuse. The words "relief claimed" do not, in my opinion, include something which the plaintiff cannot in the suit claim as of right, but can only claim in the sense of an appeal to the discretion of the Court, and which the Court may refuse in the exercise of its discretion on grounds of general expediency or otherwise, even if the cause of action is fully established. As was pointed out by Sir BARNES PEACOCK in the Full Bench case to which I have referred, the future mesne profits accruing after the institution of the suit do not form [434] part of the cause of action, cannot be claimed as of right, could not, but for section 211, be asked for at all, and may in any case be refused by the Court at its discretion.

There is no other case besides that of *Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159, which fully supports the appellant's contention. The case of *Mon Mohun Sirkar v. The Secretary of State for India in Council*, (1890) I. L. R., 17 Cal., 968, on which the lower Courts have relied, is fully in accord with the views which I have expressed. When that case is compared with the later case of *Jiban Das Oswal v. Durga Pershad Adhikari*, (1893) I. L. R., 21 Cal., 252, the view of Explanation III of section 13 becomes, I think, very clear. In the later case the former suit was for recovery of possession and for mesne profits prior to the institution of the suit. The decree awarded possession, but was silent as regards mesne profits. The plaintiff brought a subsequent suit in which he claimed both mesne profits prior to the institution of the first suit and also mesne profits for a period subsequent to that suit. It was held that the claim for mesne profits prior to the institution of the first suit was barred by section 13 of the Code, but that the claim for subsequent mesne profits was not. The case of *Mon Mohun Sirkar v. The Secretary of State for India in Council* was distinguished with reference to the essential difference between a claim for mesne profits accrued due before the institution of a suit and subsequent mesne profits asked for in the plaint by reason of section 211, but

not then accrued due. In the former case a refusal or an omission by the decree to grant relief falls within Explanation III, because it is a refusal to grant a relief, which, if the plaintiff had made out his case, the Court would have been bound to grant, which related to matters in respect of which he had a complete cause of action — a claim in the sense of a claim as of right. In the latter case these conditions are not satisfied, and if it is proper to describe the prayer in plaint as “claiming” a relief, it is not a relief “claimed” in the sense of Explanation III.

[436] The case of *Ramabhadra v. Jagannatha*, (1890) I. L. R., 14 Mad., 328, has been referred to. I must say, with all respect, that I find it extremely difficult to understand that decision. There was a suit for partition brought in September 1883. The plaintiffs in that suit asked for mesne profits for ten years prior to the suit and subsequent profits. The decree in that suit awarded the plaintiffs mesne profits for three years prior to the suit, but was silent as to the subsequent profits. There is nothing in the report which suggests that the subsequent profits claimed were only profits up to the date of the decree, or were not in respect of the whole period up to the time when the plaintiffs should obtain possession. In 1888 the same plaintiffs brought another suit to recover mesne profits for five years from the date of the former suit. The question before the High Court was whether the suit was barred on the ground that the mesne profits claimed must be deemed to have been refused by the decree in the partition suit, having regard to section 13, Explanation III of the Code. In the earlier part of the judgment the learned Judges came to the conclusion that the decision of the Court below was right “so far as it treats the decree in the partition suit on a construction of Explanation III, section 13, as if it expressly refused subsequent mesne profits.” So far the judgment is in accord with the view expressed in *Narain Das v. Khan Singh*. Having then arrived at the conclusion that the first decree must be construed as if there were inserted in it by reason of Explanation III to section 13 the words “subsequent profits are refused,” the learned Judges proceed to ask, “what is the construction to be placed on the decree as to the period for which mesne profits were refused? Was it the intention to refuse subsequent profits up to the date of decree or for all time to come until partition is effected and separate possession is awarded of appellant’s moiety? In ascertaining the intention two things have to be kept in view, *viz.*, (1) the terms of the latter portion of the decree, so that words inserted with reference to Explanation III may fit into it; and (2) the provisions of [436] section 211 as to the extent to which subsequent profits accruing after suit may be claimed and adjudged.” They came to the conclusion that the true construction of the first decree was that it refused the subsequent mesne profits claimed only up to the date of the decree, and therefore that the claim before them was only to that extent barred by section 13. It appears to me that on the principles stated by the learned Judges themselves, what they had to look to was the plaint. If the plaint in asking for subsequent profits only meant profits from the institution of the suit until decree, then, no doubt, the decision would be correct, that the decree refusing subsequent profits refused no more than that. But if as one would gather from the report, and as one would naturally expect, the plaintiffs in asking for subsequent profits meant the subsequent profits referred to in section 211 of the Code, that is, from the institution of the suit until delivery of possession, then the words inserted in the decree “subsequent profits are refused” must have been a refusal to award profits after the decree as well as profits between the institution of the suit and the passing of the decree. Assuming that for the reasons given by the

learned Judges, the decree could otherwise be construed as only refusing mesne profits up to its date, still if the plaintiff asked for mesne profits after that date, it follows that the decree, as to that prayer, was silent, and, if so, then on the principles laid down in the earlier part of the judgment, that silence must itself be treated as a further refusal. Having regard to the nature of the claim in the former suit, I cannot understand the importance attached by the High Court to the date of decree or the distinction between the subsequent profits prior to decree and the subsequent profits after decree. At p. 331 of the report they say:—"It is clear that if subsequent mesne profits were expressly refused by that decree the claim in respect of them *up to the date of that decree* would clearly be *res judicata*, the parties and the title under which the claim is made being the same in both suits." I cannot understand why they say "up to the date of that decree." There is an important distinction between the mesne [437] profits before institution of the suit which, but for section 211, are all that the plaintiff could claim, and the subsequent mesne profits which by reason of section 211 he can further ask for, but as regards the latter, there is, so far as I am aware, no further distinction in principle between subsequent mesne profits between institution and decree, and subsequently mesne profits between decree and possession. In this respect there is a material difference between section 211 and section 209 to which I shall presently refer.

The only other decisions which I need mention are the cases of *Bhirav v. Sitaram*, (1894) I. L. R., 19 Bom., 532, in which the decision in *Mon Mohun Sirkar v. The Secretary of State for India in Council* is approved, and the case of *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed*, (1886) I. L. R., 4 Mad., 308, where it was held that "Explanation III of section 13 of the Code of Civil Procedure refers to relief applied for which the Court is bound to grant with reference to the matters directly and substantially in issue."

I think that section 209 of the Code affords some support to the views which I have expressed with regard to sections 13, 211 and 244. Section 209 allows the Court in the case of decrees for the payment of money to order interest from the date of the suit to the date of the decree in addition to interest for any period prior to the institution of the suit with further interest on the aggregate sum so adjusted until payment. The second paragraph of the section provided that "where such a decree is silent with respect to the payment of further interest on such aggregate sum as aforesaid from the date of the decree to the date of payment or other earlier date, the Court shall be deemed to have refused such interest, and a separate suit therefor shall not lie." This express provision that the silence of the decree as to further interest on the aggregate sum adjudged is to be deemed a refusal and this express prohibition of a separate suit therefor show that the Legislature did not consider section 13, Explanation III, applicable to such a case. When this is compared with the absence [438] of any similar provision in section 211 coupled with the express allowance in section 244 of a separate suit for future mesne profits not dealt with by the decree, I infer that, as regards a claim for such future mesne profits, the silence of the decree is not to be deemed a refusal, and that a separate suit in respect of such a claim will lie.

On the whole case I think that the lower Courts were right in following the decision in *Mon Mohun Sirkar v. The Secretary of State for India in Council*, (1890) I. L. R., 17 Cal., 968, that the case of *Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159, was decided wrongly and must be overruled, and that this appeal must be dismissed with costs.

Banerji, J.—*judicata* entered in this appeal. It is contended that as in the former suit having become the subject of a perfect claim, not only for the period preceding the date of the former suit, but also for the period subsequent to that date, the present suit is not barred by the rule of *res judicata*. It is urged that the relief which was claimed in the former suit was expressly refused, and that it must be deemed to have been refused having regard to the provisions of Explanation III to section 13 of the Code of Civil Procedure. In the former suit the plaintiff must be held to have claimed mesne profits for the period subsequent to the date of the suit, although the 4th relief claimed in the plaint in that suit was not happily worded. In the decree, no doubt, the Court after decreeing a portion of the amount claimed as mesne profits for the period prior to the date of the suit proceeded to declare that the remainder of the suit was dismissed, but, reading the decree by the light of the judgment, it is clear that the dismissal related only to that portion of the mesne profits claimed for the period preceding the date of the suit which the plaintiff had failed [439] to prove. I therefore agree with the learned Chief Justice that the relief sought in the present suit was not expressly refused in the former suit. The next question which arises is—should that relief be deemed to have been refused in the former suit? The contention of the learned counsel for the appellant is no doubt supported by the ruling of this Court in *Narain Das v. Khan Singh*, Weekly Notes, 1884, p. 159, but with reference to that ruling it may be observed that no other ruling has been cited to us in which the same view was adopted in its entirety. With all deference, I am unable to agree with the view which the learned Judges who decided that case took of the question before us. That view is opposed to the ruling of the Calcutta High Court in *Mon Mohun Sirkar v. The Secretary of State for India in Council*, (1890) I. L. R., 17 Cal., 968, which was approved by the same Court in *Jiban Das Oswal v. Durga Pershad Adhikari*, (1893) I. L. R., 21 Cal., 252, and by the Bombay High Court in *Bhivray v. Sitaram*, (1894) I. L. R., 19 Bom., 532. I agree with the learned Chief Justice in the construction which he would place on the third explanation to section 13 of the Code of Civil Procedure. That explanation refers, as held by the Madras High Court in *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed*, (1881) I. L. R., 4 Mad., 308, to a relief applied for by the plaintiff, which it would be the duty of the Court to grant if the cause of action on which the relief was claimed was established. In the present instance the plaintiff was not entitled in his suit for possession to claim as of right mesne profits for the period subsequent to the date of the suit. No cause of action had on that date accrued to him for those mesne profits, and it was only by virtue of the provisions of section 211 of the Code that he could claim and the Court could award to him such mesne profits in his suit for possession. That section has been repeatedly held to be an enabling section. It was held to be so even by the Madras High Court in *Ramabhadra v. Jagannatha*, (1890) I. L. R., 14 Mad., 328, which the learned Chief Justice has criticized. As that section only vests the Court with a discretion [440] and there was no obligation on the Court to make a decree for mesne profits for the period subsequent to the date of the suit for possession, the omission to grant such mesne profits cannot by virtue of Explanation III to section 13 preclude a subsequent suit for mesne profits.

Aikman, J.—I am of the same opinion and have little to add to what has been said by the learned Chief Justice and my brother BANERJI. The question which we have to consider is whether when in a suit for the recovery of immovable

property the plaintiff has claimed future mesne profits, that is mesne profits subsequent to the date of the institution of the suit, and his claim has either been refused or has not been expressly granted, a subsequent suit for those mesne profits is barred by the provisions of section 13 of the Code of Civil Procedure. It cannot be said that in the present case the issue as to the plaintiff's right to the mesne profits now claimed was ever heard and finally decided, but reliance is placed on Explanation III to section 13, and it is contended that as the mesne profits claimed were not granted they must be deemed to have been refused. Whether this is so or not depends upon whether the plaintiff can as of right ask the Court to adjudicate on his claim for future mesne profits. In my opinion he cannot. Section 211 of the Code gives a Court a discretionary power of providing in its decree for the payment of mesne profits which had not accrued due at the date of the suit. If it has refused to exercise this discretion, there is nothing, in my judgment, to bar a subsequent suit. Section 209 of the Code of Civil Procedure gives the Court a somewhat similar discretionary power where a decree is made for payment of money, to award future interest from the date of the decree to the date of payment. The last paragraph of that section provides that when a Court has not chosen to exercise this power, and when its decree is silent as to the payment of future interest, it shall be deemed to have refused such interest and no separate suit therefor shall lie. The absence of any such provision in section 211 makes it clear to me that the Legislature did not intend to bar a subsequent suit in cases [441] where a Court had not seen fit to exercise the discretion conferred upon it by that section. For these reasons I am of opinion that the appeal should be dismissed.

By THE COURT:—

The appeal is dismissed with costs.

Appeal dismissed.

NOTES.

[This was followed in (1903) 32 Cal., 118; (1906) 2 N.L.R., 91; but distinguished in (1900) 25 Bom., 115 (*past mesne profits claimed in former suit*); (1907) 34 Cal., 223 (*redemption suit, account of profits*); (1908) 30 All., 225 (*ibid.*).]

[21 All. 441]

APPELLATE CIVIL.

The 14th June, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Ram Gopal.....Defendant

versus

Piari Lal.....Plaintiff.*

Pre-emption — Wajib-ul-arz — Plaintiff's title to sue for pre-emption lost after suit but before decree — Suit to be dismissed.

Where a plaintiff who had filed a suit for pre-emption based on the provisions of a *wajib-ul-arz* lost during the pendency of the suit the right to pre-empt by reason of the mahal

* Second Appeal No. 64 of 1897, from a decree of Maulvi Syed Tajammal Husain, Subordinate Judge of Saharanpur, dated the 10th December 1896, confirming a decree of Munshi Sheo Sahai, Munsif of Kairana, dated the 19th September 1895.

in which both properties were originally comprised having become the subject of a perfect partition, it was held that the suit for pre-emption should be dismissed. *Sakina Bibi v. Amiran*, (1888) I. L. R., 10 All., 472, distinguished.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

The Hon'ble Mr. Conlan and Mr. E. Chamier, for the Appellant.

Pandit Sundar Lal, for the Respondent.

Strachey, C. J.—This was a suit for pre-emption in respect of a sale of a share in a mahal, the sale having been made on 20th of March 1894. The suit was based upon a provision of the wajib-ul-arz giving a right of pre-emption to co-sharers in the mahal. At the time of the sale the plaintiff was a co-sharer of the mahal with the vendor. Before the sale, proceedings for perfect partition of the mahal had begun. The suit was instituted on the 19th of March 1895. On the 1st of July 1895, while the suit was pending, the partition proceedings were completed and [442] the partition took effect from that date. By that partition the mahal was subdivided into four mahals and the property sold was included in a mahal in which the plaintiff was not a co-sharer. The suit proceeded, and on the 19th of September 1895, a decree was passed in the plaintiff's favour by the Court of First Instance, which was subsequently affirmed on appeal by the Lower Appellate Court. The question to be determined in this appeal is whether the decrees in the plaintiff's favour can be maintained, having regard to the fact that at the date of the first Court's decree the plaintiff had ceased to be a co-sharer with the vendor in the mahal in which the property sold is situated and therefore did not fall within the category of persons entitled to pre-emption under the wajib-ul-arz. In the recent Full Bench decision in *Janki Prasad v. Ishar Das*, Weekly Notes, 1899, p. 127, it was held that the plaintiff in a suit for pre-emption based on a clause in the wajib-ul-arz giving pre-emptive rights to co-sharers, must show that his right and his status as a co-sharer subsisted not only at the date of the sale, but also at the date of the institution of the suit. The question whether the plaintiff must go farther and show that his right and his status as a co-sharer upon which the right is based still continue up to the date of the decree, or whether the defendant can obtain the dismissal of the suit by showing that the plaintiff's right and status have been lost by partition or otherwise during the pendency of the suit was expressly left open by the judgment of the Full Bench. Upon this question there appears to be no authority, and we must therefore determine it upon principle. The analogy of the Muhammadan law of pre-emption and the case of *Sakina Bibi v. Amiran*, (1888) I. L. R., 10 All., 472, with reference to that law, have been discussed. It appears to me that they afford us little or no guidance. In that case the plaintiff had lost her share by a sale in execution of a decree in another suit pending the Second Appeal in this Court in the pre-emption suit; and it was held that what the Court had to determine was only the correctness or otherwise of the decree appealed against, and that in determining that question events [443] which had occurred subsequently to the decree could not be taken into account. That of course completely distinguishes that case from the present. Mr. Justice MAHMOOD in his judgment referred to a passage in the Hedaya which he construed as showing that if by reason of a voluntary sale or other circumstance the pre-emptor before the passing of the decree of the first Court ceases to be the owner of the tenement by virtue of which he claimed pre-emption, then the decree could not be given in his favour. He expressed some doubt as to whether that principle would apply to a compulsory sale, such as a sale in execution of a decree. It appears from Baillie's Digest of Moohum-mudan Law (2nd edition, p. 505), that "the right of pre-emption is rendered void in two different ways after it has been established. One of these is

termed *ikhtiyaree*, or voluntary, the other *zurooree*, or necessary." But no instance is given of the loss of the right of pre-emption in the latter way except the death of the pre-emptor, and the result is that we get no light from the Muhammadan law as to the effect upon the right of pre-emption of a pre-emptor parting with the property, by virtue of which he claims the right, by a partition or any mode other than a voluntary sale. In the absence of authority on the subject, and in dealing with claims for pre-emption arising under the *wajib-ul-arz*, it seems to me that the only safe course is to see what mode of deciding the question would be most in furtherance of the contract or custom of pre-emption, and the principles upon which such a contract or custom is based. There can be no question that the effect of a decree in the plaintiff's favour in this suit would be to enforce the right of pre-emption in favour of a person who does not now form one of the class to whom alone the right of pre-emption is given by the *wajib-ul-arz*. The custom is one in favour of co-sharers of the undivided mahal, and no others. The object was to give such persons a preference over strangers, that is, over persons not co-sharers of the undivided mahal, and to exclude such strangers as much as possible. The plaintiff is not a co-sharer in the undivided mahal any longer. He is not even a co-sharer with the vendor in the new mahal in which the property sold [444] is situate. He is just as much a stranger in the sense of the *wajib-ul-arz* as the defendant to whom the property was sold. That seems to be a strong reason for dismissing the suit, unless it can be shown that there is some general principle of law or procedure which compels us in disregard of the custom, and which would compel us in disregard of a contract, if this were a case of contract, to look exclusively to the state of things that existed at the date of the institution of the suit, and to say that because on that date the plaintiff was entitled to pre-emption he is to have a decree for pre-emption, although since that date his right has ceased to exist. It appears to me impossible to maintain that there is any such general principle of law. On the contrary, there are many provisions of the Code of Civil Procedure which clearly show that matters may arise after the institution of the suit which either destroy or materially affect the rights which the plaintiff possessed when the suit was brought, and which may be pleaded successfully by the defendant in answer to the suit. In England the Rules of the Supreme Court provide in detail for grounds of defence which have arisen after action brought, and Order XXIV, which deals with the subject, only embodies a much older principle. In Daniell's Chancery Practice (6th edition, volume I, p. 307), it is said that "if plaintiff has a title to relief at the time of the issue of the writ, the mere fact that, owing to change of circumstances, that title has before trial expired or determined, will not prevent him obtaining a judgment in his favour for some relief, or for costs only, at the trial." The cases cited in the foot-note are cases of suits for an injunction, in which the right to the injunction, or the wrongful act to restrain which it was claimed, had ceased during the pendency of the suit. It was held that although, in consequence of what had happened, an injunction could not be granted, the Court could still order an inquiry as to the damage sustained by the plaintiff, and could, for the purpose of deciding how the costs of the suit were to be borne, decide whether the bill had been properly filed. That does not affect the point before [445] us in this case. There is therefore nothing which compels us to look exclusively to the date of the institution of the suit, to disregard all that has since happened, and to confirm the decree for pre-emption, although at the date of the decree the plaintiff was not entitled to pre-emption according to the terms of the *wajib-ul-arz* upon which the suit was based. For these reasons I am of opinion that the decrees of the Courts below were wrong, and

I would allow this appeal, set aside the decrees of both the Courts below, and dismiss the suit with costs in all Courts.

Banerji, J.—I am of the same opinion. The object of the pre-emption clause recorded in the *wajib-ul-arz* was to exclude a stranger from the co-parcenary body. That object would be defeated were we to decree the plaintiff's claim for pre-emption in this suit, for since the subdivision of the mahal into four mahals subsequently to the institution of the suit the plaintiff has ceased to be a co-sharer with the vendor in the mahal to which the property in suit appertains. In order to justify us in maintaining a decree which would defeat the object of pre-emption in a case of this kind, we should be satisfied that a rule of law or procedure exists, which makes it obligatory on us to make such a decree. We have not been referred to any such rule. The analogy of the Muhammadan law is not in favour of the plaintiff. The learned advocate who appeared for the respondent urged upon us to regard the date of the institution of the suit as the date to which we must refer for the purpose of determining the rights of the parties on the date of the decree, but he has not been able to point to any authority in support of that contention. The instances to which the learned Chief Justice has referred, clearly show that the mere fact of the plaintiff's having a right of action on the date of the suit would not entitle him to a decree if he had ceased to have that right subsequently to the institution of the suit and before decree. I concur with the learned Chief Justice in holding that in a suit for pre-emption if after the institution of the suit and before decree the plaintiff has lost the [446] status by virtue of which he could claim pre-emption, his claim must be dismissed. I agree in the order proposed by the learned Chief Justice.

Appeal dismissed.

NOTES.

[This was applied in (1904) 26 All., 389; (1901) 24 All., 119; (1903) 25 All., 421. See also (1902) P. R., 32; (1901) P.L.R., 125; (1901) P. R., 49; (1907) P. R., 124; (1909) P. R., 91; (1909) 5 N.L.R., 136; (1906) 2 N.L.R., 150; (1904) 7 O. C., 61; (1909) 12 O. C., 229.

The case of partition or alienation subsequent to the date of the suit or decree was distinguished in (1908) 31 All., 111; (1909) 31 All., 530; (1912) 15 I. C., 865 (All.); (1913) 36 All., 60.]

[21 All. 446]

The 20th June, 1899.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE AIKMAN.

Kanahai Lal.....Plaintiff

versus

Suraj Kunwar and another.....Defendants.*

Res judicata—Appeal—Plea of res judicata taken for the first time in appeal—Court not bound to entertain it if by so doing further findings of fact will be rendered necessary—Practice.

Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court. *Muhammad Ismail v. Chattar Singh*, (1881) I. L. R., 4 All., 69, and *Tek Narain Rai v. Dhondh Bahadur Rai*, Weekly Notes, 1898, p. 104, referred to.

* Second Appeal No. 180 of 1897, from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 22nd January 1897, reversing the decree of Maulvi Muhammad Abdul Ghafur, Officiating Subordinate Judge of Shahjahanpur, dated the 13th August 1896.

THE facts of this case sufficiently appear from the judgment of KNOX, J.

The Hon'ble Mr. Conlan and Mr. D. N. Banerji, for the Appellant.

Mr. E. Chamier and Babu Jogindro Nath Chaudhri, for the Respondents.

Knox, J.—The sole plea raised in this Second Appeal is that the matter in issue in the present suit has become *res judicata*, inasmuch as the issues in the suit now under appeal were also raised and determined in appellant's favour in a connected suit, and the decision in that suit has now become final. The suit before us was a suit for the balance of money due under a bond. That bond was executed by Musammat Suraj Kunwar and Sheo Prasad, both of whom are respondents to this appeal. The suit was instituted on the 6th of March 1896, against the [447] obligors of the bond. On the 25th of the same month Musammat Suraj Kunwar instituted a suit in another district for the cancelment of the very same bond on the allegation that it had been satisfied. Both suits were eventually, under orders obtained from this Court, heard by one and the same Subordinate Judge, who, on the 13th of August 1896, decreed the claim brought by Kanahai Lal and dismissed the suit brought by Musammat Suraj Kunwar. Appeals were filed from the decrees in both the suits, both the defendants to the suit brought by Kanahai Lal appealing from the decree passed in that suit. In the appeal filed by the Musammat she was required by the Court, acting under section 549 of the Code of Civil Procedure, to find security for the respondent's costs. She failed to do so, and on 18th November 1896, her appeal was rejected. The other appeal, namely, the one filed by the obligors of the bond went to hearing, with the result that the Judge found on the evidence that nothing was due under the bond. He accordingly set aside the decree of the Court of First Instance, decreed the appeal, and dismissed the suit. Before the Judge no allusion was made to, and no plea raised, based upon the order of the 18th November 1896, whereby the Musammat's appeal was rejected owing to her failure to find security. On the record, as it stands, there is no paper and no evidence by which the appellant can substantiate the plea which he has now raised in the appeal before us. His learned counsel to remove this difficulty asked us to exercise our powers under section 568 of the Code of Civil Procedure and to accept in evidence certain papers, namely, 1, plaint; 2, judgment and decree of the Court of First Instance in suit No. 46 of 1890; and also 3, the decree of the appellate Court. These are papers in the suit filed by the Musammat praying that the bond be cancelled. The other side objected to the reception of these papers, and we should have had no difficulty whatever in coming to the conclusion at which we have now arrived, but for a judgment of this Court which was laid before us with much earnestness by the learned counsel for the appellant. That judgment is the Full [448] Bench judgment in *Muhammad Ismail v. Chattar Singh*, (1881) I. L. R., 4 All., 69, a judgment which, we are told, has been followed by this Court in *Tek Narain Rai v. Dondh Bahadur Rai*, Weekly Notes, 1898, p. 104. There are certain passages in some of the judgments of the Judges who composed the Full Bench which would seem at first sight to favour the contention raised by the learned counsel. We do not question, and could not question, the decision of the Bench that the plea of *res judicata* may be raised for the first time in Second Appeal. This was the only point referred to the Full Bench. Any other passages in the judgments which may seem to go further and to furnish authority for the contention that that plea when so raised must be considered and determined either upon the record, as it stands, or after a remand for findings of fact must be deemed to be *obiter dicta*. Indeed the present case, if an example were required, would furnish a very good illustration of the danger of accepting any such rule. Here we have a finding of fact which

is irreversible to the effect that the bond in suit has been fully discharged and nothing remains due under it. In the Court below when it was arriving at that finding nothing whatever was said as to, nor was the Court allowed an opportunity of considering, the fact that simply because one obligor had not been able to furnish security, the appeal in which the other appellant was indirectly, but vitally, interested had been rejected without any consideration of the merits. Even if we were to accept the contention of the appellant it would not advantage him.

We dismiss the appeal with costs.

Aikman, J.—I have also arrived at the same conclusion. In some of the judgments in the Full Bench which has been cited there are expressions which seem to imply that when a plea of *res judicata* is raised for the first time in Second Appeal, and when, in order to support that plea, findings of fact are necessary, this Court must remand the case for such findings. These expressions of opinion, as has been pointed out by my learned colleague, were unnecessary for the determination of the question [449] referred for the consideration of the Full Bench. They seem to me to lose sight of the opening words of section 568 of the Code of Civil Procedure, which enacts that the parties to an appeal shall not be entitled to produce additional evidence, whether oral or documentary, in the appellate Court. If they are not entitled to produce additional evidence, I do not see how they can claim as of right to have a case remanded for additional evidence in order to support a plea raised for the first time in Second Appeal. But even if we did admit the additional evidence I do not see how it would advantage the appellant. The plaintiff's suit has been dismissed by the Lower Appellate Court upon a finding of fact, which cannot be disturbed in Second Appeal, namely, that the defendants respondents have discharged the bond upon which the plaintiff appellant came into Court. That finding is in favour of both the respondents. It is true that one of the respondents did bring a suit which entailed a finding upon the issue whether or not the bond had been discharged; that her suit was dismissed, and that her appeal from the decree dismissing the suit was, owing to her failure to find security of costs, rejected by the Lower Appellate Court. But I do not see how this can effect her co-obligor Sheo Prasad. He was, it is true, made a *pro forma* defendant to Musammatt Suraj Kunwar's suit, but he was in no way interested in resisting that suit, and the fact that an appeal from the decree in that suit was rejected owing to the appellant's failure to give security cannot damnify him. We have then a judgment and decree which are valid so far as one of the co-obligors is concerned to the effect that the plaintiff's bond had been discharged. In the face of this valid decree it appears to me futile to allow this appeal to proceed.

For the above reasons I concur in the decree proposed by my brother KNOX.

BY THE COURT:—

The appeal is dismissed with costs.

Appeal dismissed.

[450] *The 21st June, 1899.*

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE AND MR. JUSTICE BANERJI.

Phul Chand and another.....Plaintiffs
versus

Ganga Ghulam.....Defendant.*

Act No. XXVI of 1881 (Negotiable Instruments Act), sections 64, 66—Promissory note not presented for payment at maturity—Effect of non-presentment.

Held, that the non-presentment for payment at maturity of a promissory note, the presentment of which is required by section 66 of the Negotiable Instruments Act, 1881, has not the effect of relieving from liability the maker of the note. *Farzand Ali v. The Agra Savings Bank*, Weekly Notes, 1896, p. 201, and *Ramakistnayya v. Kassim*, (1889) I. L. R., 13 Mad., 172, followed.

THIS was a suit to recover Rs. 2,069-9-6 on a promissory note for Rs. 1,600, dated Sawan badi 5th, 1950 Sambat, corresponding to the 2nd August 1893, and payable 90 days after date. The principal defences to the suit were, first, that the plaint was not signed and verified as required by law, having been signed and verified, not by the plaintiffs themselves, but by a mukhtar; and, secondly, that the plaintiffs not having presented the note for payment at due date could not recover on it.

The Court of First Instance (Subordinate Judge of Cawnpore) found that the plaint was properly signed and verified with the permission of the Court, under section 51 of the Code of Civil Procedure, the plaintiffs being residents of another district, namely, Aligarh; and also that the non-presentation of the note was covered by section 76 of Act No. XXVI of 1881, and gave a decree in favour of the plaintiffs.

The defendant appealed, and the Lower Appellate Court found both the above issues in favour of the defendant, and, decreeing the appeal, dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court.

Pandit *Sundar Lal* and *Munshi Gobind Prasad*, for the Appellants.

[451] *Munshi Gokul Prasad* (for whom *Pandit Tej Bahadur Sapru*), for the Respondent.

Strachey, C. J.—The learned Judge has reversed the decree of the Court of First Instance and has dismissed the suit upon two grounds. The first is that, with reference to the ruling in *Mahabir Prasad v. Shah Wahid Alam*, Weekly Notes, 1891, p. 152, the fact that the plaint was not signed by the plaintiff was fatal to the suit. As to that point no objection was raised in the first Court by the defendant that the plaint was not properly signed, nor was any such objection taken by the defendant in the grounds of appeal to the Lower Appellate Court. However, the first Court finds that the plaintiffs, who resided at Hathras, were absent from Cawnpore, where the suit was filed, and that the general attorney, Nanhu Mal, who signed and verified the plaint, was duly authorized in that behalf by his power-of-attorney. We take that to mean that the plaintiffs were by reason of absence unable to sign the plaint, and that the plaint was signed by a person duly authorized by them in that behalf. That

* Second Appeal No. 132 of 1897, from a decree of J. E. Gill, Esq., District Judge of Cawnpore, dated the 24th November 1896, reversing a decree of Maulvi Syed Zainul-Abdin, Subordinate Judge of Cawnpore, dated the 15th February 1896.

being so, the provisions of section 51 of the Code of Civil Procedure appear to us to have been complied with. The decree, in our opinion, ought not to have been set aside and the suit dismissed upon the first ground stated by the Judge. One of the questions raised by the defendant's written statement, paragraph 9, is in substance, whether the institution of this suit was authorized by the plaintiffs, or whether the suit was instituted by Nanhu Mal without authority from them. As to this the learned Judge merely says that there is nothing in the evidence of Durga Prasad, munib, to show that the plaintiffs had any knowledge of the promissory note or authorized the suit. If it is necessary for the learned Judge to determine whether the suit was or was not instituted by Nanhu Mal with the authority of the plaintiffs, it will be necessary to consider, not only the evidence of Durga Prasad, but the terms of the general power-of-attorney, upon which Nanhu Mal bases his alleged authority to institute the suit on behalf of the plaintiffs.

[452] The second ground upon which the learned Judge has dismissed the suit was based on section 66 of the Negotiable Instruments Act, No. XXVI of 1881. The suit was brought upon a promissory note against the maker of the note. Section 66 directs that "a promissory note or bill of exchange, made payable at a specified period after date or sight thereof, must be presented for payment at maturity." Here the promissory note, which was made payable ninety days after date, was not presented, the learned Judge finds, at maturity, and he holds that the suit was liable to dismissal on that account. Section 66 does not state what are the consequences of a promissory note such as it describes not being presented for payment at maturity. Section 64 provides that "promissory notes, bills of exchange and cheques must be presented for payment to the maker, acceptor or drawee thereof, respectively, by or on behalf of the holder as hereinafter provided. In default of such presentment the other parties thereto are not liable thereon to such holder." It is clear that that section only exempts from liability to the holder in default of presentment parties other than the maker, acceptor or drawee of a promissory note, bill of exchange and cheque, respectively. It does not relieve from liability in the case of such default the maker of a promissory note like the present defendant. Therefore no presentment of the note for payment was necessary to make the defendant liable to a decree in this suit. This view is in accordance with the ruling of this Court in *Farzand Ali v. The Agra Savings Bank*, Weekly Notes, 1896, p. 201, and of the Madras High Court in *Ramakistnayya v. Kassim*, (1889) I. L. R., 13 Mad., 172. We must allow this appeal, set aside the decree of the Lower Appellate Court, and remand the case to that Court, for disposal under section 562 of the Code of Civil Procedure. The appellant will get the costs of this appeal. Other costs will abide the result.

Appeal decreed and cause remanded.

[453] The 23rd June, 1899.

PRESENT :

MR. JUSTICE BLAIR, AND MR. JUSTICE BURKITT.

Ram Sarup and another.....Decree-holders

versus

Ghourani and another.....Judgment-debtors.*

Act No. IV of 1882 (Transfer of Property Act), section 90—Application
for a decree under section 90—Limitation—Act No. XV of 1877
(Indian Limitation Act), Sch. ii, Art. 178.

Held, that the limitation governing an application for a decree under section 90 of the Transfer of Property Act is that prescribed by Art. 178† of the second schedule to the Indian Limitation Act, 1877.

THE decree-holders in this case obtained a decree against the judgment-debtors under section 88 of the Transfer of Property Act, on the 10th of December 1888, the suit having been instituted on the 15th of August 1888. The mortgaged property was brought to sale on the 25th of February 1895, and the sale was confirmed on the 3rd of May 1895. On the 1st of December 1898, the decree-holders applied for a decree under section 90 of the Transfer of Property Act. The Court to which the application was made (Subordinate Judge of Farrukhabad) dismissed it as barred by limitation under Art. 179 of the second schedule to Act No. XV of 1877. From this order the decree-holders appealed to the High Court.

Babu Jogindro Nath Chaudhri, for the Appellants.

Pandit Moti Lal, for the Respondents.

Blair and Burkitt, JJ.—The only question which arises in this case is, whether an application made by the appellants to obtain the decree provided for by section 90 of the Transfer of Property Act is or is not barred by limitation. The lower Court has found that it is so barred. The first question which we have to consider is whether an application of this nature is one made in the course of proceedings in execution of a decree passed under section 88 of that Act. Upon this point we are concluded by the authority of two cases—*Durga Dai v. Bhaqwat Prasad*, (1891) I. L. R., 13 All., 356, and *Musaheb Zaman Khan v. Inayatullah*, (1892) I. L. R., 14 All., 513, at p. 516. The latter case has specially laid down that such an application is a proceeding in the [454] execution of the original decree. Then so much being granted the question arises what is the limitation article applicable to such an application? The appellants contend that the article applicable is 179, while for the respondents it is argued that Art. 178 applies. Now Art. 179 is an article which provides a period of limitation for an application "for the execution of a decree or order of a Civil Court." It seems to us that the application we are considering,

* First Appeal No. 13 of 1899 from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 21st December 1898.

† [Art. 178 :—

| Description of application. | Period of limitation. | Time from which period begins to run. |
|---|-----------------------|---------------------------------------|
| Applications for which no period of limitation is provided else where in this schedule, or by the Code of Civil Procedure, section 230. | Three years. | When the right to apply accrues. |

namely one to obtain a decree under section 90, cannot by any straining of language be considered to be an application "for the execution of a decree" under section 88. Neither in substance nor in form does such an application ask for execution of that decree. What it does ask is that, certain events being ascertained to have occurred, a subsidiary decree for money may be passed, in execution of which the amount still remaining due on the principal decree under section 88 may be recovered. But as we have before remarked, such an application, though undoubtedly an application in an execution proceeding, is not an application "for the execution" of the principal decree. We hold therefore that this application is not governed by the limitation rule to be found in Art. 179. That being so, the only other article of the Indian Limitation Act applicable is Art. 178, and there can be no doubt in this case that, that article being applicable, the present application is time-barred. We therefore dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[An application under C.P.C., 1908, O. 34, r. 6 (which takes the place of sec. 90 T.P.A., 1882) is not an application for execution: (1913) 21 I. C., 530; (Mad); (1911) 10 I. C., 21 (Oudh); (1913) 24 I. C., 35 (Cal); (1905) 1 N.L.R., 143; (1907) 6 C.L.J., 119; see also (1906) 33 Cal., 867; (1902) 24 All., 542; (1903) 6 O. C., 114.]

[21 All. 455]

The 30th June, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Har Lal.....Plaintiff

versus

Muhamdi.....Defendant.*

*Act No. IV of 1882 (Transfer of Property Act), section 55, sub-section 4 (b)—
Vendor's lien—Suit to enforce charge against the property—Limita-
tion—Act No. XV of 1877 (Indian Limitation Act), Sch. II,
Arts. 132, 111.*

Held, that a suit by a vendor of immovable property to enforce against the property his lien for the unpaid purchase-money under section 55,† sub-section 4 [455] (b) of the Transfer of Property Act, 1882, falls within Art. 132 of the second schedule to the Indian Limitation Act, 1877. *Virchand Lalchand v. Kumaji*, (1892) I.L.R., 18 Bom., 48, and *Chunilal v. Bai Jethi*, (1897) I. L. R., 22 Bom., 846, followed. *Natesan Chetti v. Soundararaja Ayyangar*, (1897) I. L. R., 21 Mad., 141, dissented from. *Ramdin v. Kalka Pershad*, (1884) L. R., 12

* Second Appeal No. 78 of 1897, from a decree of Pandit Rajnath Saheb, Subordinate Judge of Moradabad, dated the 15th December 1896, modifying a decree of Babu Sheo Prasad, Munsif of Bijnor, dated the 12th September 1896.

† [Sec. 55.—In the absence of a contract to the contrary, the buyer and the seller of immoveable property respectively are subject to liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold.

(4) The seller is entitled—

(b) where the ownership of the property has passed to the buyer before payment of the whole of the purchase-money, to a charge upon the property in the hands of the buyer for the amount of the purchase-money, or any part thereof remaining unpaid, and for interest on such amount or part.]

I. A., 12, *Sutton v. Sutton*, (1882) L. R., 22 Ch. D., 511, and *Toft v. Stevenson*, (1854) 5 D. G. M. and G., 785, referred to.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Pandit *Moti Lal*, for the Appellant.

Mr. *Amiruddin*, for the Respondent.

Strachey, C. J.—This was a suit by a vendor of immovable property to recover the balance of unpaid purchase-money by enforcement of the lien or charge conferred by section 55, sub-section 4 (b) of the Transfer of Property Act, 1882. The Court of First Instance found that only Rs. 149 of the purchase-money remained unpaid. That Court held that the claim, so far as it sought to enforce the lien by sale of the property, was barred by Art. 111 of the second schedule of the Limitation Act, 1877. But it also held that the claim for a personal remedy was not barred, as it fell within Art. 116, the sale-deed being a registered instrument. It therefore gave the plaintiff a personal decree for Rs. 149. On appeal the Lower Appellate Court held that Art. 111 was equally applicable to the claim for the personal remedy and to the claim to enforce the charge against the land, and accordingly dismissed the whole suit. The plaintiff now appeals against that decision.

The sale-deed was executed on the 7th of June 1893. The suit was brought on the 17th of July 1896. The question is whether Art. 111 or Art. 132 prescribes the limitation applicable to a suit by a vendor to enforce his lien by sale of the property to which the lien attaches. In the former case the suit is barred, in the latter it is within time. In this Court there appears to be no authority in point. In the case of *Baldeo Prasad v. Jit Singh*, Weekly Notes, 1891, p. 130, to which the Lower Appellate Court refers, there is no ruling on the point with which we have to deal, and the Court evidently [456] found it extremely difficult to determine the real nature of the suit. On the question before us there is a conflict of authority between the High Court of Bombay and the High Court of Madras. In *Virchand Lalchand v. Kumaji*, (1892) I. L. R., 18 Bom., 48, and in *Chunilal v. Bai Jethi*, (1897) I. L. R., 22 Bom., 846, the Bombay High Court held in effect that a suit by the vendor to enforce his charge against the land falls within Art. 132, while his suit for the personal remedy falls within Art. 111. I gather from the report of the argument in the latter case that the same view was taken in two unreported cases published in the printed judgments of the Court. On the other hand, the Madras High Court has held in *Natesan Chetti v. Soundararaja Ayyangar*, (1897) I. L. R., 21 Mad., 141, dissenting from the first of the Bombay cases, that the suit to enforce the charge against the land falls within Art. 111 and not Art. 132. We have now to decide which of these conflicting views we ought to adopt.

The difficulty arises from the fact that both Art. 111 and Art. 132 use language sufficiently wide to cover a suit of this description. No doubt the words in Art. 111 "to enforce his lien for unpaid purchase-money" would, in the ordinary sense of the expression "enforcement of lien," include a suit to enforce it against the land as well as against the defendant personally: but a suit limited to a claim for the personal remedy would undoubtedly answer the description. Now it is noticeable that Art. 111 is placed in Part VI of the schedule among a number of articles, all of which relate exclusively to suits for a personal remedy, and prescribe the same period of limitation, that is a period of three years. In *Ramdin v. Kalka Pershad*, (1884) L. R., 12 I. A., 12, the Privy Council say:—"The second schedule places simple money demands generally under the three years' limitation. The twelve years' period is made applicable principally to suits in respect of immovable property." And they add that Art. 132 has reference only to suits for money charged on immovable property to raise it out of that

property.. There can be no doubt (See Darby and [457] Bosanquet's Law of Limitation, 2nd edition, pp. 170—175); that in England a suit to enforce a vendor's lien would come within section 8 of the Real Property Limitation Act, 1874, which prescribes a period of twelve years for a suit "to recover any sum of money secured by any mortgage, judgment, or lien or otherwise charged upon or payable out of any land or rent at law or in equity." That closely corresponds, both in language and in regard to the period prescribed, to Art. 132 of the second schedule of the Limitation Act. The difference is, that whereas in England the twelve years' limitation has been held to apply both to suits for the personal remedy and to the remedy against the land—see *Sutton v. Sutton*, (1882) L. R., 22 Ch. D., 511, in India, Art. 132 has been held to apply only to suits for the recovery of the money out of the property charged, while suits for the personal remedy fall within the limitation applicable to simple money demands. As pointed out by Mr. Whitley Stokes and Mr. Mitra, the third column of Art. 111 is based on *Toft v. Stevenson*, (1854) 5 De G. M. and G., 735, the effect of which it states almost in the exact terms of a passage at p. 175 of Darby and Bosanquet's work; but the vendor's claim which the first column of Art. 111 describes as one "to enforce his lien for unpaid purchase-money," is in the passage in Darby and Bosanquet called the right of a vendor to receive his purchase-money which is secured by his lien on the land sold. It seems probable that the first column of Art. 111 was intended to have the same effect as these words, which, however, point rather to a personal claim to receive the purchase-money than to a claim to realize it by sale of the property. On the other hand, it seems improbable that the Legislature should have intended by Art. 132 to give all other charges on land the same twelve years' limitation as in England, but to exclude therefrom the vendor's remedy against the land, which in England has been expressly held to fall within the same category and to be covered by the same words. It also seems improbable that a vendor should have a shorter period of limitation than is given to every other charge-holder, while under section 100* of the [458] Transfer of Property Act all charge-holders are put as nearly as possible on the same footing as a mortgagee. There can be no doubt, for instance, that the limitation applicable to a suit for enforcement against the land of the purchaser's charge conferred by section 55, sub-section 6† (b) of the Transfer of

* [Sec. 100.—Where immoveable property of one person is by act of parties or operation of law made security for the payment of money to another, and the transaction does not amount to a mortgage, the latter person is said to have a charge on the property; and all the provisions hereinbefore contained as to a mortgagor shall, so far as may be, apply to the owner of such property, and the provisions of Sections eighty-one and eighty-two and all the provisions hereinbefore contained as to a mortgagee instituting a suit for the sale of the mortgaged property shall, so far as may be, apply to the person having such charge.

Nothing in this section applies to the charge of a trustee on the trust-property for expenses properly incurred in the execution of his trust.]

† [Sec. 55.—In the absence of a contract to the contrary, the buyer and seller of immoveable property respectively are subject to the liabilities, and have the rights, mentioned in the rules next following, or such of them as are applicable to the property sold.

(6) The buyer is entitled—

(b) unless he has improperly declined to accept delivery of the property, to a charge on the property, as against the seller and all persons claiming under him with notice of the payment, to the extent of the seller's interest in the property, for the amount of any purchase-money properly paid by the buyer in anticipation of the delivery and for interest on such amount; and, when he properly declines to accept the delivery, also for the earnest (if any) and for the costs (if any) awarded to him of a suit to compel specific performance of the contract or to obtain a decree for its rescission.]

Property Act would be governed by Art. 132, and so would all other charges on land under the Transfer of Property Act or otherwise. It is difficult to see why the vendor should have a shorter time for suing than the purchaser and the other charge-holders mentioned. Again, in all other cases provided for by the Limitation Act, where there is a charge against land and also a personal remedy, a longer period of limitation is allowed for the claim against the land than for the merely personal claim. On the construction adopted by the Madras High Court, either both claims stand on the same footing under Art. 111, or else a longer period is allowed for the personal remedy, in the case of a registered instrument, for instance, under Art. 116. For some reason which does not appear from the report, the Madras High Court, while dismissing the suit before them, so far as regards the charge, as barred by Art. 111, confirmed the first Court's personal decree against defendant No. 1, though the suit was brought more than three years from the date mentioned in the third column of Art. 111. To apply Art. 111 to suits like the present might lead to various difficulties and anomalies. Apart from the difficulty of applying to ordinary sales in the mofassil the second date mentioned in the third column—the date of the acceptance of the title—cases might occur in which the first date, "the time fixed for completing the sale," could not be applied without absurdity or injustice. It must be remembered that under section 55 (4) (b) of the Transfer of Property Act the vendor's charge does not arise, as in England, as soon as there is a valid contract for sale, though there may be no actual conveyance, and the time for completing the sale has arrived without payment of the purchase-money. It arises only "where the ownership of the property has passed," that is, not until the actual completion of the sale by (where the property is worth Rs. 100 [489] or upwards) a registered instrument. If, for any reason, the sale were not completed, and if consequently the charge did not arise until more than three years after "the time fixed for completing the sale," the effect of applying Art. 111 would be that the remedy was barred before the right had come into existence. In many, if not most, cases the right would not come into existence until some part at least of the prescribed period had elapsed. On the whole, although there are difficulties in the way of either interpretation, I have come to the conclusion that that adopted by the Bombay High Court is supported by stronger reasons and involves fewer anomalies than that of the Madras High Court. In this view of the case I think that the decree of the Lower Appellate Court dismissing the suit was wrong, that this appeal should be allowed, the decree of the Lower Appellate Court set aside, and the case remanded to that Court under section 562 of the Code of Civil Procedure for disposal of the appeal on the merits. The appellant to have his costs of this appeal. Other costs will abide the result.

Banerji, J.—I concur in the order proposed by the learned Chief Justice and in the reasons by which it is supported. The question is not one free from difficulty; but any other conclusion would create anomalies which we are not justified in assuming the Legislature contemplated.

Appeal decreed and cause remanded.

NOTES.

[The contrary decisions in (1898) 12 Mad., 141; (1901) 24 Mad., 233; (1904) 27 Mad., 28 were overruled in (1905) 29 Mad., 305. This was followed in (1906) 9 O. C., 284; (1908) 30 All., 172; see also (1905) 2 A.L.J., 379; (1906) 3 N.L.R., 81.]

[460] PRIVY COUNCIL.

The 11th, 15th and 16th February, 1898, and 11th March 1899.

PRESENT at the hearing of the Appeal from Madras :

LORD HOBHOUSE, LORD MACNAGHTEN, AND SIR RICHARD COUCH.

Sri Balusu Gurulingaswami.....Appellant

versus

Sri Balusu Ramalakshamma and others.....Respondents.

On Appeal from the High Court at Madras.*

The 6th and 18th July, 1898, and 11th March, 1899.

PRESENT at the hearing of the Appeal from the N.-W. P. :

LORDS HERSCHELL, WATSON, HOBHOUSE AND MACNAGHTEN, AND
SIR RICHARD COUCH.

Radha Mohan, Representative of Beni Prasad, deceased.....Appellant

versus

Hardai Bibi and another.....Respondents.

On Appeal from the High Court for the North-Western Provinces at Allahabad.

Hindu law—Adoption—Validity of the adoption of the only son of his natural father.

On the general question as to the validity by Hindu law of the adoption of the only son of his natural father decided in one judgment upon these two appeals, *Held* that such an adoption is valid by that law.

The authority of a widow, in reference to adoption, not being identical in different schools of Hindu law, it was *Held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widow of his natural father that, unless there has been some express prohibition by the husband, the wife's power with the concurrence of sapindas, where the concurrence of sapindas is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband.

THE first appeal heard on the 11th, 15th and 16th February 1898, was from a decree (20th September 1894,) of the High Court of Madras affirming a decree (20th September 1893,) of the District Judge of Godavari.

The decree from which this appeal was preferred, affirmed on appeal the dismissal by the original Court of the suit, which was brought to have set aside an adoption made on the 10th November 1881, by the first defendant-respondent, Ramalakshamma, the childless widow of Butchi Sarvarayuda, the last male owner of two villages, now claimed by the plaintiff-appellant as the nearest collateral relation of the deceased's husband.

[461] The adopted son, Pattabhiraya, the second defendant-respondent, was the only son of a kinsman of the deceased. The widow had adopted him with the assent of her late husband's sapindas, several of whom had assented in writing. The natural father of the boy had died when the latter was a few

* An abridged report is here given of the appeal from Madras. The full report of it will be found in its place in the I. L. R., 22 Mad., 393.

months old. It was found below that he had expressed his approval of this adoption.

The first and principal question raised in both the appeals, in which one judgment dealing with both was given by their Lordships, was whether the adoption of an only son was valid by Hindu law. In the first, or Madras appeal, a further question related to the power of the widow respectively to give and take with legal effect.

An appeal from the judgment of the first Court, which had upheld the adoption as valid, was heard by a Division Bench (MUTTUSAMI AYYAR and SHEPHERD, J.J.) whose judgments are reported at length in *Gurulingaswami v. Ramalakshamma*, (1895) I. L. R., 18 Mad., 53. They followed a series of decisions in Madras in favour of the validity of an only son's adoption, but did not examine the judgments of the High Courts elsewhere, some of which were to the contrary.

On this appeal Mr. J. D. Mayne appeared for the Appellant.

Mr. J. H. A. Branson, and Mr. A. Phillips, for the Respondents.

The arguments are reported in I. L. R., 22 Mad., for the year 1899.

Their Lordships' judgment was given after the second appeal had been heard.

The second appeal, heard on the 6th and 18th July 1898, was from a decree, (1892) *Beni Prasad v. Hardai Bibi*, I. L. R., 14 All., 67, (18th March 1892) of the High Court of the North-Western Provinces at Allahabad, affirming a decree (21st November 1887) of the Subordinate Judge of Benares.

The appellant was the son of the original plaintiff Beni Prasad who brought his suit on the 31st March 1886, to have it declared that Ram Prasad, the second defendant-respondent, was not the [462] adopted son of Chaudhri Jaganath Prasad, the deceased husband of Hardai Bibi, the first defendant-respondent. The ground of the suit was that Ram Prasad having been the only son of his father the adoption was invalid and void.

Chaudhri Jaganath Prasad died without issue in 1858, leaving Hardai Bibi, his childless widow, and heiress, in possession for life of his property.

To her he had given a power to adopt. This power she exercised on the 16th December 1858, on which date Govind Prasad, the natural father, executed a deed signifying the gift in adoption.

The adoption was in the Dattaka form. The parties were Agarwala Banias of Benares. It was not suggested that there was, apart from the Hindu law, any special custom that would affect the validity of the adoption.

The Subordinate Judge, following the judgment of a majority of the Judges of a Full Bench of the High Court in *Hanuman Tiwari v. Chirai*, (1879) I. L. R., 2 All., 164, upheld the adoption, and, refusing the relief sought, dismissed the suit.

On an appeal to the High Court a Division Bench (MAHMOOD and YOUNG, J.J.) referred the following questions to the Full Court (EDGE, C. J., STRAIGHT, MAHMOOD and KNOX, J.J.). The referring order (10th June 1894) stated that of the Full Bench in 1879 (STUART, C.J., SPANKIE, PEARSON, TURNER and OLDFIELD, J.J.), TURNER, J., had not concurred in the judgment; that there had been no reported case since 1879 to show that this judgment had been followed; that there had been, on the other hand, two unreported cases referred to the Full Court by Division Benches, but these had been disposed of on points other than the question referred, the validity or invalidity of the adoption. The following were the questions now referred.

First, the adoption of an only son having taken place, in fact, is such an adoption null and void? Second, if so, generally, does the subsequent birth of sons to the natural parents of the son given in adoption have retrospective effect to validate it. [463] Third, does the circumstance that the adopted son is Sagotra, or descended from one common ancestor with the adopted father, render his case an exception to the general rule of prohibition against the adoption of only sons?

The unanimous opinion of the Court, delivered on February 4th, 1892, was that the adoption of an only son, which had in fact taken place, was not null or void under the Hindu law applicable. The first question having been so answered it was not necessary that the second or third question should be answered.

This having been returned the appeal was accordingly dismissed by the Division Bench on the 18th March 1892.

On this appeal, preferred by the son and representative of Beni Prasad, Mr. C. W. Arathoon, for the appellant, argued that the adoption of an only son was altogether void under the Hindu law. The absolute prohibition which had come down from the Smritis had received effect in many modern decisions. For the general principles of adoption he referred to *Huradhun Mookurjia v. Muthorath Mookurjia*, (1849) 4 Moo. I. A., 414. The religious and legal aspects of adoption were inseparable. In Manu, Chapter IX, vv. 137, 138, 168, although the adoption of an only son was not expressly forbidden, the duties to be performed of a religious character were inconsistent with such an adoption. It was, however, to the texts of Bandhayana, of Vasishtha, and of Saunaka, that the prohibition was mainly to be referred. The adopted son's duty, as that of a son, was to perform rites, which would, according to the Hindu religion, benefit three preceding generations, the father, grandfather, and great-grandfather; Colebrooke's Digest, Vol. III, 242, 296; Bandhayana's text was against such an adoption. The other text was that of Saunaka; Dattaka, Mimamsa, section IV, cls. 1 to 7. Vasishtha was quoted on the Mitakshara only to the extent that it said: "Let no man give, or accept, an only son"; Mitakshara, ch. 1, sections 11 and 12; Stokes' Hindu Law Books, 416; Dattaka Chandrika, section 1, cl. 27; Vayavahara Mayuka, ch. IV, cl. 9.

[464] Taking the European writers, Sir W. F. Macnaghten in his "Considerations on Hindu Law," p. 147; STRANGE, J., in his Manual, p. 23; Sutherland in his "Synopsis"; Steel in "Laws and Customs of Hindus in the Deccan," p. 183; West and Buhler in their "Hindu Law," pp. 908, 1040, had stated their belief that the adoption of an only son was contrary to the Hindu law. It was submitted that Sir W. H. Macnaghten came to the same conclusion. Sir T. Strange only, at the time when he wrote the comments found in ch. IV of Vol. I of his Hindu Law, seemed to be of the contrary opinion. West and Buhler had added that the Mitakshara did not recognise the distinction that the adoption may be valid, however improper, after having been made. It pronounced against the adoption without reserve. Jaganatha pointed out that, according to the Mithila Shasters, the gift of an only son was illegal. Colebrooke's Digest, Book V, T. 275; 1 Strange's Hindu Law, 87; 1 W. Macnaghten's Hindu Law 67. The Shastris, expounding the law, had pronounced against this adoption, except in certain cases in which they had been embarrassed by the inapplicable doctrine "factum valet." The Tagore Law Lectures, 1880, p. 534, by Mr. Rajkumar Sarvadhikari, referred to the Dattaka Chandrika III, 17, as to the prohibition "Let not a man give his only son."

The argument for the appellant then was that the Full Bench judgment of the majority of the Judges in the North-Western Provinces High Court in

Hanuman Tiwari v. Chirai, (1879) I. L. R., 2 All., 164, had been mainly based on a judgment of the Madras High Court in *Chinna Gaundan v. Kumara Gaundan*, (1862) 1 Mad. H. C. Rep., 54, where the Chief Justice, Sir C. SCOTLAND, had considered himself bound by previous decisions. That case was afterwards followed by another in Madras, *V. Singamma v. Vinjamuri Venkatacharlu*, (1868) 4 Mad. H. C. Rep., 165, with the same result, the support of the adoption. But the true view of the law was afterwards taken in the Bengal case, *Raja Upendra Lal Roy v. Srimati Rani Prasannamayi*, (1868) 1 B.L.R., 221, by DWARKANATH [465] MITTER, J. The current of decisions in Madras had commenced with the cases of 1862 and of 1868, having since then been in the direction of upholding the validity of the adoption.

The last cited Bengal case was followed by *Manick Chunder Dutt v. Bhuggobutty Dossee*, (1878) I. L. R., 3 Cal., 443, in which the authorities were examined by MARKBY, J., in a judgment in which GARTH, C. J., had concurred against the validity of the adoption. In fact, whilst the Madras and North-West Provinces Courts had, in the majority of cases, supported the adoption of an only son, the Bengal and Bombay Courts had in the main, concluded to the contrary, and had denied its validity.

It was then argued that, in the judgments now under appeal, the High Court had attributed too much to new interpretations of Sanskrit texts by eminent Sanskrit scholars, but who had not hitherto been recognised as of weight equal to that of Sutherland, Colebrooke, and Ellis. Reference was made to Mr. Mandlik's work, and to the Tagore Law Lectures of 1888 by Golap Chandra Sarcar, Sastri. *Thakoorain Sahiba v. Mohun Lall*, (1867) 11 Moo., I.A., 386, 403, was next cited in which the danger of superseding former well-settled authorities was pointed out by Sir J. COLVILLE. Again, in *Waman Raghupati Bova v. Krishnaji Kushiraj Bova*, (1889) I. L. R., 14 Bom., 249, the High Court of Bombay declined to be guided by new readings of old texts, at variance with the accepted authority. Also reference was made to *Minakshi v. Ramanada*, (1886) I.L.R., 11 Mad., 49, 52, in which MUTTUSAMI AYYAR, J., had spoken of commentaries generally received as authorities, among which he had reckoned the Dattaka Mimamsa. That treatise, and the Chandrika especially, had been, without sufficient grounds, underrated in the judgment now appealed from. Those works had for more than a hundred years been recognised by all the Indian Courts as of great authority on questions of adoption. Reference was then made to *Rungama v. Atchama*, (1846) 4 Moo., I. A., 1, at p. 96, and to *The Collector of Madura v. Moottoo Ramalinga Sathupathy*, (1868) 12 Moo. I. A., 397. In connection with the estimation in which the two last [466] mentioned treatises, which were, it was true, comparatively modern, were held, the observations of BANERJI, J., in his judgment in *Bhagwan Singh v. Bhagwan Singh*, (1895) I. L. R., 17 All., 294, where he sets forth repeated recognitions of their value by the Courts, should be regarded.

Again, a new rule had been applied, or canon of construction, termed Jaimini's rule to the effect that, in construing the ancient Sanskrit texts, a precept was to be held only a recommendation, and not to be obligatory as a law, where a reason for the precept was given. This rule had not yet been applied by any Court.

The judgment now appealed from could hardly be said to be founded on the same grounds that were taken in the Madras High Court, though the same result had been arrived at. In the Madras cases, at least in those preceding the latter few, support of this adoption had been found in the maxim "factum valet," at all events to some considerable extent. But that maxim could not be applied to give legal effect to such an act as the adoption of a man's only son.

It was definitely prohibited in the sacred texts, and was therefore contrary to Hindu law.

Mr. J. D. Mayne and Mr. C. E. A. Ross, for the respondent* Ram Prasad, argued that the Courts below had rightly held that the adoption was valid in law. The following of this precept of the Sanskrit texts depended on the degree of strictness with which the Hindu system prevailed among varying classes. In Bengal where Brahmanism was the guide, this was the basis on which rested the unanimity with which the pandits and the law Courts adhered to the rule excluding the only son from being adopted. In connection with this the judgment of MITTER, J., in *Raja Upendra Lal Roy v. Srimati Rani Prasannamayee*, (1868) 1 B. L. R., 221, was referred to. In other provinces the precept was more often disregarded, and the terms in which it was expressed were open to the doubt whether it was of the greater or less obligation. It might be that the less strict observance of it corresponded with a more lax degree [467] of Hinduism. In Madras, for instance, the admonition, or prohibition, whichever it might be, was not regarded by the Dravidian races, who were not, in adopting a son, influenced by the purposes of their religion at all. That the father's position in a future existence would be improved by the performance of ceremonies which a son, natural or adopted, alone could perform, was not in their thoughts. The Manual of Madras administration, p. 71, and the Madras Census of 1891, XIII, p. 128, were referred to. In Bombay the Full Bench decision in *Waman Raghupati Bova v. Krishnaji Kashiraj Bova*, (1889) I. L. R., 14 Bom., 249, followed a decision upon an application for a certificate of succession, where the parties were Lingayets. A similar question arising in a suit between parties of that caste, it was established that the custom among them was to make no exception of the only son as being one not to be adopted. In the present case the parties were Agarwalas. The majority of that caste appeared to be Jains. Reference was made to Sherring's "Castes of the Hindus," p. 285, and to Golap Chandra Sarcar Sastri on adoption, p. 452. The Jains performed no ceremonies for the dead. The fact that the admonition against the adoption of an only son, as given by Vasishtha and the other Rishis, was observed by those who in religion were Hindus, did not lead to the inference that the texts were applicable to those who in name only were Hindus. Counsel would not again state the different views of the authorities which had been discussed in the appeal from Madras. They referred again to the Tagore Law Lectures of the Sastri Golap Chandra Sarcar and they argued that only admonition was intended as prescribed in the texts. The comparatively recent date of the Mimamsas, 1623 A.D., should be considered, and the apparently modern stress laid on the religious feeling in connection with the law should not be allowed to control every aspect of the question.

Mr. C. W. Arathoon replied.

Their Lordships' judgment on both the appeals was delivered on the 11th March 1899 by Lord Hobhouse.

[468] The first of these two cases, which comes from Madras, was argued in February 1898, but the judgment was postponed for the hearing of the second, which comes from Allahabad. The reason was that each case raises a question of general importance on which different views have been taken by different High Courts, and it was agreed on all hands to be advantageous that the two litigations should be under consideration at the same time. The Allahabad appeal was argued in the month of July last, and their Lordships are now prepared to state their opinions on both cases.

In the Madras case, the plaintiff sued as one in the line of succession to the last owner of an estate who had died without issue. The principal defendant was a boy who had been adopted by the last owner's widow with the consent of the family gñatis or sapindas. The plaintiff claimed a declaration that the adoption was invalid. His main ground was that the adopted boy was the only son of his father. The defendants showed that the natural father of the boy authorized his widow to give him in adoption in the way which was actually effected between the two widows, and that the plaintiff himself in his character of sapinda was a party to the transaction. In addition to asserting the legal validity of the adoption, they pleaded that the plaintiff was estopped by his concurrence in it.

The District Judge gave no opinion on the point of estoppel. He found that the law in Madras was settled, and he gave judgment in the following terms :—

"The case illustrates how the people of this Presidency have settled down under the law as enunciated by the Madras High Court so long ago as 1862, and re-affirmed in 1887, and it is impossible to say how many adoptions of only sons may have been made during the last thirty years on the faith of such enunciation of the law, and what innumerable rights might be disturbed by any contrary decision after such a lapse of time."

The case was heard on appeal before the late Judge, Sir T. MUTTUSAMI AYYAR and Mr. Justice SHEPHARD, who affirmed the [469] decree below. The learned Judges did not express any original opinion of their own on the main question. They thought that there was no estoppel because at the date of the adoption nobody thought of its being illegal. As to its legal validity they found that all the Madras decisions had been in its favour, and that the Madras Courts were right in following an unbroken current of authority in that Presidency, notwithstanding differences of view in other Courts.

At this Bar two points have been taken : first that the gift or reception of an only son in adoption is invalid in law ; and secondly that, if not invalid when the boy is received by the adoptive father or given by the natural father, it is so improper that in the absence of express authority given by a husband his widow has no power to effect it.

In the Allahabad appeal it is not necessary to make any statement of facts because the decree appealed from depends entirely on the answer given to a question referred by a Division Bench of the High Court to a Full Bench. That question is as follows :—

"The adoption of an only son having taken place in fact, is such adoption null and void under the Hindu law ?" That abstract question is the only one raised in the case lodged by the appellant and the only one argued at this Bar. The High Court answered it in the negative. Mr. Arathoon has contended in a learned argument that it ought to be answered in the affirmative.

As regards the second question raised in the Madras case, which is peculiar to that case, their Lordships feel no difficulty. The only authority for the argument of the appellants is the opinion of the late Sir MICHAEL WESTROPP, delivered in the case of *Lakshmappa v. Ramava*, which was decided in the High Court of Bombay in the year 1875, and a report of which was after long delay inserted in the 12th Bom., H. C. R., page 364. That learned Judge held that, assuming that a man's only son may be given in adoption by himself, yet if he has not expressly given to his widow an authority to make such a gift, it cannot be implied by law. [470] Now the authority of a widow to give or take in adoption differs in different schools of Hindu law. Their

Lordships are not retrying this Bombay decision. In Madras it is established as the learned Judge MUTTUSAMI AYYAR shows, that, unless there is some express prohibition by the husband, the wife's power, at least with concurrence of sapindas in cases when that is required, is co-extensive with that of the husband. That is certainly the simplest rule, and it seems to their Lordships most consistent with principle. The distinction taken by WESTROPP, C. J., appears to have been quite novel, and also at variance with a decision by his predecessor, Sir MATTHEW SAUSSE. There may be some peculiarity in the school of law which prevails in Bombay, to support it, though it has not been brought to their Lordships' notice, but if there is any such it does not apply to these parties in Madras. On this point therefore their Lordships agree with the learned Judges below.

What remains to them is the difficult task of deciding the more general question which is common to both the appeals. The difficulty which first meets the eye is the variety of judicial opinions and of opinions in treatises, which during the last quarter of a century have been gathering into definite opposite channels in the different areas of jurisdiction. There are also other difficulties beyond. Many of the judicial decisions relied upon are embodied in imperfect reports or in mere notes of points. The question is complicated by the use of different modes of adoption not always clearly specified, and by the intrusion of special local or tribal customs. And the original authorities on which all the conflicting opinions alike are based are written in Sanskrit, which for many centuries has been a dead language known only to a few learned people, which hardly any of those who have been called to judgment have understood, the translations of which are more or less disputed, and of which it is averred, probably with truth, that its exact phases of meaning cannot be caught except by those who have studied closely and as a whole the language and the works of the particular writer under consideration. Their Lordships have, [471] however, one advantage over their predecessors in these inquiries. The greater attention paid of late years to the study of Sanskrit has brought with it more translations of the sacred Hindu books and closer examinations of texts previously translated. And in the Allahabad case especially, the appellants' side was argued in the High Court by Mr. BANERJI, who is stated by the Court to be familiar with Sanskrit, and it is the subject of a very elaborate judgment by Mr. Justice KNOX, who is a student of Sanskrit, and as he tells us has paid special attention to the books of Manu and Vasishttha. Perhaps the most convenient course will be to set out the more important texts which have been brought into discussion, then to see how they have been treated by recent commentators and by judicial decisions, stating finally the conclusions to which their Lordships have with these aides been brought.

The most revered of all the Rishis or sages is Manu, who, though he says nothing specific on the point now in issue, is referred to as favouring one side or the other. The passages cited are as follows. They are in Ch. IX :—

"By the eldest son as soon as born a man becomes the father of male issue, and discharges his debt to his pitris or progenitors. That son alone by whose birth he discharges his debt to his forefathers and through whom he attains immortality, was begotten from a sense of duty." He adds sentences to affirm the powers, privileges and duties of the first-born, and his great importance in the family."—VV. 106—109.

"By a son a man obtains victory over all people, by a son's son he attains immortality, then by the son of that son he reaches the region of Brahma."—V. 137.

"Since the son delivers the father from the region called Put, he was therefore called Putra by Brahma himself."—V. 138.

"Whom the mother or the father give with water a son in distress similar endowed with affection he is to be deemed a datrima, one brought forth."

In the three last quotations their Lordships have followed the words of Mr. Justice KNOX, who says that he has attempted to [472] follow the text word by word without interpolating or taking away any particle, and that on that account his style is rough.—(See *Record, and Golap Chandra Treatise on Adoption*, p. 282.)

Near to Manu in point of antiquity and of authority comes Vasishttha, around whose utterance on the point in issue the greater part of subsequent comments has clustered. His writings have been translated by Dr. Bühler and published in the work entitled "Sacred Books of the East" which has been edited by Professor Max Müller. The passage in that translation is as follows, Ch. XV :—

(1) Man formed of uterine blood and virile seed proceeds from his mother and his father as an effect from its cause.

(2) Therefore the father and the mother have power to give, to sell, and to abandon their son.

(3) But let him not give or receive in adoption an only son.

(4) For he must remain to continue the line of ancestors.

(5) Let a woman neither give or receive a son except with her husband's permission.

On the record Mr. Justice KNOX gives his own translation which does not appear to differ substantially, though it does slightly in form, from that of Dr. Bühler.

Another ancient sage is Saunaka, of whom a text is quoted in the *Dattaka Mimamsa* of Nanda Pandita as follows :—

Section IV., Para. 1. "In reply to the question as to the qualification of the person to be affiliated Saunaka declares: 'By no man having an only son (eka putra) is the gift of a son to be ever made; by a man having several sons (bahu putra) such gift is to be made on account of difficulty (prayab natas).'"

Next in time is Yajnavalkya, whose writings, with comments by Vijnanesvara, constitute the *Mitakshara*, a work of very high authority all over India. The material passages are as follows in Mr. Colebrooke's translation, Ch. 1, Sec. XI :—

Para. 9. "So Manu declares 'He is called a son given (datrima) whom his father or mother affectionately gives as a son [473] being alike [by class] and in a time of distress, confirming the gift with water.'"

Para. 10. "By specifying distress it is intimated that the son should not be given unless there be distress. This prohibition regards the giver [not the taker]."

Para. 11. "For an only son must not be given [nor accepted] for Vasishttha ordains 'Let no man give or accept an only son.'"

Para. 12. "Nor though a numerous progeny exist should an eldest son be given, for he chiefly fulfils the office of a son, as is shown by the following text 'By the eldest son as soon as born a man becomes the father of male issue.'"

The above-mentioned writings are all classed among the *Smritis*, which are held by orthodox Hindus to have emanated from the Deity, and to have been recorded, not like the *Sruti* in the very words uttered by that Being, but

still in the language of inspired men. They contain precepts whose authority is beyond dispute, but whose meaning is open to various interpretations, and has been, and is, the subject of much dispute, which must be determined by ordinary processes of reason. The Dattaka Mimamsa stands on a different footing. It is not older than the 17th century A.D. and does not claim any but human origin. Indeed its translator, Mr. Sutherland, says that it is, "As its name denotes, an argumentative treatise or disquisition on the subject of adoption; and though from the author's extravagant affectation of logic the work is always tedious, and his arguments often weak and superfluous, and though the style is frequently obscure and not unrarely inaccurate, it is on the whole compiled with ability and minute attention to the subject, and seems not unworthy of the celebrity which it has attained." Moreover it was written during Muhammadan rule and cannot be the work of a lawgiver or judge. The date of the Dattaka Chandrika is not certain, but it is at all events very much later than the Smritis, and it stands only on the footing of a work by a learned man. Messrs. West and Bühler in their valuable work on Hindu Law (3rd Edition, page 11) [474] speak thus: "The Dattaka Mimamsa and the Dattaka Chandrika, the latter less than the former, are supplementary authorities on the Law of Adoption. Their opinions however are not considered of so great importance but that they may be set aside on general grounds in case they are opposed to the doctrines of the Vyanahara Mayukha or the Dharmasindhu and Nirayesindha." This is spoken with special reference to Bombay or Western India. But both works have had a high place in the estimation of Hindu lawyers in all parts of India, and having had the advantage of being translated into English at a comparatively early period, have increased their authority during the British rule. Their Lordships cannot concur with Mr. Justice KNOX in saying that their authority is open to examination, explanation, criticism, adoption or rejection like any scientific treatises on European jurisprudence. Such treatment would not allow for the effect which long acceptance of written opinions has upon social customs, and it would probably disturb recognised law and settled arrangements. But so far as saying that caution is required in accepting their glosses where they deviate from or add to the Smritis their Lordships are prepared to concur with the learned Judge.

The passages in the Dattaka Mimamsa are as follows. They are contained in Section IV. Para. 1 is that which gives the saying of Saunaka already quoted. Para. 2.—"He, who has one son only, is '*eka-putra*' or one having an only son: by such a one the gift of that son must not be made; for a text of Vasishtha declares 'an only son let no man give &c.'" Para. 6. The writer comments on the word "ever" as used by Saunaka thus: "In a time of calamity accordingly, Narada says 'a deposit, a son, and a wife, the whole estate of a man who has issue living, the sages have declared unalienable, even by a man oppressed by grievous calamities: although the property be solely that of the man himself.' This text also regards an only son, for it is declaratory of the same import as the texts of Saunaka and Vasishtha." Para. 8.—The writer [475] comments on Saunaka's words:—"By no man having an only son," thus:—"From this prohibition the gift by one having two sons being inferrible, this part of the text ('By one having several sons, &c.') is subjoined, to prohibit the same by one having two sons also."

The Dattaka Chandrika (Section 1, Para. 27) only repeats Vasistha's saying, and couples it with the obligation to adopt a brother's son if there is one.

Their Lordships do not propose to spend much time in a close examination of the recent commentators. They have been very carefully sifted in the Indian Courts, and naturally so, seeing what was the paucity and obscurity of judicial authority until within the last thirty years or so. The principal effect which they have on the mind is to show the great variety and uncertainty of opinion on the question now in issue. The earliest of those referred to is Jagannatha, a learned Hindu lawyer employed by Sir W. Jones to compile a digest. He thought that the prohibition in the Smritis is only moral and not legal. That also is the opinion of the two latest writers, both deeply versed in the Sanskrit language—Mr. Mandlik, who appears to have translated the texts of Saunaka, and Mr. Golap Chandra Sarkar, who has written a treatise on adoption. Sir Thomas Strange writing in the year 1830 expresses an opinion in the body of his treatise that the prohibition is monitory only—Vol. 1, page 87. On the other hand the weighty opinions of Mr. Colebrooke, Sir Francis Macnaghten and Mr. Sutherland are thrown into the scale; and that of Mr. Justice STRANGE is also cited to the same effect, and is supposed by some to express the latest opinions of his father, Sir Thomas Strange. But it may be observed that Sir FRANCIS MACNAGHTEN and Mr. Justice STRANGE found their opinions on the wickedness of the act in question, and that the adoption of an eldest son is placed by Mr. Justice STRANGE on precisely the same footing as that of an only son, and is ranked by Sir F. Macnaghten as a heinous crime, though not so heinous as the adoption of an only son. Their Lordships think that the authority [476] of recent text writers must not be stated more favourably to the present appellants than is stated in the book of Messrs. West and Bühler. Expressing no opinion of their own, those learned writers say “if he have but one son, the gift of that one is everywhere reprobated as a grave spiritual crime. By most the gift is thought invalid.” Their Lordships turn now to the more solid ground of judicial decision.

In Madras the course of decision has been very simple. In 1862 the High Court decided that the adoption of an only son, however sinful, was valid in law. It has been shown by Mr. Mayne that a previous decision then relied on was misapprehended by the learned Judges. But that was not the sole ground of their decision; they also relied on learned opinions and they agreed with those opinions. And the same High Court has since that time had the same question brought before it more than once; three times it is stated in one of the judgments below. There has been no fluctuation in their decisions. It must be taken that the law in Madras has ever since been settled in favour of the present respondents.

In Allahabad also the condition of judicial decisions is simple. In 1879 the question was brought before a Full Bench of the High Court consisting of Sir ROBERT STUART and Sir CHARLES TURNER, who were English barristers, and three eminent civilians—Justices PEARSON, SPANKIE, and OLDFIELD. The Court decided in favour of the adoption, Sir C. TURNER dissenting. In the year 1889 some doubts were expressed on the point by Justices STRAIGHT and MAHMOOD, and that circumstance, coupled with the delivery of adverse opinions by the High Courts of Calcutta and Bombay, led to the rather unusual course of referring the same question to a Full Bench, of which Mr. Justice MAHMOOD was one. The result has been a unanimous decision supported by judgments of the Chief Justice and Mr. Justice KNOX, which are remarkable for research and fulness of treatment.

In Bengal there has been more fluctuation of opinion. The law was quite unsettled in the year 1868. It would be of little [477] use now to examine the earlier decisions in the Sudder Dewani Adalat and the Supreme

Court. That has been done with great care by Sir WILLIAM MARKBY in a case about to be mentioned. The first case which raised the exact question in the High Court was heard in the year 1868 before Justices DWARKANATH MITTER and LOUIS JACKSON. The judgment was delivered by Mr. Justice MITTER. After quoting passages from the two above-mentioned Dattaka treatises the learned Judge lays the law down thus: "The institution of adoption as it exists among the Hindus is essentially a religious institution. It originated chiefly, if not wholly, from motives of religion; and an act of adoption is to all intents and purposes a religious act, but one of such a nature that its religious and temporal aspects are wholly inseparable. 'By a man destitute of male issue only' says Manu, 'must the substitute for a son of some one description always be anxiously adopted for the sake of the funeral cake, water and solemn rites.' It is clear therefore that the subject of adoption is inseparable from the Hindu religion itself and all distinction between religious and legal injunctions must be inapplicable to it."

There is no doubt that this judgment has exercised very great influence on the controversy; and indeed if the learned Judge's fundamental position were sound there could be no controversy at all. Let us assume for this purpose, though it is matter of grave dispute, that the learned Judge is right in saying that adoption originated in motives of religion and not in the ordinary human desire for perpetuation of family properties and names. Still the question is whether certain precepts have a legal or only a religious bearing. What is there in the subject-matter of adoption which makes it clear that all precepts relating to it must bear a legal character? The learned Judge does not discuss that question. He begs it, merely stating that his own inference clearly follows from Manu's text. Their Lordships think that the doctrine propounded by him is equally opposed to a reasonable construction of the books apart from decision, and to decided cases. [478] Indeed to show how far the doctrine is from being universally applicable it would not be necessary to go further than the passage which the learned Judge himself cites from Manu, though of course differences may be suggested between prohibitory and mandatory injunctions. Manu prescribes adoption on the score of religion. According to Mr. Justice MITTER this is necessarily a legal injunction, yet nothing is clearer than that there is no legal compulsion upon a Hindu to adopt a son, however irreligious it may be in him not to do it. There is not even any legal compulsion on his widow to do it, when he is dead and cannot have a natural son. But the principle laid down is so important, goes so deep down to the root of these questions, and has exercised such influence, that their Lordships think it necessary to discuss it at length, for which this will be a convenient place.

Their Lordships had occasion in a late case to dwell upon the mixture of morality, religion and law in the Smritis. *Rao Bahwant Singh v. Rani Kishori*, L. R., 25 I. A., 69. They had to decide whether a prohibition on alienation of property away from a man's family, certainly based on religious grounds, had a purely religious or also a legal bearing. They then said:—"All these old text books and commentaries are apt to mingle religious and moral considerations not being positive laws, with rules intended for positive laws. In the preface to his valuable work on Hindu law Sir William Macnaghten says 'it by no means follows that because an act has been prohibited it should therefore be considered as illegal. The distinction between the "vinculum juris" and the "vinculum pudoris" is not always discernible.'" They now add that the further study of the subject necessary for the decision of these appeals has still more impressed them with the necessity of great caution in interpreting books of mixed religion, morality and law, lest foreign lawyers, accustomed to treat

as law what they find in authoritative books, and to administer a fixed legal system, should too hastily take for strict law precepts which are meant to appeal [479] to the moral sense, and should thus fetter individual judgments in private affairs, should introduce restrictions into Hindu society, and impart to it an inflexible rigidity never contemplated by the original lawgivers.

The late extension of the study of Sanskrit has apparently resulted not in weakening but in strengthening the cited opinion of Sir William Macnaghten. Of course their Lordships do not presume to form any opinion on questions of Sanskrit grammar, but they observe that Mr. Golap Chandra, who is frequently referred to in the judgments below, contends as a matter of grammar that words (*e.g.*, those of Saunaka) which have been translated in the imperative form of command should take that of recommendation. Mr. Mandlik insists on the same view, and Mr. Justice KNOX says that he originally took a contrary view but has been brought round by the authority of Mandlik and another Sanskrit scholar, Mr. Whitney.

Let us see now how Mr. Justice MITTER's principle accords with actual decisions. The controversy respecting eldest sons, whether or no they can be given in adoption, has a strong bearing on the present question. Manu attaches the highest importance to the character of an eldest son. The relevant passages from his Institutes have been quoted above.

No specific prohibition is contained in these passages, but the reasonable inference from them is given in the Mitakshara in Ch. 1, Sec. XI, Para. 12, which has been already quoted. This express prohibition has been taken by some to be a legal rule, and has been enforced by modern writers of weight as before stated, and in legal decisions. It would certainly fall within Mr. Justice MITTER's principle. But it is quite abandoned; all over India as their Lordships understand; and the prohibition is held to be a matter for religious consideration only. It was the subject of careful examination and express decision by Justices MARKBY and ROMESH CHANDER MITTER in the case of *Janokee Debea v. Gopaul Acharjea*, (1877) I. L. R., 2 Cal., 365.

[480] Again it is laid down that the giver of a son ought to have more than two sons. The text of Saunaka quoted above says that the gift is to be made by one having several sons (Bahuputra). The Dattaka Mimamsa, Sec. IV, 8, lays it down that the Sanskrit word signifies more than two, and that Saunaka's precept was introduced for the express purpose of excluding the inference that a man with two sons might give one in adoption. The Dattaka Chandrika, Sec. 1, 29 and 30, declares the same law. The precepts are precise, and yet their Lordships cannot find that anybody asserts them to be law in any but the religious sense.

Another precept is that a Hindu wishing to adopt a son should adopt the son of his whole brother in preference to any other person. That question came before this Board in the year 1878 in a case in which the Subordinate Judge had held the adoption to be invalid for violation of this precept, and the High Court were of a contrary opinion. This Board held that the terms of the precept were contained in both the Dattaka Mimamsa and the Dattaka Chandrika, and they are founded on the Mitakshara. Nevertheless they held that it is not a precept of law. They referred to the opinions of English text writers to support them. No decision in point was cited, and probably there is none in the books.

One of the conditions for adoption laid down by Manu in the passage first quoted from him is that there must be distress. This is emphasized in the Mitakshara, Chap. 1, Sec. 11, Para. 10: "The son shall not be given unless there be

distress," which appears to mean that the giver must be in distress. "This prohibition," it continues, "regards the giver," and then occur the words "not the taker," apparently interpolated by the learned Benares lady who wrote under the name of Balam Bhatta. The Dattaka Mimamsa, Sec. IV, 20, says: "No distress existing, the giver commits a sin on account of the prohibition." If then the giver commits a sin the taker who enables him to do it cannot be free from sin; and if the commission of a sin makes the transaction void in law there can be no gift and consequently [481] no adoption. And yet nobody contends for the legal force of this prohibition. It does not appear that in cases of adoption any inquiry is ever made about the distress of the natural father.

It is clear that the principle laid down so confidently by Mr. Justice MITTER as paramount in cases of adoption is repeatedly repudiated in practice; and in the Bengal case next to be cited the learned Judges while following the conclusion of their predecessors, dissociated themselves from the fundamental reason assigned for it.

Moreover this sweeping doctrine of Mr. Justice MITTER is not consistent with the prevalence of exceptional customs or other interferences with the law. The extent to which the Smritis admit of special customs has not been argued in these cases and their Lordships cannot easily form any judicial opinion about it. But in a discussion about the sources of Hindu law by Dr. Jolly published in 1883 (see p. 33), that learned Sanskrit scholar states grounds for holding that customs are only recognised by the Smritis when they do not contravene divine laws.

Mr. Arathoon has impressed upon their Lordships more than once during this argument that the texts he relies on are held to emanate from the Divine Power. If then that Power has said that certain modes of adoption shall be null and void, how can any human practices lawfully limit its operation? And yet the validity of local or tribal customs to adopt only sons is asserted by every jurist. In the Punjab such a custom is received as the general law of that large area, and it governs the relations of the eight millions or so of the Hindus (Jats, Brahmans, Rajputs, and others) who live there: and that, though the sources of their law are the same Smritis which are followed in other parts of India. The inference is that among numerous Hindu communities the prohibition of the Smritis on this point has not been received as invalidating the transaction.

Again, if the religious and legal injunctions were co-extensive, it would place both Courts of justice and Legislatures in a very [482] delicate position when dealing with such matters. Suppose that in this Madras case the Court had upheld the plea of estoppel; it would have set up a judicial rule to bar the working of a divine law. Suppose that the statutory six years had elapsed and that the suit had been barred by time; then the Legislature would be interfering to bar the working of a divine law. In each case a separation would have been made between those religious and temporal aspects which MITTER, J., declares to be wholly inseparable. Yet the British rulers of India have in few things been more careful than in avoiding interference with the religious tenets of the Indian peoples. They provide for the peace and stability of families by imposing limits on attempts to disturb the possession of property and the personal legal status of individuals. With the religious side of such matters they do not pretend to interfere. But the position is altered if the validity of temporal arrangements on which temporal Courts are asked to decide is to be made subordinate to inquiries into religious beliefs.

No system of law makes the province of legal obligation co-extensive with that of religious or moral obligation. A man may, in his conduct or in the disposition of his property, disregard the plainest dictates of duty. He may

prefer an unworthy stranger to those who have the strongest natural claims upon him. He may be ungrateful, selfish, cruel, treacherous to those who have confided in him and whose affection for him have ruined them. And yet he may be within his legal rights. The Hindu sages doubtless saw this distinction as clearly as we do, and the precepts they have given for the guidance of life must be construed with reference to it. If a transaction is declared to be null and void in law, whether on a religious ground or another, it is so; and if its nullity is a necessary implication from a condemnation of it, the law must be so declared. But the mere fact that a transaction is condemned in books like the Smritis does not necessarily prove it to be void. It raises the question what kind of condemnation is meant.

[483] It is true that the learned Judges MITTER and JACKSON refer to the texts of the Dattaka Mimamsa and Chandrika. But according to the paramount principle laid down by them those texts could only be read in one way. That principle is in fact the sole ground of the decision, and as it cannot be admitted the decision is deprived of weight.

The next case in Bengal was decided in the year 1878 by Chief Justice GARTH and Mr. Justice MARKBY, *Manick Chunder Dutt v. Bhuggobutty Dossee*, (1878) I. L. R., 3 Cal., 443. In delivering judgment Sir W. MARKBY reviews with great care and discrimination the then existing authorities, judicial and non-judicial, and he shows that only in four cases had the point been brought before the Highest Courts of Appeal in India. There had been no decision at that time in Allahabad. The Madras High Court supported the adoption: so apparently did the Bombay High Court, for the judgment of Chief Justice WESTROPP which threw doubt upon the point, though delivered in 1875 was not reported as early as 1878. The learned Judge states the ground of his decision thus: "It appears to me therefore that the vast preponderance of authority, if not the entire authority in Bengal, is against the validity of the adoption of an only son, and if we were to hold the adoption of the plaintiff in this case to be valid it would be necessary to overrule both the carefully considered decision of JACKSON and DWARKANATH MITTER, JJ., and the equally careful decision of four Judges of the Sudder Court. This of course could only be done by a full bench. But we could only refer the case to a full bench if there is a conflict of authority, or if we ourselves differ from these decisions. Having gone through all the cases with great care I do not think it can be said that there is any such conflict of authority in Bengal as to justify us in referring the case to a full bench on that ground, and I am not prepared to refer the case to a full bench upon the ground that I myself think the adoption of an only son valid. On the contrary, on the best consideration I [484] have been able to give to the authorities, I think such an adoption ought in Bengal to be held to be invalid wherever the effect of holding such adoption to be valid would be to extinguish the lineage of the natural father and so to deprive the ancestors of the adopted son of the means of salvation."

This is a very instructive judgment and entitled on all grounds to great respect; and it is with great respect that their Lordships, being obliged to differ either from it or from other High Courts, proceeded to note some points which detract from its weight. As to the vast preponderance of authority in Bengal, there were only two decided cases. One was before the Sudder Dewani Adalat and is reported in 3 Select Reports, p. 232. The report does not show any examination of the question by the learned Judges themselves. Their decision appears to rest wholly upon the opinion of Pandits, who in their turn content themselves with a simple citation of texts. The other decision rests entirely on a principle which is untenable, as Sir W. MARKBY himself showed the

year before in the case of *Janokee Debea*. Moreover the Court in 1878 hardly addressed itself to the question why the injunctions relating to the only son are imperative and legal while those which relate to the eldest son are only monitory or religious. In 1877 Sir W. MARKBY says that while the latter prohibition is only monitory the former is clear; referring, as their Lordships suppose, to the differences of expression in Colebrooke's translation of the *Mitakshara*. In 1878 he intimates that the stronger objection to the adoption of an only son is based on religious grounds, on which their Lordships remark that *Manu* ascribes a character to the eldest son which affords strong religious grounds against his adoption, and that they do not find themselves competent to put such grounds in the balance against one another, so as to decide which is the stronger.

On this point they add that there seems to have been a great deal of exaggeration used in urging the religious topic throughout this controversy; especially in later times. *Manu* says that by the eldest son as soon as born a man discharges his debt to his [486] progenitors; and it is through that son that he attains immortality. According to him the son serves his father's spiritual welfare at the moment of his birth. There is no intimation that if the boy dies the next day, or fails to have a son, this service is obliterated. Why then should it be so if the boy is adopted? It is true that *Manu* attributes additional value to the first born's son and grandson. It may be that such further benefit is lost by adoption, as it would be by death, but that is a very different thing from depriving the ancestors of the adopted son of the means of salvation, which have been already attained. *Vasishttha*, whose text is the fundamental one, does not rest his injunction on spiritual benefit at all, but he says that the only son is to continue the line of his ancestors; one of the very commonest of human motives for desiring legitimate issue. Nor does he make any allusion to "Put" here, or, if Mr. Justice KNOX is right, elsewhere. If he was really thinking of the spiritual benefits of the son's ancestors as the ruling consideration, it is inexplicable that he should not have said so. Moreover, their Lordships asked during the argument why a man who had given a natural son in adoption could not afterwards, if he was so minded, adopt another and neither authority nor reason was adduced to show that he could not.

That is the state of authorities in Bengal. The question has never come before a Full Bench, and it seems to their Lordships that there is only one decision, viz., that of 1878, to which great weight is to be attached.

In Bombay, after a Division Bench had decided in favour of validity, the question was discussed before another Division Bench in the year 1875; *Laksh-mappa v. Ramava*, (1875) 12 Bom. H. C. Rep., 364. The case was decided on another ground, as has been mentioned above. But the Chief Justice, Sir M. WESTROPP, delivered an elaborate judgment containing his reasons for holding the adoption of an only son to be invalid. Those reasons appear to have been adopted by the Court including Sir M. WESTROPP himself in [486] a subsequent case which was decided in 1879 but has never been reported. In 1889 the question was referred to a Full Bench, who simply followed the unreported case. See I. L. R., 14 Bom., 249. Sir C. SARJENT, then Chief Justice, delivered judgment. He pointed out that prior to *Laksh-mappa v. Ramava* the decisions in Bombay were in favour of validity; that the judgment of Sir M. WESTROPP in that case was the first that treated the point with due consideration; and that as the opinion there expressed had been adopted by a Full Bench, it was not proper to review it. The decision was necessarily in favour of invalidity. The law in Bombay therefore rests

on the authority of the unreported case of 1879, which itself rests on the reasoning contained in the judgment of 1875.

In that judgment the learned Chief Justice makes more elaborate reference to the Smritis than is contained in any judgment earlier than the present Allaha-bad case. He dwells emphatically on Colebrooke's translation of the Mitakshara, showing that with regard to the only son the expression "must not," and with regard to the eldest the expression "should not," is employed. He adds that the distinction is even more strongly marked in the Mayukha, which is received as a high authority in Bombay. On this point their Lordships interpolate again the remark that they are not retrying the Bombay decision and that the effect of the Mayukha has not been argued before them. He then examines decisions by Bombay Courts prior to the establishment of the High Court, which certainly exhibit a confusion of legal opinion. The authority of the High Court up to 1875, though not perhaps very decisive, was in favour of validity. From this, and from the decision of the Madras Court, the learned Chief Justice differs. He cites the passages of Smritis and law books and English text-writers with which we have now been made familiar. And his decision apparently is founded on the language of Colebrooke's Mitakshara and on the judgment of Mr. Justice MITTER. Their Lordships have already stated their reasons for thinking that the latter of these foundations is unsound. The value of the former will be examined presently. [487] They have also stated above that the point actually decided in this case is a novel suggestion of the learned Chief Justice, and is unsustainable in principle, and unsupported by authority unless there be something peculiar to Bombay to support it.

Before leaving this judgment their Lordships ought to state their concurrence with the learned Chief Justice in his remarks on the so-called doctrine of *factum valet*. That unhappily expressed maxim clearly causes trouble in Indian Courts. Sir M. WESTROPP is quite right in pointing out that if the *factum*, the external act, is void in law, there is no room for the application of the maxim. The truth is that the two halves of the maxim apply to two different departments of life. Many things which ought not to be done in point of morals or religion are valid in point of law. But it is nonsensical to apply the whole maxim to the same class of actions and to say that what ought not to be done in morals stands good in morals, or what ought not to be done in law stands good in law. Sir M. WESTROPP has, not without cause, reduced the ambiguous maxim to its proper meaning.

Such was the state of judicial authority in India prior to the present cases. For as regards the Punjab, it is true that in the early days of the Chief Court Judges have pronounced opinions in favour of the adoption under general Hindu law; and in 1874 MELVILLE and THORNTON JJ., pointed out that the turning point of the controversy was Mr. Justice MITTER's judgment of 1868. But after the first reported case in 1867, the decisions there have turned on the popular customs into which the Government had the prudence to inquire immediately after the annexation, and which they made the foundation of law. The Punjab therefore may be omitted in our estimate of judicial authority. The reasons against the validity of the adoption of an only son are contained in the three judgments of the learned Judges MITTER, MARKBY, and WESTROPP. The point has never come before this Board for decision. It has been alluded to in two cases but in so indirect a way that though the authority of the Board is relied on by both sides, it is not available for either. The foregoing remarks represent all [488] the light which has been thrown on the Smritis to which after all we must recur to decide the question.

In addition to the remarks already made on the bearing of Manu's texts, those of Mr. Justice KNOX upon his silence are worthy of attention. Manu mentions three conditions for a good gift of a boy in adoption. The natural father must be in distress; the boy must be "similar," apparently meaning of the same caste with the adoptive father; and he must be affectionate. Nothing is said about his having brothers, which is now represented as a vital condition the breach of which is a sin, a heinous crime as some writers have called it, and as annulling the transaction. It seems very unlikely that Manu should either have viewed it in that light, or with his very high notions of the value of the first-born should have overlooked the point altogether.

The crucial text is that of Vasishtha. He first states the parents' power in the most sweeping terms, and derives it from causes affecting every child that is born into the world. The power is to later ideas, whether Hindu or English, an extravagant one; but it accords with what we know of the early stages of other nations and probably did not shock the contemporaries of Vasishtha, though the sage Apastamba, who is perhaps of equal antiquity, denies the right to give away or sell a child (Prasna II, Patala 6, Khanda 13, paras. 6—11). A man may sell his son—no restriction of purpose is expressed—or he may even abandon him. But then comes an injunction expressed in terms which may amount to a command or may be only a recommendation, *viz.*, that an only son should not be given or accepted. The first remark to be made upon this is akin to the one just made upon Manu. If Vasishtha intended to except an only son from the father's power to give in adoption why did he not say so? It would have been much more simple. But he first states the power, and far greater powers, in the broadest terms, and then adds a qualification which is, to put it at the highest, in ambiguous terms. That looks much more like an appeal to the moral sense not to exercise the power than a denial [489] of its existence. In this respect the case resembles that of the father's power to alienate family property: which indeed is the light in which Vasishtha seems to regard a son. The power is given, while the action is condemned in terms consistent with actual prohibition. After long controversy it has been settled by a great preponderance of Indian authority culminating in a decision by this Board, that the power exists, and that the prohibition, though a solemn warning as to the spiritual responsibility of exercising it, is not efficacious in law.

In examining this question their Lordships are again at great disadvantage in not knowing Sanskrit. In the absence of agreement among Sanskrit students they cannot adopt the representations made, though by learned men, to the effect that as a matter of grammar Vasishtha's injunction imports admonition rather than command. So with respect to what has been called Jaimini's rule, which is so much relied on by Chief Justice EDGE. That author who wrote in the 13th century appears to have been received as a high authority on the interpretation of Smṛiti texts. He lays down the rule that all precepts supported by the assignment of a reason are to be taken as recommendations only. That, if sound, would be conclusive as to Vasishtha's text. But it is rather startling, and a very intimate acquaintance with the Smṛitis would be needed before admitting its truth. It has not been brought forward in any case prior to this case from Allahabad. It may, however, fairly be argued that one who, having the power to give an absolute command, gives an injunction not expressed in unambiguous terms of absolute command but resting on a reason, is addressing himself rather to the moral sense of his hearers than to their duty of implicit obedience. So far Vasishtha's reason,

founded as it is on temporal and not on religious considerations, gives some, though not every strong, support to the respondent's theory.

The text of Saunaka is open to two obvious remarks. One is that the injunction not to give an only son is couched in the same terms as the injunction to give a son if there are more than two. The latter of these cannot possibly be [490] obligatory. The other remark is that, as Nanda Pandita in the Dattaka Mimamsa points out, Saunaka in effect prohibits a gift in adoption when there are only two sons; and that is a prohibition which has never been regarded as obligatory. Saunaka does not help the appellants, but rather lends weight against them.

Then comes the Mitakshara. We have seen that Sir M. WESTROPP emphatically, and Sir W. MARKBY possibly, rely on the difference of expressions in Colebrooke's translation. The passages from their judgments have been quoted above, and so have the passages from the Mitakshara (Sec. 1, Ch. XI, paras. 10, 11, 12). Now it has been brought out in the arguments that precisely the same expressions of injunction are used by the author in these three paragraphs. To fortify their knowledge their Lordships have inquired of one of the most eminent of Sanskrit scholars, Professor Max Müller, and he has courteously informed them that as a matter of fact the three expressions are identical, and as a matter of grammar are, in his judgment, equally capable of expressing obligation or recommendation. Now paragraphs 10 and 12 have been observed on before. It has been placed beyond dispute in point of law that neither is obligatory. It requires some good reason to show why, when the same expression is used in three consecutive sentences, it should be construed one way in the first and third and another way in the middle one. No such reason has been given. It is an unfortunate thing that in translating a law book Colebrooke should have used different English words to represent the same Sanskrit word. He has certainly misled at least one Judge in a leading case. As the matter is now shown to stand, the Mitakshara must be taken to bear strongly against the appellants.

In intimating that Sir M. WESTROPP was misled by Colebrooke their Lordships have not overlooked the fact that in 1889 Sir C. SARJENT thought that Sir M. WESTROPP was aware of the state of the Sanskrit text. It seems, however, next to impossible that Sir M. WESTROPP should have known that Colebrooke's variations of expression were not authorised by the original, [491] and should have said nothing about it; seeing that it deprives his emphatic reference to those variations of all meaning. If indeed he knew the state of the Sanskrit text and thought it so immaterial as not to deserve notice, he practically treated Colebrooke as the original authority and his reasoning does not thereby gain but loses in force.

The material passages in the two Dattaka books have been indicated before and remarks have been made on those which quote and comment on Saunaka. It seems to their Lordships that the authors, who bring in the older texts at every turn, did not mean to do more than repeat and enforce them. If they were clearly laying down any additional precepts or authoritative interpretations of ambiguities, then, though, as Mr. Justice KNOX points out, such comments should be received with some caution, they should also be received with due regard to the authority which the books have acquired. But on this topic the writers seem anxious to found themselves entirely on the Smritis and to refer their readers back to them. Certainly on the crucial point now in issue they throw no light at all. They do not touch the question whether the injunction not to adopt only sons is a matter of positive law or only addressed to the moral sense. And yet Jaimini's treatise written some

centuries earlier than the Dattaka Mimamsa must have made the latter of the writers, if not both, familiar with the importance of that distinction.

It is, however, worth while to observe how Nanda Pandita deals with the consequences of a forbidden adoption. He quotes Manu's requirement that the adopted son should be "similar," and he says (Sec. II, paras. 22, 23), "Hence it is established that one of a different class cannot be adopted as a son." In Sec. III, he recurs to that prohibition and asks "should this rule be transgressed what would be the case?" Then he deduces from texts of Saunaka and Katyayana, that the adopted son shall not share in the inheritance, but shall be entitled to food and raiment. So that the adoption is not void, but the son of the wrong class is reduced to a claim for maintenance only. With this exception [492] which favours the appellants' theory, it seems to their Lordships that these two treatises leave the question exactly where it stands on the earlier authorities.

From both the Courts below we learn that there is no resentment excited by this kind of adoption. The District Judge of Godavry says "the people have settled down under the law enunciated in 1862." He can hardly recollect the state of things prior to 1862; but his statement of the present state of things is founded on personal knowledge. Whether the people have settled down under the High Court decisions, a result which is usually of very slow growth if it takes place at all, or whether, as is more probable, that decision was in accordance with the ordinary existing ideas and practice, we are told that in point of fact there is no conflict between the declared law and the feelings of the people. Nor is there any indication that there ever was such a conflict. In Allahabad the parties are Agarwala Banias of Benares, who are, as two of the learned Judges below state, specially careful of caste and religious observance. The adoption was twenty years old and no caste penalties had followed it. These things do not prove a custom, but they do tend to prove that among orthodox Hindus the adoption of only sons has never been so inculcated as a sin by their teachers as to excite abhorrence or social hostility, such as we know to follow some other breaches of their religious laws. That the practice is a frequent one is shown by the frequency of litigated cases, which must be quite insignificant in number as compared with those that actually occur, and from the establishment of customs authorising it in various places. This is not one of the cases in which people are tempted by appetite to break an acknowledged law. It is inconceivable that the choice of an only son for adoption can in any large number of cases proceed from any other cause than a conviction of its suitability to the circumstances. That is a family matter which a wise lawgiver, while warning parties of their spiritual responsibility, would yet leave it possible for them to do. The Hindu sages appear to have taken that course in this and kindred matters.

[493] Their Lordships then have a case before them of which the broad outlines are as follows. Old books, looked on as divine, give to the father plenary powers over his sons. The same books discountenance the giving of an only son in terms which may be construed as a positive command making the gift void or as a warning pointing out the mischief of the act but leaving individual men to do it at their peril. The books contain no express statement which kind of injunction is meant. The practice of such adoption is frequent. Over some substantial portions of Hindu society it is established as a legal custom, whatever may be the general law. In other very large portions it is held to be part of the general Hindu law. Nowhere is it known to be followed by hatred or social penalties. Pausing there, the case is one in which if the authoritative precepts are evenly balanced between the two constructions, the

decision should be in favour of that which does not annul transactions acceptable to multitudes of families, and which allows individual freedom of choice.

But what says authority? Private commentators are at variance with one another; judicial tribunals are at variance with one another; and it has come to this, that in one of the five great divisions of India the practice is established as a legal custom, and of the four High Courts which preside over the other four great divisions, two adopt one of the constructions and two the other. So far as mere official authority goes there is as much in favour of the law of free choice as of the law of restriction. The final judicial authority rests with the Queen in Council. In advising Her Majesty their Lordships have to weigh the several judicial utterances. They find three leading ones in favour of the restrictive construction. The earliest of them (in Bengal 1868) is grounded on a palpably unsound principle and loses its weight. The second in time (Bombay 1875) is grounded in part on the first and to that extent shares its infirmity; and in part on texts of the Mitakshara which are found to be misleading. So that it too loses its weight. The third (Bengal 1878) is grounded partly on the first, and to that extent shares its infirmity; but it rests in [494] great measure on more solid ground, viz., an examination of commentators and of decided cases. It fails, however, to meet the difficulty of distinguishing between the injunction not to adopt an only son and other prohibitive injunctions concerning adoptions which are received as only recommendatory; the only discoverable grounds of distinction being the texts of the Mitakshara which are misleading, and the greater amount of religious peril incurred by parting with an only son, which is a very uncertain and unsafe subject of comparison. The judicial reasoning then in favour of the restrictive construction is far from convincing. That the earliest Madras decision rested in part on a misapprehension of previous authority has been pointed out; and the Madras reports do not supply any close examination of the old texts or any additional strength to the reasoning on them. The Allahabad Courts have bestowed the greatest care on the examination of those texts, and the main lines of their arguments, not necessarily all the by-ways of them, command their Lordships' assent. Upon their own examination of the Smritis their Lordships find them by no means equally balanced between the two constructions, but with a decided preponderance in favour of that which treats the disputed injunctions as only monitory and as leaving individual freedom of choice. They find themselves able to say with as much confidence as is consistent with the consciousness that able and learned men think otherwise, that the High Courts of Allahabad and Madras have rightly interpreted the law and rightly decided the cases under appeal.

Their Lordships have been reminded of the length of time for which the law must have been considered as settled in Bombay and Calcutta. A similar consideration affected the Courts of Madras and Allahabad and is remarked on by both. The time is not very long in any of the four provinces, but it is long enough to increase the gravity of the questions in these appeals. In estimating the weight of reasoning in the various litigated cases their Lordships have not forgotten the weight of the actual decisions; that they represent the opinions of eminent and responsible men, [495] arrived at after public and anxious discussion carrying with them an authority not legally disputable in the provinces under their jurisdiction, and it may be affecting many minds and many titles to property or to personal status. Such decisions are not lightly to be set aside. A Court of Justice, which only declares the law and does not make it, cannot, as the Legislature can, declare it with a reservation of titles acquired under a different view of

it. But their Lordships are placed in the position of being forced to differ with one set of Courts or the other. And so far as the fear of disturbance can affect the question, if it can rightly affect it at all, it inclines in favour of the law which gives freedom of choice. People may be disturbed at finding themselves deprived of a power which they believed themselves to possess and may want to use. But they can hardly be disturbed at being told that they possess a power which they did not suspect and need not exercise unless they choose. And so with titles. If these appeals were allowed, every adoption made in the North-West Provinces and in Madras under the views of the law as there laid down may be invalidated, and those cases must be numerous. Whereas in Bengal and Bombay the law now pronounced will only tend to invalidate those titles which have been acquired by the setting aside of completed adoptions of only sons, and such cases are probably very few. Whether they demand statutory protection is a matter for the Legislature and not for their Lordships to consider. It is a matter of some satisfaction to their Lordships that their interpretation of the law results in that course which causes the least amount of disturbance.

Their Lordships will humbly advise Her Majesty to dismiss both appeals and the appellants must pay the costs.

Solicitors for Appellant—in the appeal from the North-West Provinces :—Messrs. *T. L. Wilson and Co.*

Solicitors for Respondents :—Messrs. *Pyke and Parrott.*

Solicitor for Appellant—in the appeal from Madras :—Mr. *R. T. Tasker.*

Solicitors for Respondents :—Messrs. *Keen, Rogers, and Co.*

NOTES.

[See Notes to 22 Mad., 398 in our I.L.R., Reprints, 8 L.R., Mad., 292.]

[496] *The 16th and 20th February, and 11th March, 1899.*

PRESENT :

LORD WATSON, LORD HOBHOUSE AND SIR RICHARD COUCH.

Beni Ram and another.....Plaintiffs

versus

Kundan Lal and others.....Defendants.

[On appeal from the High Court for the North-Western Provinces.]

Law of landlord and tenant as to building by the tenant on the land—

Acquiescence of lessor—Terms of special leave to appeal in this suit.

A lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the term of whose lease has expired, merely by reason of that tenant's having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it.

To raise an equitable estoppel against the lessor precluding him from suing, on the determination of the tenancy, for possession, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. Acquiescence by the lessor in this case was a legal inference to be drawn from such facts as were found. The

onus of establishing sufficient cause for an equitable estoppel had not been discharged by the tenant in this instance.

Ramsden v. Dyson, (1865) L. R., 1 E. and I. A., 129, and section 108 of the Transfer of Property Act, 1882, referred to.

Special leave to appeal had been granted on terms that the appellants should be liable to pay the respondents' costs in any event, if directed so to do. Costs were, however, directed to be paid by the respondents.

APPEAL by special leave, on terms, from a decree (26th January 1894) of the High Court affirming a decree (21st April 1892) of the Subordinate Judge of Aligarh, who affirmed a decree (27th July 1891) of the Munsif of Hathras, dismissing the appellants' suit with costs.

This suit was brought on the 30th August 1890 by the representatives of the original lessors of six bighas of land to dispossess the successors of the original lessees, and to obtain the removal of the houses built on the land. Special leave to appeal had been obtained by the plaintiffs, whose suit had been dismissed on the ground that an equitable estoppel against them caused by their having acquiesced in the building, had been established.

This leave to appeal was granted in regard to the question of law which the case presented. This was whether it was a good [497] ground of defence that predecessors in the tenancy had erected permanent buildings on the land, without the owners having interfered to prevent the building, which was within their knowledge. There was no stipulation that the tenants should have an extended term.

The appellate Courts below had decided in favour of the defendants, on the ground of there having been an equitable estoppel upon the plaintiffs in consequence of their predecessors having acquiesced in the building. The original lease had been made in 1858 for the term of the settlement then current. The successors of the former owners of the land served the defendants with notice to quit possession on the 30th June 1890, with which notice the defendants had not complied.

The facts of the case, the expiration of the original lease, and the bringing of the subsequent tenancy-at-will to an end, appear in their Lordships' judgment, as well as the decisions of the Courts below.

Mr. *H. Cowell*, for the Appellants, argued that the lease of 1858 having expired and the subsequent tenancy having been determined by notice, the respondents had no right to resist eviction by the owner of the land. The tenants had built without having any good reason for believing that the land would be subject to their permanent occupancy. The inference drawn by the Courts below that the plaintiffs' predecessors had acquiesced in the acts of the defendants in building on the land was not the well-founded, or legal, inference. The facts found by the two Courts must be accepted, but not the conclusion that the facts amounted to permission or acquiescence. He cited *Ramsden v. Dyson*, (1865) L. R., 1 E. and I. A., 129, where it was decided that if a tenant so builds he does not, in the absence of special circumstances, acquire a right to prevent the landlord from taking possession of the land when the tenancy has been determined. The case was distinctly different from this, where a tenant builds in the belief that he is entitled [498] to claim, afterwards, a lease, and the landlord allows him so to build, knowing that the tenant is acting in that belief, and does not interfere to correct the error. There it might be that the tenant had an equity to claim a lease. But nothing of the kind occurred here.

Mr. W. H. Upjohn, Q. C., and Mr. G. E. A. Ross, for the Respondents, referred to the qabuliyat containing the terms of the lease of 1858. Therein was a clause which, they contended, should be read as written in contemplation of a continuance of the relation of landlord and tenant after the time of the settlement then current. The Lower Appellate Court and the High Court in concurrence had found that the plaintiffs' predecessors in interest had acquiesced in the erection of the buildings; and it was argued that the above clause, coming from the lessors had justified the lessees in concluding that they would have some further interest after the expiration of the original term. There were then special circumstances. Again, the finding of acquiescence had been before the Court on a second appeal, which was confined to the question of law, and the High Court had rightly held that under the circumstances the appellants were estopped from suing to eject the respondents. Reference was made to the Transfer of Property Act, IV of 1882, section 108, cls. (h)* and (p),† and to *Shibdas Bandapadhya v. Bamandas Mukhapadhya*, (1871) 8 B. L. R., 237.

Mr. H. Cowell, in reply, submitted that the respondents' long resistance to a just claim was a ground for their being required to pay the costs of this appeal, notwithstanding that the special leave to appeal had been obtained on the terms that, if ordered so to do, the appellants would pay those costs.

Their Lordships' judgment was afterwards, on the 11th March, given by Lord Watson.

In November 1858, Bhawain Das, and Dhani Ram, bankers of Hathras, and owners of the mauza Ramanpur, let to five tenants, whose interests are now represented by the respondents in this appeal, six bighas of land, for the term of the current [499] settlement, for the construction thereon of a saltpetre factory, at the annual rent of Rs. 28. The conditions of the lease appear from the qabuliyat executed by the tenants, on the 17th November 1858, which, so far as material, are as follows:—"That, until the lease money is continued to be paid, the malguzars (persons who pay the revenue) shall not be competent to dispossess me within the foresaid term, nor shall I be competent within it to give up the land. After the settlement, the parties shall be bound to carry out the order of the Government, if any, issued by it. I have therefore executed these presents, by way of a qabuliyat, in order that they may serve as evidence, and be of use in time of need."

The appellants having acquired, by purchase, the interest of the original lessors, on the 1st August 1859, served a notice upon the respondents requiring them to quit possession of the lands upon the 30th June 1890. The respondents did not comply with the notice; and the appellants, on the 30th August 1890, brought a suit for their ejectment in the Court of the Munsif of Hathras. The plaint *inter alia* craves decree for removal of the material of the houses built by the ancestors of the respondents lying on the said lands.

The respondents, in their written statement, amongst other defences to the action, pleaded that the predecessors of the appellants, "after the completion of the saltpetre factory for which the lands were taken on lease, saw that from time to time houses were built, and the defendants, and the ancestors of the defendants, spent several thousands of rupees on building, and they instead of objecting, or prohibiting, induced the defendants and their ancestors to build."

* [Sec. 108, clause (h) :—The lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it.]

† [Sec. 108, clause (p) :—He must not, without the lessor's consent, erect on the property any permanent structure, except for agricultural purposes.]

The Munsif received evidence on nine issues, but in his judgment, which was given on the 29th June 1886, he only dealt with the first and second of them. Upon the first, which related to an amendment obtained by the appellants, he found in their favour. Upon the second, he found that the notice of removal given by the appellants upon the 1st August 1889 was not according to [500] law. With regard to the remaining issues, from three to nine inclusive, the learned Judge observed :—"There is sufficient material to dispose of all these issues, but since issue No. 2 is decided against the plaintiffs, and it is held that the suit must fail, there is no further necessity to enter into the trial of these issues." Accordingly, in respect of his finding upon his second issue, he dismissed the suit.

An appeal was taken from the Munsif's judgment to the first appellate Court, being that of the Subordinate Judge of Aligarh, who, on the 21st April 1892, affirmed the decree appealed from, although on a different ground. The Subordinate Judge dealt with three issues, the first and third having reference to the validity of the notice upon which the action of ejectment was based, and the second being :—"Was the land in dispute only let for the construction of a saltpetre factory, and what is the effect of the plaintiffs or their predecessors having acquiesced in the defendants or their predecessors having built upon the land after the saltpetre factory had ceased to exist?"

The Subordinate Judge, differing in opinion from the learned Munsif, held that the notice to quit possession, which the appellants had given, was valid in law. Upon the second issue, he found the following facts, upon which the decision of this appeal has come to depend :—"The tenancy, as I have already stated, was originally created for the construction of a saltpetre factory, but we have the evidence of the plaintiffs' own witness Khyali Ram, and Chokey Lal, patwari of the village, to show that saltpetre was only manufactured here for four or five years; that since 20 years shops have existed on the land, and that since 12 or 14 years pacca shops have been built. Inside the enclosure, the evidence shows, are rooms (?) erected 18 or 20 years ago, a pacca as well as a katcha well. It is also proved in the most unmistakeable manner that the former owner of the land saw the buildings and did not prohibit their construction. The plaintiffs' evidence, moreover, shows that, even on their calculations the buildings cost Rs. 1,000, or Rs. 1,500. [501] The evidence of Gobind Prasad, their witness, is that the buildings cost about Rs. 900. Jugul Kishore makes them worth Rs. 800. Khyali Ram says nothing on the point, while the patwari deposes that the buildings are worth Rs. 1,000 or Rs. 1,500. On the other hand, the defendant Kundan Lal and his witnesses' evidence shows that there are 12 shops, some katcha and some pacca, now standing on this land; that they have been built between Sambat 1918 and 1935; that in addition to the shops are dalans and kothas, two wells, the one katcha and the other pacca, and a temple, all costing between three and four thousand rupees. The evidence also shows in the most unmistakeable manner, that not only did the original lessee not object to the enclosing of these buildings when they were being erected, and stood by, but that by continuing to receive rents from the lessees, even after the erection of the buildings, and even though the saltpetre factory, for which the land was let, had ceased to exist, he sanctioned the lessees doing so. His successors are therefore equitably estopped from now suing for the lessee's ejectment. The case is governed by what was said in *Gopi v. Bisheshwar* (Weekly Notes for 1885, page 100)."

The rule or principle thus adopted by the Subordinate Judge, which is reported to have been laid down in *Gopi v. Bisheshwar*, is thus stated by him:—
 "If a man permits another to build upon his land, and, with the knowledge that the building is being erected, stands by and does not prevent the other from doing so, then, no doubt, equity comes in, and by the rules of equity which in this respect are the same as the rules of law, he cannot eject that other person."

The case was then carried, by the present appellants, before the second appellate tribunal, the High Court at Allahabad, who, on the 26th January 1894, confirmed the decision of the Subordinate Judge of Aligarh and dismissed the appeal, with costs. The learned Judges of the High Court, without entering into any discussion of the other issue which the first appellate [502] Court had decided in favour of the present appellants, said:—"We need not go further into the construction that should be placed upon that lease, because we are of opinion that upon the finding of acquiescence, which we think was a right finding in this case, the appeal will have to be dismissed." They accordingly disposed of the appeal on that ground alone.

It is to be regretted that the loose and inadequate statement of the rule of equity, which is reported in *Gopi v. Bisheshwar* should have been accepted, apparently without much consideration, by the learned Judges of both appellate Courts. The proposition, if it were carefully supplemented, might possibly be made to apply to the case where the owner of land sees another person erecting buildings upon it, and knowing that such other person is under the mistaken belief that the land is his own property, purposely abstains from interference, with the view of claiming the building when it is erected. The findings of fact pronounced by the Subordinate Judge, which were conclusive in the second appellate Court, and are equally binding upon this Board, show that the present is not a case of that kind. The respondents knew that the predecessors of the appellants were the owners of the land let, and that their own title was limited to their occupation of the land as tenants, upon the terms and for the periods provided by the original lease of 1858. In order to raise the equitable estoppel which was enforced against the appellants by both the appellate Courts below, it was incumbent upon the respondents to show that the conduct of the owner, whether consisting in abstinence from interfering, or in active intervention, was sufficient to justify the legal inference that they had, by plain implication, contracted that the right of tenancy, under which the lessees originally obtained possession of the land, should be changed into a perpetual right of occupation.

Their Lordships have had no difficulty in coming to the conclusion that the respondents have failed to discharge themselves of that *onus*. If there be one point settled in the equity law of England, it is, that in circumstances similar to those of [503] the present case, the mere erection by the tenant of permanent structures upon the land let to him, in the knowledge of and without interference by his lessor, will not suffice to raise the equitable right against the latter which has been affirmed by the Courts below. It must also be kept in view that, in Indian law, the maxim "*quicquid inaedificatur solo, solo cedit*," has no application to the present case. The rule established in India is that of section 108 of the Transfer of Property Act, which provides that "the lessee may remove, at any time during the continuance of the lease, all things which he has attached to the earth; provided he leaves the property in the state in which he received it."

The leading authority of the law of England upon the point, is *Ramsden v. Dyson and Thornton*, (1865) L. R., 1 E., and I. A., 129. In that case, the

Vice-Chancellor (Sir J. Stuart) had held that Sir J. Ramsden, the owner, was estopped in equity from bringing ejectment against the defendants, his tenants, by reason of the defendants having been permitted, in the knowledge of their lessor, to build valuable and permanent structures upon the land demised to them. The judgment of the Vice-Chancellor was reversed in the House of Lords, by the Lord Chancellor, (Cranworth), Lord Wensleydale and Lord Westbury, *dissentiente* Lord Kingsdown.

The Lord Chancellor (at p. 141 of the report) said :—" It follows as a corollary from these rules, or, perhaps, it would be more accurate to say it forms part of them, that if my tenant builds on land which he holds under me, he does not thereby, in the absence of special circumstances, acquire any right to prevent me from taking possession of the land and buildings when the tenancy has determined. He knew the extent of his interest, and it was his folly to expend money upon a title which he knew would or might soon come to an end." The noble and learned Lord, in his opinion, which is expressed at considerable length, appears to me to indicate some [504] at least of the special circumstances which might suffice to raise an estoppel against the lessor. It was strongly urged for the defendants, at the Bar of the House, that Sir J. Ramsden had made representations " which might fairly be supposed to lead his tenants at will or from year to year to expend money in building, in the belief that by building they acquired a title which he could never disturb." I do not find that the noble and learned Lord indicated any opinion that, if such representations had actually been made by the lessor, they would not have been sufficient to show the terms of a contract which might be enforced in a Court of Equity. But he rejected the plea on the double ground (1) that the alleged communications were not proved to have been sufficient for that purpose, and (2) that the representations, if they had been sufficient to raise an implied contract, were not binding upon the lessor, inasmuch as they proceeded from an estate agent, and were not shown to have been made by him, in the knowledge and with the authority of the lessor.

The respondents, in their appeal case lodged before this Board, relied exclusively upon their plea of acquiescence, which had been sustained by both the appellate Courts below. In their argument, the learned Counsel by whom they were represented, ably urged that plea, but frequently digressed into other points raised in the case, always with the explanation that these digressions were meant to aid the plea of acquiescence. They also argued that their Lordships could not competently disturb the judgment to the effect that there had been acquiescence, inasmuch as it was a concurrent finding of the appellate Courts. The argument was palpably erroneous. Their Lordships were bound by, and have accepted as final, the findings of the Subordinate Judge of Aligarh upon the facts from which acquiescence might or might not be inferred. But acquiescence is not a question of fact, but of legal inference from the facts so found ; and upon it the judgments of the appellate Courts are not final.

[505] Their Lordships will therefore humbly advise Her Majesty to reverse all the judgments appealed from, and to give the appellants decree of ejectment in terms of their plaint ; to order that the costs, if any, already paid by the appellants, under the decrees respectively of the Munsif of Hathras, the Subordinate Judge of Aligarh, and the High Court at Allahabad, be repaid to the appellants by the respondents ; and that there be no costs of suit in

the Courts below paid to or by either of the parties. The respondents must pay to the appellants the costs of this appeal.

Appeal allowed.

Solicitors for the Appellants—Messrs. *Ranken Ford, Ford and Chester.*

Solicitors for the Respondents, Kundan Lal and Birj Lal—Messrs. *Borrow and Rogers.*

NOTES.

[I. BELIEF OF THE BUILDER.—

There must be a mistaken belief in the builder that the land was his own in addition to the silence of the lessor:—(1908) 1 I. C., 821 (All.) ; (1906) 33 Cal., 1119 (buildings erected by the Dayabhaga son on the property of the father) ; (1907) 29 All., 652 (buildings on the abadi land) ; (1902) 22 A. W. N., 60 ; (1906) 3 C. L. J., 616 ; (1899) 19 A. W. N., 191 ; (1904) 4 A. L. J., 252 n (non-interference when one's property was sold) ; (1910) 35 Bom., 182 (building on Government land with knowledge of want of title). In (1904) A. W. N., 70, such belief was found to have been proved. To resist ejectment by a tenant on the ground that the tenancy is a permanent one, and that the landlord stood by and permitted him (the tenant) to erect *pucca* buildings on the land in the belief that the said tenancy was a permanent one, it is incumbent on the tenant to show that in erecting the building he was acting under an honest belief that he had a permanent right in the land, and the landlord, knowing that he (the tenant) was acting under such belief, stood by and allowed him to go on with the construction of the buildings :— (1900) 27 Cal., 570.

In (1910) 37 Mad., 1 it was held as follows :—“ If a tenant knowing that he has not a permanent occupancy right in the land in his possession makes improvements without any hope or expectation in himself created or encouraged by the landlord, he cannot claim compensation for the value of such improvements. Even if the landlord knew that the tenant was making the improvements under a mistaken belief that he had occupancy rights in the land and merely kept quiet without interfering, there will be no estoppel against the landlord.”

II. TENANT'S ERECTION OF PERMANENT BUILDINGS.—

It was shwon in an exhaustive judgment by Sir V. Bhashyam Ayyangar, J. in (1902) 27 Mad., 211 that by the Common Law of India, the tenant had the right to remove the superstructure of buildings erected by him, at or before the termination of the tenancy, and that he had not any right to compensation if he should surrender the land on the expiry of the tenancy without such removal. The rule laid down by s. 108 (h) T. P. A. 1882, substantially reproduces the law as it stood before the Act. Both under the Common Law of the land and under s. 108 (h) of the Transfer of Property Act, the lessee cannot, after the termination of the lease, remove the superstructure erected by him on the demised land or claim compensation for the same from the lessor, unless the lessor is estopped from contesting such a right:—*Per* WHITE, C. J. (*contra* SANKARAN NAIR, J.) (1911) 11 I. C., 745 (Mad.) : 10 M. L. T., 193; 21 M. L. J., 891.

III. INFERENCE OF PERMANENCY FROM ERECTIONS.—

As regards the inference of permanent tenancy, see also (1901) 28 Cal., 738 ; (1905) 9 C. W. N., 463 ; (1905) 32 Cal., 41 ; 51 ; (1901) 5 C. W. N., 846 ; (1902) 6 C. W. N., 352 ; (1912) P. R., 121.

In (1905) 32 Cal., 648, the tenancy was from year to year but the parties contemplated from the outset the erection of permanent buildings.

For instances of cases where the Privy Council held that there was estoppel, see (1901) 28 Cal., 693 (construction of canals) ; *Plimmer v. Mayor etc. of Wellington*, (1884) 9 A. C., 699 (a case of revocable license at first rendered irrevocable by subsequent conduct of the licensor).

IV. WHETHER A QUESTION OF FACT.—

Estoppel or acquiescence is not a question of fact but one of inference from the facts found ;—(1904) 6 Bom. L. R., 440; (1906) 4 C. L. J., 198; (1908) P. L. R., 100. Implied prohibition is not a question of fact, but of legal inference from the facts found :—(1899) 23 Bom., 789 (applied to authority to adopt).

[21 All. 505]

The 22nd February, and 24th March, 1899.

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR RICHARD COUCH.

Parsotam Gir.....Plaintiff

versus

Narbada Gir.....Defendant.

On appeal from the High Court for the North-Western Provinces.

Res judicata—Civil Procedure Code, section 13—Prior decree between the same parties in the same claim, not arriving at a final decision.

In a former suit between the same parties that were now in litigation, in which the same claim upon title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open to the plaintiff to sue again, and that no matters affecting the rights of the parties were decided between them. *Held*, that the prior decree was not a final decision within the meaning of section 13 of the Code of Civil Procedure, and the defence of *res judicata* was not maintained.

APPEAL from a decree (4th November 1895) of the High Court reversing a decree (29th June 1893) of the Subordinate Judge of Allahabad.

This suit was filed on the 3rd January 1893 by one Nepal Gir, upon whose decease during the proceedings the present appellant was brought upon the record. The claim was against the respondent Narbada Gir, representative of Prasad Gir, deceased, for possession with mesne profits, of lands belonging to a religious institution, which lands had been in the possession [506] of Prasad Gir in his lifetime. The plaint, which was based on an agreement registered on the 30th March 1868, stated the proceedings in a prior suit of 1885, disposed of by the High Court on the 8th March 1886, between the same parties.

The defendant in his written statement pleaded adjudication in that suit of the matters now in issue.

The facts of the case, as well as the proceedings in both the suits, sufficiently appear in their Lordships' judgment on this appeal.

The only questions now raised were whether or not this suit was barred, within section 13 of the Code of Civil Procedure, by the decree of the 8th March 1886, and whether or not there was any estoppel from the former proceedings.

The Subordinate Judge held that the suit was not barred by that decree. He found in favour of the plaintiff on all the issues; and decreed possession with mesne profits for three years.

On an appeal by the defendant to the High Court, the above was reversed.

On the plaintiff's appeal, Mr. A. Cohen, Q. C., and Mr. C. E. A. Ross, for the appellant, urged that there was nothing in the judgment and decree of the

High Court of the 8th March 1886 to prevent the plaintiff from bringing the present suit.

Mr. J. D. Mayne and Mr. J. F. Kershaw, for the respondent, argued that the High Court was right in holding that material contentions of the appellant had been decided against him sufficiently to cause an estoppel, so that the present suit was barred.

Mr. A. Cohen, Q.C., was not heard in reply.

Their Lordships' judgment was afterwards, on the 24th March, delivered by Lord MACNAGHTEN.

This is an appeal from a decree of the High Court at Allahabad. The plaintiff, Mahant Nepal Gir, who is now represented by the appellant, sued for recovery of possession of four villages. The suit was brought in the Court of the Judge of Small Causes at Allahabad exercising the powers of a [507] Subordinate Judge. He gave the plaintiff a decree which has been reversed by the learned Judges of the High Court, who dismissed the suit with costs.

The facts of the case are few and simple and not in dispute. The whole argument before this Board turned upon the meaning and effect of a judgment of the High Court in a previous litigation between Mahant Nepal Gir and Prasad Gir, the person whom the defendant Narbada Gir claims to represent.

The parties to the present suit are sannyasis or ascetics of a sect known as Baghambari from the name of their founder, who lived more than a hundred years ago. The gaddi or shrine of Baghambari, which appears to have been endowed with considerable property, was originally established in a house below the fort of Allahabad. This house was destroyed in the Mutiny and the gaddi was removed in consequence to an adjoining mauza called Baski. The manager of the gaddi at this time was Baba Bhola Gir. Bhola Gir died on the 8th of March 1868, leaving four chelas or disciples, Nepal Gir, Bijai Gir, Moti Gir and Prasad Gir. There seems to have been at first some dispute about the succession, but the differences, whatever they were, were soon arranged. On the 25th of March 1868 the four chelas executed an ikrarnama or deed of arrangement providing for the administration of the gaddi and division of offices between them. Nepal Gir became gaddi-nashin or head Mahant, Moti Gir Bhandari or treasurer and manager at Allahabad; Bijai Gir manager of certain villages, and Prasad Gir manager of the villages in dispute.

This ikrarnama was duly registered on the 30th of March 1868. It recites that Bhola Gir before his death gave the following direction to his four chelas in the presence of respectable people:—"After me you four persons should by common consent become proprietors of all the properties belonging to the gaddi of Baba Baghambari and should maintain the property and management thereof as usual like myself." It then goes on to declare that in compliance with that direction [508] and in order to avoid future disputes and to keep up the name and prestige of the gaddi and properties the four persons parties to the deed unanimously covenanted in the terms expressed in the following clauses. Clause 1 provided that Nepal Gir having been appointed Mahant should be installed as gaddi-nashin. Clause 2 so far as material was in the following words:--

"2ndly, that as formerly the name of Baba Bhola Gir was entered in respect of the ilakas (villages) and the Mahant's name was not entered, so the names of Bijai Gir and Prasad Gir be entered in respect of the ilakas and they should be peshwakars (heads) and managers of the property (ilakas) and other affairs and should maintain the management of receipts and disbursements in the same way as it had been before. But they on account of their names being entered or any other person for any reason neither have nor shall have

any right whatever nor even the Mahant himself shall have any power of partition or temporary or permanent transfer in respect of the whole or any part of the movable or immovable property because all the properties belong to the gaddi of Baba Baghambari and they are not meant for person or for any particular individual."

Clause 1 had provided for the expulsion of the gaddi-nashin in certain events. Clause 2 provided for the expulsion of any of the other three "discovered doing any vicious act or any act disgracing the gaddi or contrary to the customs of the Math." Clause 3 provided that—

"As at present the disciples stay at ilakas (villages) and look after the management of cultivation and making collections of the ilakas like managers, so Bijai Gir and Prasad Gir should in the like manner live there as munsarims and managers and carry on the current affairs as usual. In case of their proving unfaithful and of misconduct the Mahant Moti Gir and the third person who might be left of good behaviour have and shall have power to turn them out with their mutual consent and consultation as an owner has in respect of the manager."

Clause 4 provided for the duties to be undertaken by Moti Gir. Clause 5 so far as material was as follows:—

"5thly, that none of us either gaddi-nashin, peshwakar or another disciple or any one who may be the successive representative or disciple of any person shall have any power to act contrary to any of the terms of this document . . . and those who are our disciples should also live as usual in those ilakas of which we are the managers in our stead; but in case of misbehaviour the Mahant and Peshwakar have and shall have in every case authority to turn them out."

[509] On the terms of this ikrarnama Prasad Gir entered into possession of the villages in dispute. One of his first acts after he obtained possession was to join with the other three persons parties to the deed in a petition for a certificate to enable the four to collect the debts due to the estate of Bhola Gir. The petition was verified by a declaration signed by Prasad Gir himself. It set out Bhola Gir's will as contained in the ikrarnama and proceeded to state that the petitioners in union among themselves for giving additional strength to the will having executed an ikrarnama on the 25th March 1868 "with the conditions entered therein," got it registered and according to the same mutation of names in their favour was effected, and that under the same they had been in possession and enjoyment as proprietors of all goods and properties (imlak) appertaining to the gaddi of Baghambari left by the deceased goshain.

Whether in the interval between the execution of the ikrarnama and the end of the year 1881 Prasad Gir remitted any contribution in money or in kind from the estates under his management to the gaddi of Baghambari at Baski is a question about which a good deal of evidence was adduced which left the matter still in doubt. For the purpose of the present suit that question seems to be wholly immaterial. It is clear that from the commencement of the year 1882, Prasad Gir made no remittance to the gaddi of Baghambari. In June 1884 there was a meeting of the persons interested, to which Prasad Gir, Moti Gir and the representatives of Bijai Gir, who was then dead, were summoned. Moti Gir and the representatives of Bijai Gir attended and formally acknowledged the obligation incumbent upon them to act in conformity with the terms of the ikrarnama. Prasad Gir absented himself without making any excuse or sending any explanation of his conduct. The parties present resolved that Prasad Gir should be requested to state his intentions and furnish an account of the property under his management within a limited time and that then a further meeting should be convened to consider future proceedings. A notice to that effect with a copy of the [510] proceedings of the meeting of June 1884 was accordingly sent to Prasad Gir. Prasad Gir, however, paid no

attention to the summons, and treated the matter with absolute indifference. Thereupon the Mahant Mepal Gir, Moti Gir and the representatives of Bijai Gir brought a suit to recover possession of the villages in dispute and for an account.

Prasad Gir filed a written statement. He alleged that the villages in dispute did not belong to the gaddi of Baba Baghambari at Baski, but to the gaddi of Baba Baghambari at Niria, one of the villages in dispute where Prasad Gir lived. He denied that he had executed the ikrarnama of March 1868. He pleaded that he had been in adverse possession for twelve years and that the plaintiffs' claim was barred by limitation.

While the suit was pending, and after it had been partly heard, Prasad Gir died. On his death Narbada Gir who had taken possession of the villages in dispute claiming under Prasad Gir was brought upon the record, but no amendment was made, nor was any fresh issue directed. The Subordinate Judge found that the villages in dispute belonged to the gaddi of Baba Baghambari at Baski, that the ikrarnama of March 1868 was executed by Prasad Gir and that he never challenged its genuineness or validity until he filed his written statement. He negatived the plea of adverse possession. He held that if Prasad Gir had been alive the plaintiffs would have been entitled under the terms of the ikrarnama to oust him from the villages in dispute on account of his misconduct in not rendering account and sending profits to the gaddi and in claiming them as his own property. He further held that Narbada, assuming that he was Prasad Gir's heir, could not retain possession of the villages in dispute against the will of the plaintiffs who were entitled to resume possession of the villages and to make a fresh arrangement for their management. He dismissed the claim for an account. Narbada, he said, had not misappropriated the profits which the plaintiffs claimed, and as it was not proved that any personal estate of Prasad Gir had come to his hands he could [511] not be made accountable for the profits received by Prasad Gir. In the result therefore the claim for an account was dismissed, but the claim for possession was granted.

Against this decree Narbada appealed. On the 8th of March 1886 the learned Judges who heard the appeal pronounced a judgment which unfortunately neither the High Court on the appeal in the present suit nor the learned counsel at the bar nor their Lordships are able to understand. They seem to have misapprehended the grounds of the Subordinate Judge's decision. They held Prasad Gir absolved apparently because it was not proved to their satisfaction that he "had acted as a person accountable to the gaddi." "The impression left upon our minds," they said, "is that . . . there is good reason for believing that from 1868 down to his death Prasad Gir occupied and asserted an independent position in respect of the Niria Shrine." So they held that the suit would have failed against Prasad Gir if he had been alive, and accordingly they reversed the decree and dismissed the suit against Narbada Gir as the legal representative of Prasad Gir with costs. But they concluded their judgment with the following announcement—"We think that the Subordinate Judge should, as we propose to do, have left it open to the plaintiffs, or rather Nepal Gir, to institute a suit against Narbada Gir personally in which a number of questions which as yet have never been raised or considered can be properly dealt with and determined, and in holding that the present suit failed as against Prasad Gir, we leave untouched and undecided all matters affecting the rights of the plaintiff Nepal Gir on the one side and of Narbada Gir on the other."

On the 30th of July 1892 Nepal Gir sent a notice to Narbada Gir, requesting him under threat of legal proceeding to come in and submit his accounts, treating him as "manager and agent in charge" of property belonging to the gaddi of Baghambari. As Narbada Gir paid no attention to this notice the present suit was brought for the purpose [512] of recovering possession of the villages in dispute. Narbada pleaded the defence of *res judicata*, adverse possession by Prasad Gir and title under Prasad Gir's will, and refused to admit the validity and existence of the *ikrarnama* of March 1868.

The Subordinate Judge held that the suit was not barred by the decree of the High Court of the 8th of March 1886. He found in favour of the plaintiff on all the issues and gave a decree for possession with mesne profits for three years.

Narbada Gir appealed to the High Court. On the 14th November 1895 the learned Judges of the High Court pronounced a judgment which is almost, if not quite, as difficult to understand as the judgment of their predecessors in 1886. They observe that the difficulty which they had felt in the case had been "in trying to ascertain from the judgment of the Court in the previous suit what were the findings upon which this Court in that suit made its decree dismissing the suit." They then address themselves to the solution of that problem. They begin by rejecting the only part of the former judgment which is absolutely clear, and they express their opinion that "the only possible construction of that judgment which would make it consistent throughout and would not suggest absolutely inconsistent findings" is a construction which (if their Lordships have rightly apprehended its effect) leaves it undetermined whether the *ikrarnama* of 1868 was or was not proved or was or was not binding on the parties and attributes to learned Judges of one of the highest Courts of Appeal in India the view that a person who executes a solemn instrument in the terms of such an *ikrarnama* and accepts the management of property on the conditions therein contained is at liberty to repudiate the trust and to set up an adverse title in some other religious foundation if not in himself without being liable to removal either by the parties interested or by the Court. Having placed this construction on the earlier judgment and finding that the only charge against Narbada Gir was that he obtained possession under the *ikrarnama* of 1868, and then wholly repudiated the obligations of that instrument the [513] learned Judges of the High Court treated the matter as *res judicata* and dismissed the suit with costs in all Courts.

The High Court placed some reliance on the notice of the 30th of July 1892. Narbada Gir did not accept it or act upon it. It seems to their Lordships to have no bearing on the question between the parties.

Their Lordships think that it would be an idle and a hopeless task to speculate upon the grounds of the judgment of the High Court in 1886. Whatever the grounds may have been, they are certainly not apparent on the face of the judgment. One thing, however, is plain; the learned Judges in 1886 did not intend to decide anything as between Nepal Gir and Narbada Gir. They "left it open to Nepal Gir to institute a suit against Narbada Gir personally." They said in so many words: "We leave untouched and undecided all matters affecting the rights of the plaintiff Nepal Gir on the one side and Narbada Gir on the other." The only reason why the High Court in 1895 refused to give effect to those words was because they considered that if they construed them according to their plain meaning they "should be holding that

the decree of this Court in the previous suit was simply what is known in England as a decree of non-suit." Such a decree, they say, no Court in India has power to make. Now the objection to a judgment of non-suit under the old practice in this country—there was no such thing as "a decree of non-suit" for the term "non-suit" was not known in Chancery—was this:—It enabled a plaintiff after he had dragged the defendant into Court, if he found the case going against him or that he had not the requisite materials to support his claim, to elect to be non-suited, with the result that he could bring a fresh action and so harass the defendant with further litigation. The Judge at the trial was powerless: the plaintiff was *dominus litis*. There can be no room for such an objection when the Judge has the matter in his own hands. But however that may be, the real answer to the difficulty propounded by the High Court is this:—The question is not whether the judgment of the High Court in 1886 was [514] right, but whether it did or did not finally decide the present question as between Nepal Gir and Narbada Gir. It would be a contradiction in terms to say that the Court had finally decided matters which it expressly left "untouched and undecided."

Mr. *Mayne* for the respondent did not go so far as to contend that the judgment of 1886 as it stands, and of itself would support a plea of *res judicata*. Following the arguments or suggestions contained in the judgment under appeal, he endeavoured to persuade their Lordships that there must have been some grounds for the decision of the High Court in 1886 or some findings underlying that decision which would support a case of what may be called constructive estoppel. It is enough to say that there is no such thing known to the law as constructive estoppel and if there were it would not satisfy the requirements of section 13 of the Code of Civil Procedure (XIV of 1882). "The conditions for the exclusion of jurisdiction on the ground of *res judicata* are" as WILLES, J., says, "that the same identical matters shall have come in question already in a Court of competent jurisdiction, that the matters shall have been controverted and that it shall have been finally decided" *Langmead v. Maple*, (1865) 18 C. B. N. S., 255; at p. 270. That is just what section 13 requires; there must be a final decision.

Their Lordships are of opinion that the view taken by the Subordinate Judge was correct. Their Lordships will therefore humbly advise Her Majesty that the appeal ought to be allowed, the decree of the High Court reversed, and the appeal to it dismissed with costs, and the judgment of the Subordinate Judge restored.

The respondent must pay the costs of the appeal.

Appeal allowed.

Solicitors for the Appellant—Messrs. *T. L. Wilson and Co.*

Solicitors for the Respondents—Messrs. *Barrow and Rogers.*

NOTES.

[An issue left undecided cannot have the effect of *res judicata*:—(1915) 29 I. C., 731; (1915) P.L.R., 160; (1912) 15 I. C., 930 (Punjab); (1909) 2 I. C., 622 (All.).]

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THE INDIAN LAW REPORTS, ALLAHABAD SERIES,
CONTAINING CASES DETERMINED BY THE HIGH
COURT AT ALLAHABAD, AND BY THE JUDICIAL
COMMITTEE OF THE PRIVY COUNCIL ON APPEAL
FROM THAT COURT.

ALLAHABAD—Vol. XXII—1900.

FULL BENCH.

The 15th May, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BANERJI, MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Dalganjan Singh.....Plaintiff

versus

Kalka Singh and others.....Defendants.*

*Pre-emption—Wajib-ul-arz—Perfect partition of mahal—Act No. XIX of 1873
(N.-W.P. Land Revenue Act), section 191—No new wajib-ul-arz framed
on partition—Pre-emption claimed under wajib-ul-arz of undivided
mahal—Custom—Co-sharers—“Hissadar deh.”*

Where, on the perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer. It depends in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. But there is a strong presumption against such claims for pre-emption when made after perfect partition by persons who are no longer co-sharers of the vendor; and where the language of the wajib-ul-arz is ambiguous this presumption may be decisive.

The wajib-ul-arz of a village forming one undivided mahal recorded a right of pre-emption by custom as existing in favour of “hissadaran deh” in cases of transfer by a “hissadar” of his share or “hissa” to a stranger. After a perfect partition, on which no new wajib-ul-arz was framed, and after a subsequent sale to a stranger of land in one of the new mahals, a person

* Appeal No. 34 of 1898, under section 10 of the Letters Patent.

who, prior to the partition, was a co-sharer of the vendor in the undivided mahal, but who, since the partition, owned a share only in another of the new mahals, claimed pre-emption under the old wajib-ul-arz as a "*hissadar deh*."

Held by the Full Bench, upon the construction of the wajib-ul-arz, that he was not entitled to pre-emption.

[2] THIS was an appeal under section 10 of the Letters Patent arising out of a suit for pre-emption of a piece of land in the village of Serai Sitam in the Jaunpur district, the suit being based on a custom recorded in the wajib-ul-arz of that village framed at the last Settlement in 1880-81. The suit was brought in September 1896. The village, which at the time of the settlement had consisted of only a single mahal, was divided by perfect partition, in 1888 or 1889, into three mahals, but no new wajib-ul-arz was framed for any of the new mahals. The plaintiff pre-emptor was not a sharer in the mahal in which the property sold was situated. The Court of First Instance (Munsif of Jaunpur) and the Lower Appellate Court (Subordinate Judge) held that the plaintiff was entitled to pre-emption by the custom of the village notwithstanding the partition, and decreed the claim. On appeal by the defendants to the High Court, a single Judge of the Court allowed the appeal and dismissed the suit. From that decree the present appeal under section 10 of the Letters Patent was preferred by the plaintiff. The facts of the case will be found stated in greater detail in the judgment of the Chief Justice. The substantial question raised by the appeal was—what is the effect of a perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, upon claims for pre-emption based on a custom recorded in the wajib-ul-arz where no new wajib-ul-arz for any of the new mahals has been framed at or since the partition?

Babu *Durga Charan Banerji* for the Appellant (pre-emptor).

The learned Judge has dismissed the appellant's suit upon the solitary ground that upon perfect partition the old wajib-ul-arz disappears with the legal entity to which it applied, and therefore no suit will lie for pre-emption. I submit that there is no such rule of law. The Land Revenue Act gives no sanction to such a view. On the other hand the Land Revenue Act and the case-law support the contention that a record-of-rights may remain in force even after the term for which it was prepared. Section 191 of the Land Revenue Act lays down that if no new [3] wajib-ul-arz is prepared, the existing wajib-ul-arz remains in force, even after the settlement, when it is not superseded by a new one—*Shiam Sundar v. Amanant Begam*, (1887) I. L. R., 9 All., 234. In *Sadhu Sahu v. Raja Ram*, (1893) I.L.R., 16 All., 40, it has been held that even after the expiration of the term for which a wajib-ul-arz is prepared, the old wajib-ul-arz may be good evidence of custom.

If the wajib-ul-arz is in force, the plaintiff who is still a share-holder in the village (though not in the mahal) is entitled to pre-empt as a *hissadar deh*. The entity *deh* (village) has not ceased to exist with the partition. The area still exists, though for fiscal purposes it has been divided into separate portions which for such purposes are independent of one another.

If the wajib-ul-arz recorded a contract, such contract ran with the land and would not be abrogated, there having been no novation in the shape of a fresh wajib-ul-arz. If it is a record of custom, such custom applied to the area *deh*, and partition for revenue purposes would not affect such custom. The wajib-ul-arz is a record-of-rights prepared under the Land Revenue Act. The Collector has to keep and maintain the record, and he is required to note any changes which may occur during the term of the settlement for which such record is prepared. This evidently contemplates alteration in the existing

record. Changes in such record consequent upon partition should be noted,—see sections 94 to 102 of the Act.

Upon the construction of the particular wajib-ul-arz in question, *hissadar* means a shareholder and not necessarily a co-sharer. The plaintiff still holds a share in the village, and upon that account he is entitled to claim pre-emption.

I rely upon *Gokal Singh v. Mannu Lal*, (1885) I. L. R., 7 All., 772; *Ramjiawan Sahu v. Raturaj Singh*, Weekly Notes, 1889, p. 81; *Shiam Sundar v. Amanant Begam*, (1887) I. L. R., 9 All., 234; *Kuar Dat Prasad Singh v. Nahar Singh*, (1888) I. L. R., 11 All., 257; *Abbas Ali v. Ghulam Nabi*, Weekly Notes, 1891, p. 137; *Mata Din v. Mahesh Prasad*, Weekly Notes, 1892, p. 100. [4] In *Lachcho v. Maya Ram*, (1882) I. L. R., 5 All., 158, relied upon by the other side, a new wajib-ul-arz had been prepared which abrogated the old one.

I also rely on *Ghure v. Man Singh*, (1895) I. L. R., 17 All., 226, which indirectly supports my contention.

Mr. *Abdul Majid* for the Respondents :—

The question is, what is the meaning of the word village (*deh*) and what is the meaning of the word share (*hissa*) and share-holder (*hissadar*) used in the wajib-ul-arz? The wajib-ul-arz was framed for the mahal of Serai Sitam. The co-sharers before the village was partitioned were the existing co-sharers of the mahal Serai Sitam. The village and mahal Serai Sitam were both one and the same. But when the village was partitioned and divided into several mahals, the co-sharer of the separated mahals could not be said to remain still co-sharers of the old mahal Serai Sitam. There is nothing joint between them now in the new mahals. The words '*deh*' and '*hissa*' and '*hissadar*' must be used in one sense in the whole wajib-ul-arz whenever those words are used.

The old wajib-ul-arz which was framed for the mahal Serai Sitam has disappeared when the said mahal was partitioned into these new mahals, inasmuch as the mahal for which it was prepared has disappeared.

The following cases cited are distinguishable from the present case.

Gokal Singh v. Mannu Lal, (1885) I. L. R., 7 All., 772; *Ramjiawan Sahu v. Raturaj Singh*, Weekly Notes, 1889, p. 81; *Shiam Sundar v. Amanant Begam*, (1887) I. L. R., 9 All., 234; *Kuar Dat Prasad Singh v. Nahar Singh*, (1888) I. L. R., 11 All., 257; *Abbas Ali v. Ghulam Nabi*, Weekly Notes, 1891, p. 137, and *Mata Din v. Mahesh Prasad*, Weekly Notes, 1892, p. 100.

I rely on the following cases :—

Motee Sah v. Mussumat Gokhre, S. D. A., N.-W. P., 1861, Vol. I, 506; *Moolchund v. Rugha Singh*, S. D. A., N.-W. P., 1864, Vol. I, 96; *Jooobraj Singh v. Tookun Singh*, (1870) 14 W. R., C. R., 476; *Shaikh Bunday* [5] *Hossein v. Lalla Puriag Dutt*, (1871) 16 W. R., C. R., 110; *Ram Pershad v. Buljeet Singh*, N.-W.P.H.C.Rep., 1867, 252; *Jai Ram v. Mahabir Rai*, (1885) I.L.R., 7 All., 720; *Abdul Rahim Khan v. Kharag Singh*, Weekly Notes, 1892, p. 240; *Nazir-ud-din v. Kadir Baksh*, Weekly Notes, 1894, p. 193; *Abdul Aziz Khan v. Husen Ali Khan*, Weekly Notes, 1895, p. 233; *Abdul Hai v. Nain Singh*, (1897) I. L. R., 20 All., 92; *Ghure v. Man Singh*, (1895) I. L. R., 17 All., 226, and *Mithu Lal v. Muhammad Ahmad Said Khan*, Weekly Notes, 1899, p. 19.

Strachey, C.J.—This appeal raises a question which has been discussed in many previous decisions of this Court, the effect of a perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, upon claims for pre-emption based on a custom recorded in the wajib-ul-arz, where no new wajib-ul-arz for any of the new mahals has been framed at or since the partition.

The present suit for pre-emption is based on the *wajib-ul-arz* of a village, Serai Sitam, in the Jaunpur district. The sale which it seeks to avoid was a sale of 7 bighas of land in that village, and was made on the 29th September 1896. The *wajib-ul-arz* was framed at the last settlement in 1880-81. The part of it relating to pre-emption is contained in chapter 11, which is headed "As to the rights of co-sharers among themselves based on custom or agreement." Section 13 of the chapter is headed "As to the custom of right of pre-emption." In regard to the precise English equivalents of some of the expressions used in the pre-emption clause, there has been some dispute. The following is a translation of the clause, leaving the disputed terms as they stand in the original:—

"If any *hissadar* wishes to transfer his share (*hissa*), first he will transfer it to his own brother, then to his near relatives, thirdly to owners in the village who are partners in the same *khata* (*malikan sharik khata*), fourthly to the *hissadaran deh*: if none of these purchase, then he is competent to transfer it to anyone he likes."

[6] The plaintiff claims pre-emption as one of the fourth class of pre-emptors mentioned in the clause, the *hissadaran deh*. The defendant vendee is admittedly a stranger to the village. It is not disputed that until 1888 or 1889 the plaintiff would have been entitled to pre-emption under the *wajib-ul-arz* as a *hissadar deh* in respect of such a sale as that of the 29th September 1896. Up to that time the village Serai Sitam formed a single mahal, of which both the plaintiff and the defendant vendor were co-sharers. But in 1888 or 1889 the mahal was divided by a perfect partition into three separate mahals. The plaintiff is a co-sharer in one of the new mahals: the property in suit is situate in another, in which he is not a co-sharer. No new *wajib-ul-arz* has been framed for any of the new mahals. The suit is based upon the custom of pre-emption alleged by the plaintiff to prevail in the village Serai Sitam, and upon the status of the plaintiff as a *hissadar* of the village within the meaning of the *wajib-ul-arz*. The principal defence was that no such custom existed, and that upon the partition of Serai Sitam the pre-emption clause of the *wajib-ul-arz* of 1880-81 ceased to have effect. No evidence of the custom except the *wajib-ul-arz* was produced. Upon that document the Courts below decided that the custom was proved, and that the plaintiff was entitled to pre-emption in accordance with the *wajib-ul-arz*, notwithstanding the partition. On appeal by the defendants to this Court, Mr. Justice BLAIR stated the question involved as "whether the *wajib-ul-arz* of a mahal before partition applies to each part which is partitioned off into a separate mahal" and said that there had been of late years a *cursus curiæ* according to which many, if not all, of the Judges of this Court had held in principle "that the old *wajib-ul-arz* disappears with the legal entity to which it applied." He accordingly set aside the decree of the Court below and dismissed the suit, and in this appeal under the Letters Patent we have to say whether his decision was right.

It appears to me to be incorrect to say that, upon a perfect partition of a mahal, the *wajib-ul-arz* necessarily "disappears" [7] or ceases to exist. There is no such general rule of law. The *wajib-ul-arz* forms part of the record-of-rights which the settlement officer has to frame for each mahal under section 62 of the Land Revenue Act. It is true that both that section and section 3 (1) speak of this document as the record-of-rights for the mahal, and this suggests that when the mahal is destroyed by perfect partition the record-of-rights becomes inoperative. But section 191 provides that "in all cases the existing record-of-rights shall remain in force until a new record-of-rights is

framed." It was held by this Court in *Kedar Nath v. Ram Dial*, (1893) I.L.R., 15 All., 410, that the Collector had an implied power, upon the partition of a mahal, to frame a new record-of-rights for each of the new mahals so constituted. It was further held in *Abdul Hai v. Nain Singh*, (1897) I. L. R., 20 All., 29, that it was the duty of the Collector or Assistant Collector to do so. Where, that is done, the old wajib-ul-arz is, of course, superseded. But it is often not done and, in the absence of any such new wajib-ul-arz, the old wajib-ul-arz remains in force except so far as its provisions are inconsistent with the state of things which the partition has created. That was expressly held to be "clear law" by Mr. Justice BLAIR in *Mithu Lal v. Muhammad Ahmad Said Khan*, (1898) Weekly Notes, 1899, p. 19. Then, if the wajib-ul-arz as a whole is not necessarily abrogated by a perfect partition, is there any more ground for holding that the pre-emption clause of it is so abrogated? In the case just referred to, Mr. Justice AIKMAN said that he could not draw the conclusion that the custom of pre-emption recorded in the old wajib-ul-arz had fallen into abeyance from the fact that the officer who carried out the partition omitted to prepare a new wajib-ul-arz. If the custom may still be in force, the wajib-ul-arz is still good evidence of it. Some of the decisions cited to us appear to lay down a general rule of law that, after a perfect partition, no claim for pre-emption can be successfully made on the basis of the old wajib-ul-arz. Others, going to the opposite extreme, [8] appear to regard partition as a purely fiscal arrangement concerned exclusively with the collection of the Government revenue, and having no possible bearing upon any contract or custom of pre-emption. Both views appear to me equally open to the objection that they treat as an abstract question of law what is really a question of the construction of a particular contract or the interpretation and application of a particular custom. In many of the cases the terms of the particular pre-emption clause upon which the decision properly depended are not even referred to. This mistaken way of looking at the subject appears to me to account for much of the conflict of authority which undoubtedly exists. The pre-emption clause of a wajib-ul-arz may constitute either a contract of the co-sharers or the record of a custom found by the settlement officer to prevail among them. In all that follows, I assume that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. Upon that supposition, where the clause constitutes a contract, the question whether or how far it is applicable after a perfect partition is one of the proper construction of its terms. In other words, the question is whether the intention of the parties as expressed in the clause was that the right of pre-emption should exist only so long as the village remained a single mahal, of which they were the co-sharers, or that it should be wholly unaffected by the destruction of the mahal and the severance of that co-parcenary bond, or that it should be claimable after partition by those only who continued to be co-sharers in any of the separate mahals. If the contract unmistakeably confined the right to the existing co-parcenary body, there can be no doubt that it would not survive the partition. If it contained this express covenant—"no person hereby entitled to pre-emption shall be deprived of his right by any perfect partition of the mahal"—it would be difficult to contend that partition would affect the right. If it expressly provided that all who were still co-sharers should have the right notwithstanding any perfect partition, then those who continued to be [9] co-sharers in any of the new mahals, but no others, would have a good claim. If, in any of these three cases, the terms used were less clear, the question would still be whether the same intention was to be inferred from them. Again, where the clause does not constitute a contract but records a custom, the

question is still one of its true meaning, though in this case, considering that the wording of the clause is often the composition of some ignorant subordinate whose accuracy cannot be assumed, the only safe course is to look to the substance of the thing, and not to attach undue weight to the particular expressions used. The question is whether the custom is one which necessarily presupposes the continuance of the co-parcenary body existing at the time when the clause was framed. If the custom recorded is one by which the right of pre-emption is confined to co-sharers of the then existing mahal, then it appears to me that it can no more exist in favour of others after the mahal and that particular co-parcenary body have been destroyed by perfect partition than any other custom can continue after the class among which it has always prevailed has perished. On the other hand, it is possible to imagine a custom of pre-emption which does not depend upon the continued existence of the undivided mahal and its co-parcenary body. A custom in favour of the brothers, or other near relatives of the vendor, might be an instance. Again, when a settlement officer records a custom of pre-emption in the wajib-ul-arz of a new mahal created by perfect partition of an old one, what is that custom? It cannot be something absolutely new, or the word custom would be a misnomer. It must therefore be something which existed before the new mahal and before the partition, something therefore which existed in the time of the old mahal, which has survived the partition, and which is recognized as still applicable within the new mahal. In one of the cases cited to us, and no doubt in a great many other cases, the settlement officer simply copied *verbatim* in the new wajib-ul-arz the pre-emption clause of the old one. This implies that the old custom thus continued is regarded as a custom [10] of the co-sharers, still applicable to all who, notwithstanding the partition, stand in the relation of co-sharers, not a custom necessarily confined to co-sharers while members of the co-parcenary body of the old undivided mahal. For these reasons, the decisions which treat the question of the effect of a perfect partition upon the pre-emption clause as capable of an absolute and invariable answer appear to me to be based upon a wrong principle.

• At the same time, it would be a mistake to conclude that in deciding whether a contract or a custom of pre-emption recorded in the wajib-ul-arz is applicable after a perfect partition, no general considerations are of any value. In every case we must place ourselves as nearly as possible in the position of the parties and have regard to the surrounding circumstances. In particular, one must remember what is the nature of the co-parcenary body in an undivided mahal, the nature of the wajib-ul-arz prepared by the settlement officer, the meaning and object of pre-emption, and the meaning and object of perfect partition. The most essential feature of the co-parcenary body is the joint and several responsibility of the co-sharers for the payment of the Government revenue assessed on the mahal, coupled in cases of zamindari tenure with the holding and management of the whole of the lands of the mahal by all the co-sharers in common. It is for the mahal, for the "local area held under a separate engagement for the payment of the land revenue," not for a village or other local area not being a mahal, that the settlement officer frames the wajib-ul-arz. It is meant as a record of the contracts or the customs of the co-sharers of the mahal. This being its object, it is *prima facie* unlikely to include any contract or custom which is absolutely independent of the continuance of the mahal as a fiscal and proprietary unit or of the co-parcenary body for which it is framed. Next, what is pre-emption? It is a right very closely connected with the objects of the co-parcenary system. Its essential purpose is the exclusion of strangers and the maintenance of the existing

proprietary body throughout all changes of ownership. It thus *prima facie* [11] implies that the co-parceners desire to preserve and not to destroy their mutual connection, and is *prima facie* inapplicable after that connection has been severed by a perfect partition. Lastly, what is a perfect partition? It is defined by section 107 of the Act as "the division of a mahal into two or more mahals." Its object is the exact opposite of the object of pre-emption: it is to completely break up the connection hitherto existing between the co-sharers; to put an end to their joint and several responsibility for payment of Government revenue; to destroy altogether the distinction between them and strangers. Sometimes partition is effected in order to get rid of a quarrelsome or litigious co-sharer who seeks to take more than the others consider him entitled to: *Ghure v. Man Singh*, (1895) I. L. R., 17 All., 226, at p. 238, *Mithu Lal v. Muhammad Ahmad Said Khan*, (1898) Weekly Notes, 1899, at p. 21. Sometimes it is because some of the co-sharers "do not pay their quota of the Government revenue regularly, thereby bringing liability for their arrears upon all the co-sharers of the mahal:" *Abdul Hai v. Nain Singh*, (1897) I. L. R., 20 All., at p. 94. Whatever the reason, the co-sharers can no longer get on comfortably together, and partition is the process which enables them to separate. It is therefore *prima facie* unlikely that, in the case of a contract, the co-sharers should intend that pre-emption, which implies the distinction between the co-parceners and outsiders, should continue after a partition by which that distinction is abolished. It is also unlikely, as pointed out by Mr. Justice KNOX in *Ghure v. Man Singh*, that a custom "recorded at a time when the village bore its natural and, from a Hindu point of view, proper form of an undivided village and an undivided mahal," would be applicable "when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place." I agree with him that it would require "strong proof to establish that a custom which regulated and provided for one set of circumstances still regulates and [12] provides when these circumstances have been wholly altered." I also agree with the learned Judges who decided *Abdul Hai v. Nain Singh* that "it would require very strong evidence to satisfy us that after shareholders in a mahal have applied for and obtained partition and consequent separation of their interest from other shareholders in the mahal, they intended that the other co-sharers from whom they had separated their interest should be entitled to come in and pre-empt in the new mahal, and become again their co-sharers." Some of these considerations obviously do not apply where the right is claimed after partition by persons who, having been co-sharers in the undivided mahal, are still co-sharers with the vendor in one of the separate mahals. Partition has not, as regards them, made so radical a change, they are as closely united as before, though by a new bond; there is still the distinction between them and strangers which it is the object of pre-emption to preserve. The inference which I draw is that while it depends in every case on the particular circumstances and especially upon the terms of the particular *wajib-ul-arz*, whether or how far pre-emption can be claimed under it after a perfect partition, there is a strong presumption against such a claim when made by persons who are no longer co-sharers of the vendors. Where the language of the *wajib-ul-arz* is ambiguous, this presumption may be decisive.

The earliest case which was cited to us is *Motee Sah v. Musummat Goklec*, S. D. A., N.-W. P., 1861, Vol. I, p. 506. The terms of the *wajib-ul-arz* are not stated in the report, and it does not appear whether the claim for pre-emption was based upon contract or upon custom. The judgment contains this passage:—"Now, an essential condition of the existence of a right of

pre-emption is that the parties claiming such a right shall be co-parceners in the same estate as those against whom the claim is made, a relation between the parties which is extinguished by the very operation of partition and the separate proprietorship thereby established." I infer that the wajib-ul-arz in that case confined the right of pre-emption to co-parceners [13] of the vendor, and that after the partition the plaintiff was not such a co-parcener in one of the new mahals. Upon that assumption the decision was no doubt right. If, however, the passage means that, whatever the terms of the wajib-ul-arz, no one can in any case successfully claim pre-emption who is not a co-parcener of the vendor, it is, in my opinion, too widely expressed. The unreported case of *Abdullah Khan v. Halimunnissa* (F. A. No. 69 of 1882) is cited in *Shiam Sunder v. Amanant Begam*, (1887) I. L. R., 9 All., 234, at p. 238, as laying down the rule that, despite the partition of a village into separate mahals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. No such proposition is to be found in any of the three judgments successively remanding the case, nor in the judgment finally disposing of the appeal. The precise terms of the pre-emption clause do not appear from the paper-book, but it was a contract giving the right to "sharers" or "owners." The plaintiffs did not, after the partition, own any share in the new mahal in which the property sold was situate. The remand order of the 22nd April 1884, contained this passage :—

"In our opinion the wajib-ul-arz, never having been withdrawn, is still binding, and the plaintiffs-appellants are entitled to come into Court to enforce its terms, if they can show themselves to be, and this is admitted that they are, co-sharers in the villages of Khushalpur and Majri." As, however, the High Court apparently accepted the lower Court's finding on remand that the villages in question had not been partitioned in the manner and with the formalities required by the Land Revenue Act, I cannot regard that case as instructive. The next case is *Gokal Singh v. Mannu Lal*, (1885) I. L. R., 7 All., 772, decided by PETHERAM, C.J., and MAHMOOD, J., in 1885. The pre-emption clause is not set out in the report, but apparently it contained a contract, and gave the right of pre-emption to persons described in the report as "shareholders" or "partners" in the "village," but in the Subordinate Judge's judgment as "co-sharers" or [14] "co-parceners." In the undivided village the two plaintiffs held a one-third share, and the vendor and another person one-third each. There was a perfect partition by which each one-third share was divided from the others and made a separate mahal. After the partition, therefore, the plaintiffs were still co-sharers, but no one was a co-sharer of the vendor, who was the sole proprietor of one of the separate mahals. The sale to which the suit related was of the whole of that mahal. The judgment of PETHERAM, C.J., appears to have been based, first on the use of the word "village" as distinguished from "mahal," and secondly, on the view that the word "shareholder," "partner" or the like would, notwithstanding the partition, still apply to persons "living in" the village and sharing in the common use of roads, drains and other public things. This interpretation of the word shareholder as referring not to proprietary interest but to residence and participation in the use of roads and drains is very singular. MAHMOOD, J., whom the report represents as simply concurring with PETHERAM, C.J., delivered a separate written judgment, which appears to have escaped the Reporter's notice. He apparently held that the partition was not "perfected" or complete so as to constitute the separate mahals until a new wajib-ul-arz had been framed for each divided portion of the original mahal. So far as I know, there is no other authority for that view. The learned

Judge further held that the pre-emption clause of the old wajib-ul-arz, not having been superseded by any new covenant, was still in force. "The mere apportionment of revenue and the disavowance of the liability to that revenue could not, *ipso facto*, defeat a covenant relating to pre-emption entered into by all the co-sharers for the time being, and which covenant ran as an incident of the tenure of the lands owned by them before such partition. In the second place, the terms of the pre-emption clause of the wajib-ul-arz speak not of the co-sharers of the mahal but of the village, and the distinction between these two terms seems to me sufficiently obvious, as explained by the learned Chief Justice." It appears to me that the whole question was whether the plaintiffs, [16] when they brought their suit, were co-sharers of the village within the meaning of the contract. That depended on whether the pre-emption clause meant by co-sharers of the village all persons owning shares within any part of the village area, or all whose shares were co-extensive with the whole of that area, or all who, whether in the whole or in part of the village, were co-sharers of the vendor. If it had the first meaning, then the plaintiffs, being co-sharers of one of the mahals into which the village was divided, were entitled to pre-emption. If it had the second meaning, neither the plaintiffs nor anyone else were entitled to pre-emption, for the class of co-sharers of the village in that sense ceased to exist when the partition was made. If it had the third meaning, the plaintiffs were not entitled to pre-emption, for they were not co-sharers of the vendor, who was the sole proprietor of his mahal. The next case is *Jai Ram v. Mahabir Rai*, (1885) I. L. R., 7 All., 720. The terms of the wajib-ul-arz are not stated in the report. From the paper-book it appears that the pre-emption clause gave a right of pre-emption (apparently by custom) "to brothers and sharers of the thoke, and if the thokewallah refuses, then to other shareholders. There was a partition by which one of the pattis of the mahal was divided from the rest and made a separate mahal. A new wajib-ul-arz was framed for the new mahal, giving a right of pre-emption to the co-sharers of that mahal, but not to the co-sharers of the pattis remaining with the original mahal. There was a sale of property, part of which was in the new mahal and part in the other pattis. A co-sharer in those pattis, but not in the new mahal, sued for pre-emption, excluding from the suit so much of the property sold as was situate in the new mahal. The defendant pleaded that, according to certain rulings of this Court, a suit for pre-emption could not be maintained in respect of part only of the property sold. The plea was overruled and the suit decreed, on the ground that as the suit included all the property sold which the plaintiff was entitled to pre-empt, the rulings referred to were inapplicable. MAHMOOD, J., held that the effect of the partition [16] was to exclude property in the new mahal from the operation of the old wajib-ul-arz, and to place it under the new wajib-ul-arz which gave the plaintiff no right of pre-emption. OLDFIELD, J., without referring to the new wajib-ul-arz, held as to the old one that "the condition as to pre-emption only affected the shareholders of the mahal so long as they remained shareholders, and ceased to have effect upon those shareholders and their property who separated themselves and their property by forming a separate mahal. The plaintiff could, after the separation, exercise no right of pre-emption against and in respect of shareholders and property so separated, nor could the separated shareholders exercise any right of pre-emption against the plaintiff and his property remaining in the mahal from which they had separated." It is noticeable that no suggestion appears to have been made that the partition affected the plaintiff's right under the old wajib-ul-arz to pre-empt the property not situate in what was called

"the new mahal." The judgments treat the partition not as destroying the "old mahal"—that is, the undivided mahal—but as merely detaching from it and converting into a new and separate mahal one of its pattis. It follows, however, from the definition in the Land Revenue Act of perfect partition as "the division of a mahal into two or more mahals," that after the partition both the mahals were "new," the old mahal with its co-parcenary body had disappeared, and for it were substituted two new mahals, each with a separate co-parcenary body of its own. Whether in that view the right of pre-emption given by the old wajib-ul-arz to the co-sharers of the original undivided mahal could be claimed by a co-sharer of the larger of the two mahals into which it was divided, was a question not considered by the Court. In *Shiam Sundar v. Amanant Begam*, (1887) I. L. R., 9 All., 234, decided by STRAIGHT and TYRRELL, JJ., in 1887, the pre-emption clause was described as a contract. At the time when the wajib-ul-arz was framed, the plaintiff was a co-sharer with the vendor in the three villages to which it related. It gave a right of pre-emption to "shareholders" [17] or "co-sharers" in the village or mauza. Afterwards there was a perfect partition by which the plaintiff's shares were formed into a separate mahal, of which he was the sole proprietor, but no new wajib-ul-arz was made. The judgments do not discuss the terms of the wajib-ul-arz upon which the claim was based. They state the question for decision as "whether, this partition having taken place, the conditions of the wajib-ul-arz which subsisted prior thereto, and which has not been replaced by another, are still effectual and binding on all the persons who were originally co-sharers in the villages." Upon this they observe:—"The question is by no means without difficulty, and, were it *res integra*, we should have had some doubts in deciding it. There are, however, two rulings of Division Benches of this Court—one (*Gokal Singh v. Mannu Lal*, (1885) I. L. R., 7 All., 772, and the other an unreported case, F. A. No. 69 of 1882—the former of which has been followed in the present suit by the Court below, that are directly in point. We are not prepared, as at present advised, to reconsider the rule therein laid down, to the effect that despite the partition of the village into separate mahals, the existing wajib-ul-arz at the time of partition must be presumed to subsist and govern the separate mahals until it is shown that a new one has been made. We may add that this view is supported by the terms of the second paragraph of section 191 of the Revenue Act of 1873." In this passage the effect of the two cases cited is not, in my opinion, accurately stated. No such rule or presumption is laid down in either. The second paragraph of section 191 only provides that the existing record-of-rights shall remain in force until a new record-of-rights is made. It implies no presumption as to the construction to be placed on the terms of the wajib-ul-arz, nor as to whether co-sharers in the separate mahals, or even a sole proprietor of one of them, can claim the benefit of a pre-emption clause in favour of co-sharers in the undivided mahal. The case of *Kuar Dat Prasad Singh v. Nahar Singh*, (1888) I. L. R., 11 All., 257, decided by STRAIGHT and MAHMOOD, JJ., in 1888, does not throw much [18] light on the subject. There was no question of the application after partition of a wajib-ul-arz framed for an undivided mahal. There was a perfect partition of a village into two separate mahals, for each of which a wajib-ul-arz was framed. The suit was based on one of these wajib-ul-arzes; it was brought by a co-sharer in the mahal, though not in that patti of the mahal in which the property sold was situate; and the question was whether, according to the pre-emption clause, such a co-sharer was entitled to preference over the vendee who was a co-sharer in a patti of the other mahal. The judgment was based on the terms of the wajib-ul-arz, but it contained this passage:—"It must be distinctly understood that this

view of this particular wajib-ul-arz in no way ignores any other decision that may have been passed in cases where one wajib-ul-arz having existed for the purpose of a common village area, and that village area having been divided into separate revenue areas, and no new wajib-ul-arz having been drawn up, such wajib-ul-arz has been held to apply generally to the new area. The principle upon which that view of the law is based is to be found stated in the case of *Gokal Singh v. Mannu Lal*, and this principle, which is further elaborated in another ruling at page 720 of the same volume (*Jai Prasad v. Mahabir Rai*) is that this pre-emptive right runs with the land, and the division of that land for the purposes of the revenue in no way affects any covenant or agreement existing between the co-sharers." That is, in my opinion, a misleading description of the effect of perfect partition, an inaccurate account of the case of *Gokal Singh v. Mannu Lal*, and a most extraordinary misconception of the judgments in *Jai Prasad v. Mahabir Rai*. The learned Judges in the latter case did not elaborate any principle stated in the former, and, so far from holding that the pre-emptive right ran with the land and that partition did not affect any agreement between the co-sharers, held, as nearly as possible, the very reverse.

In *Ramjiawan Sahu v. Raturaj Singh*, Weekly Notes, 1889, p. 81, decided by STRAIGHT and TYRRELL, JJ., the question was whether under the [19] wajib-ul-arz of an undivided village, which gave rights of pre-emption to "co-sharers," the plaintiff as a co-sharer of one only of the two separate mahals into which the original mahal had been divided, could pre-empt property in the other. No new wajib-ul-arz had been framed. The learned Judges held that "the right of pre-emption was one created by agreement between the co-sharers of the village, and constituted a covenant which attached to and ran with the land. The mere fact that for purposes of revenue the village has been divided into two revenue-paying areas does not put an end to that covenant, which still attaches to all the land which formed a part of the original village unit, and will until it is abrogated. In support of this view, we may refer to I. L. R., 7 All., 772." I cannot agree either with the conception of pre-emption as a covenant running with the land, or with the conception of a perfect partition as an exclusively fiscal operation involving no material change in the pre-emptor's status as a co-sharer, or with the view that either conception is supported by *Gokal Singh v. Mannu Lal*. To describe pre-emption as a covenant running with the land is to misapply a technical term of English real property law. To describe perfect partition as concerned exclusively with "purposes of revenue" is to ignore half its effect. In *Abbas Ali v. Ghulam Nabi*, Weekly Notes, 1891, p. 137, KNOX, J. held in substance that the partition of a village consisting of a single mahal into two separate mahals, in one of which the plaintiff and the vendor were co-sharers, and in the other the vendee was a co-sharer, did not render the previously framed wajib-ul-arz inapplicable, and that under it the vendee was equally entitled with the plaintiff as a co-sharer of the vendor. The learned Judge did not discuss the effect of the word which he translated "shareholder," but merely observed that the case was one in which the principle which should guide the Court was that contained in *Gokal Singh v. Mannu Lal*, and in another case which does not seem very applicable. The circumstances of the next case, *Mata Din v. Mahesh Prasad*, Weekly Notes, 1892, p. 100, were peculiar. There [20] was a village or mauza originally forming a single mahal, and the wajib-ul-arz gave a right of pre-emption to "hissadaran" (translated by the learned Judge as "co-sharers") not of the "mahal" but of the "mauza." There was a perfect partition of the village into three mahals, for each of which a new wajib-ul-arz was framed, and in each the pre-emption clause was

copied *verbatim* from the old wajib-ul-arz. At that time one of the new mahals belonged to a single owner. Upon the sale of property in that mahal a suit for pre-emption was brought by a person who was a co-sharer in another of the new mahals. Mr. Justice MAHMOOD held that the plaintiff was entitled to pre-emption as a co-sharer of the mauza, notwithstanding the partition and the fact that he was not a co-sharer of the vendor in the mahal where the property was situate. Although the judgment refers to some of the previous cases, it treats the question as strictly one of the intention of the parties to the contract contained in the wajib-ul-arz. The learned Judge held that, from the use in that wajib-ul-arz of the expression "co-sharers of the mauza" as distinguished from the mahal, from its exact reproduction of the pre-emption clause of the wajib-ul-arz of the undivided village, and from the circumstance that when the new wajib-ul-arzes were framed one of the new mahals belonged to a single owner, it was to be inferred that the parties to those instruments intended to preserve the right of pre-emption on its original footing as a right to be enjoyed by all who were formerly co-sharers of the mauza, notwithstanding the partition. It was as if each new wajib-ul-arz had said, "the right of pre-emption shall belong not only to the co-sharers of this mahal but to all persons who, prior to the partition, could have claimed pre-emption under the old wajib-ul-arz as co-sharers of the undivided mauza." In other words, they desired to confine the effect of the partition as nearly as possible to "fiscal purposes as to the payment of Government revenue," and to retain some distinction between the old co-parcenary body and total strangers to the village. Whether Mr. Justice MAHMOOD's conclusions [21] in that particular case were correct or not, I cannot doubt that his method of deciding it upon the construction of the contract contained in the wajib-ul-arz was the right one.

In *Angan Lal v. Hamidulnissa* (S. A. No. 1249 of 1892), the question was discussed in the judgment of TYRRELL and BLAIR, J.J., remitting certain issues on the 29th June 1894. The claim for pre-emption was based on the wajib-ul-arz of a mahal consisting of 12 biswas only of a mauza. In that mahal the plaintiff and the vendors were co-sharers. The wajib-ul-arz gave the right of pre-emption by contract to sharers (*sharkai*) in the mahal. There was a perfect partition by which the 12 biswas mahal was divided into four separate mahals. In one of these, in which the property in question was situate, there were several co-sharers, including the vendors, but not the plaintiff. Of another of the four, the plaintiff was the sole proprietor. No new wajib-ul-arz was framed. After the partition, the vendors sold some of the land in their new mahal to a stranger. The plaintiff sued for pre-emption on the basis of the old wajib-ul-arz. I think there can be no doubt that the suit was rightly dismissed. The plaintiff was not a *sharik* or sharer in the mahal, within the meaning of the wajib-ul-arz. The class of sharers in that mahal had ceased to exist with the mahal itself. The plaintiff was not even a *sharik* or sharer in the new mahal in which the property sold was situate. The Court distinguished *Gokal Singh v. Mannu Lal*, *Kuar Dat Prasad Singh v. Nahar Singh*, *Ramjiawan Sahu v. Raturaj Singh* and *Abbas Ali v. Ghulam Nabi*, on the grounds that in those cases the mauza and the mahal were originally conterminous; that in them the wajib-ul-arz gave rights of pre-emption not to co-sharers in the mahal but to shareholders in the mauza, and that therefore the right there survived the partition of the mahal into separate mahals for which no new wajib-ul-arzes were framed. In *Ghure v. Man Singh*, (1895) 1. L. R., 17 All., 226, decided in 1895, the wajib-ul-arz of a village forming a single mahal gave the right of pre-emption to "*hissadaran deh*," the same expression as is used in [22] the wajib-ul-arz in the present

case. There was a perfect partition of the village into three separate mahals, and for each mahal was framed a new wajib-ul-arz which gave no right of pre-emption to sharers in the other mahals. A suit for pre-emption based on the old wajib-ul-arz was brought by a co-sharer of one of the separate mahals to avoid a sale of land situate in another of them. Two questions arose. The first was whether the new wajib-ul-arz was prepared in accordance with law so as to govern the rights of the parties. The second was whether the old wajib-ul-arz was still operative, notwithstanding the partition, and whether the plaintiff was entitled to pre-emption under its provisions. Upon the first question, the Court held that the new wajib-ul-arz was a valid document, and that, as it gave the plaintiff no right of pre-emption, the suit failed. Upon the second they held that the plaintiff could not, after the partition, successfully claim pre-emption on the basis of the old wajib-ul-arz. In reference to the argument for the plaintiff based on the words "*hissadar deh*" Mr. Justice KNOX made the following important observations :—

"We are dealing with a village which bears a Hindu name, the parties before us are Hindus, and the custom, if there be one, of pre-emption, in so far as it extends, is a custom superseding general law. In examining the terms in which it is recorded, we cannot forget that it was recorded at a time when the village bore its natural, and, from a Hindu standpoint, proper form of an undivided village and an undivided mahal. The term "*hissadar deh*" as then used would apply to all who could claim to hold a share in land within a well-defined ring-fence in which all were shareholders, and at a time when there existed no intention of the village brotherhood being separated or the land being broken up into distinct parcels, in which some only and not all the village brotherhood would hold a share. It is more than difficult to say that those who then made the record would have recorded that the custom was one which should prevail when the relations of persons and property then subsisting had undergone such a radical change as necessarily ensues when perfect partition takes place."

[23] The learned Judge proceeded to distinguish *Gokal Singh v. Mannu Lal*, *Mata Din v. Mahesh Prasad*, *Kuar Dat Prasad Singh v. Nahar Singh* and *Shiām Sundar v. Amanant Begam*, with reference to the special circumstances of those cases. He concluded as follows :—"The result then is that the document upon which the respondents base their right, and which was the only evidence which they produced in support of that right, is a document prepared at a time when circumstances wholly different from those now in existence prevailed, and which never contemplated the existing state of things. We are not prepared to hold that it is sufficient to establish that the custom which did prevail, if there be such a custom, can be held to be a custom governing and ruling the parties in the new and altered state of things." Mr. Justice AIKMAN, after holding that the new wajib-ul-arz would supply a sufficient answer to the suit, expressly stated that this would be enough to decide the case. What follows is therefore *obiter*. He proceeded to discuss the question "whether after a partition an owner of land in one mahal can assert a right of pre-emption when a sale is made of property situated in another mahal." After observing that it had never been held that a right of pre-emption disappears with an *imperfect* partition, he referred to *Motee Sah v. Musammat Goklee* and *Jai Ram v. Mahabir Rai* in support of the view that "it is different in the case of perfect partition." He dissented from the decision in *Gokal Singh v. Mannu Lal* and expressed the opinion "that unless at the time of partition a right of pre-emption is specifically reserved by the co-sharers in respect of lands lying in the other mahals, such right of pre-emption is not to be presumed from the mere fact that, when the village formed but one mahal, the co-sharers had

pre-emptive rights against each other." I agree that there is no such presumption, but in deciding whether the right has been established the terms of the *wajib-ul-arz* and the state of things existing when it was framed, as well as that existing at that time of partition, must, I think, be considered. However, there is nothing in Mr. Justice AIKMAN'S [24] judgment to the contrary, and he expresses no disagreement with Mr. Justice KNOX. The decision in that case was followed by Mr. Justice AIKMAN in *Abdul Aziz Khan v. Hasen Ali*, Weekly Notes, 1895, p. 233, and by Mr. Justice KNOX in *Shuh Bindraban Das v. Dani Ram* (S. A. No. 675 of 1897). The claim in the former case appears to have been based on custom. The judgment holds in substance that, after perfect partition, the benefit of a custom of pre-emption recorded in the old *wajib-ul-arz* as prevailing among the co-sharers of the undivided mahal could be claimed by a co-sharer of one of the separate mahals in respect of property situate therein, but not in respect of property situate in another mahal of which he was not a co-sharer. The reason of this distinction must be that in the former case, but not in the latter, the claim is made by a co-sharer of the vendor. In neither case, however, is it made by a co-sharer of the mahal, to which alone the *wajib-ul-arz* presumably referred. Whether the distinction was justified or not depends, in my opinion, upon the terms of the *wajib-ul-arz*. It would not, I think, be safe to assume that a custom prevailing among the co-sharers of mahal A would, after the destruction of that mahal and of the co-parcenary body connected with it, necessarily apply to the co-sharers of mahal B or mahal C, into which A has been partitioned. In this respect Mr. Justice AIKMAN'S decision appears to be inconsistent with that of Mr. Justice KNOX in *Shuh Bindraban Das v. Dani Ram*, which, however, also purports to follow *Ghure v. Man Singh*. For in the case before Mr. Justice KNOX, the claim for pre-emption based on the old *wajib-ul-arz* was made by a person who, after perfect partition, was a co-sharer of the vendor in one of the separate mahals. He claimed as coming within words which the Court of First Instance translated as "co-sharers in the order of nearness, with regard to their holding shares in the village." No new *wajib-ul-arz* was framed. The vendees were admittedly strangers. Mr. Justice KNOX confirmed the decree of the Lower Appellate Court dismissing the suit. His judgment treats *Ghure v. Man Singh* as not merely stating certain presumptions [25] of fact or considerations as to what is probable in given circumstances, but as giving a general answer in the negative to the question "whether a *wajib-ul-arz* which was prepared at a time when the village out of which two separate mahals have now been carved by perfect partition, and for each of which separate mahals no *wajib-ul-arz* of any kind has been framed, governs the co-sharers in the two new mahals upon a question of the right of pre-emption based upon a covenant said to be contained in the old *wajib-ul-arz*." In *Abdul Hai v. Nain Singh*, (1897) I. L. R., 20 All., 92, the terms of the *wajib-ul-arz* do not appear from the report or from the paper-book. It appears, however, to have recorded a custom of pre-emption as prevailing in the undivided village. The village was divided by perfect partition into two mahals consisting respectively of 15 biswas and 5 biswas. No new *wajib-ul-arz* was framed. The whole 5 biswas mahal belonged to the defendant vendor, and he sold it to strangers. The owner of a share in the 15 biswas mahal only sued for pre-emption on the basis of the old *wajib-ul-arz*. The High Court on appeal dismissed the suit. The Judgment of EDGE, C.J., and BLAIR, J., refers with approval to *Ghure v. Man Singh* and *Angan Lal v. Hamid-ul-nissa*. The principle on which it is based is the improbability, having regard to the usual objects and motives of shareholders obtaining perfect partition of a mahal, that they should, after partition, intend that the other co-sharers from whom they had separated their interest should

be entitled to come in and become again their co-sharers. The last reported case is *Mithu Lal v. Muhammad Ahmad Said Khan*, Weekly Notes, 1899, p. 19, decided by BLAIR and AIKMAN, JJ. The suit was based on a pre-emption clause recording a custom of pre-emption in favour of "co-sharers in the village." The village, at the time when the wajib-ul-arz was framed, was an undivided mahal. By a perfect partition it was afterwards divided into two separate mahals of 15 and 5 biswas respectively. No new wajib-ul-arz was framed. The plaintiffs and the vendors were co-sharers in the 5 biswas mahal, in which the property was sold. The vendee [26] was sole proprietor of the 15 biswas mahal, and his only connection with the other was that he owned in it certain rent-free land. His main defence to the suit was that the plaintiffs had no preferential right because he was himself a "co-sharer in the village" within the old wajib-ul-arz, notwithstanding the partition. The High Court held in substance (1) that the old wajib-ul-arz and the old custom still remained in force in so far as they were not inconsistent with the state of things created by the partition, (2) that as in consequence of the partition the defendant had ceased to be a "co-sharer in the village" with the vendor, and was not a co-sharer in the 5 biswas mahal, he had not equal rights with the plaintiffs, and (3) that the plaintiffs were entitled to pre-emption under the old wajib-ul-arz. So far as this decision rejected the defendant's claim to the right of pre-emption, I have no doubt that it was right. But what about the claim of the plaintiffs? The Court in decreeing the suit assumed that the plaintiffs, at all events, were entitled to pre-emption under the old wajib-ul-arz, notwithstanding the perfect partition. Apparently they assumed it because the plaintiffs were admittedly co-sharers with the vendor in the 5 biswas mahal in which the property sold was situate. In other words they took for granted that co-sharers in one of the separate mahals were "co-sharers in the village" within the meaning of the wajib-ul-arz. It is likely enough that they were right, but they do not discuss the question. All depends on what the wajib-ul-arz meant by "co-sharers in the village." If it included all persons who might thereafter be co-sharers in any part of the village, the decision was right. If it meant all persons who were co-sharers in the entire undivided village for which the wajib-ul-arz was framed, the decision was wrong, for the plaintiffs, after partition, were no more co-sharers of the village in that sense than the defendant vendee. As a matter of fact the only co-sharers in the village at the time when the wajib-ul-arz was framed were co-sharers of the undivided village.

In the present case the whole question is, in my opinion, whether a *hissadar* has transferred his share within the meaning [27] of the wajib-ul-arz, and whether the plaintiff is a *hissadar deh* within the fourth category of pre-emptors. Taking first the word *deh*, it is, I think, virtually equivalent to *mauza*. It means a village in the sense of a definite local area, the actual village, with the lands belonging to it: Wilson's Glossary of Judicial and Revenue Terms, p. 141, Elliott's Supplementary Glossary of Terms used in the North-Western Provinces, Vol. ii, p. 283. It does not mean a mahal, and has no necessary reference to the fiscal unit. So far I agree with the argument on behalf of the plaintiff. The next question is, what is a *hissadar* of the village? The learned pleader contended that *hissadar* did not here mean a "co-sharer" of a mahal in the sense in which that term is used in the Land Revenue Act, but merely "the holder of a share." He argued that if co-sharers, in the sense of persons owning shares in the mahal formed by the undivided village, had been intended, some such word would have been used as "*sharik-i-mahal*," the term used for co-sharers in the official vernacular translation of the Land Revenue Act, or else "*sharik-i-hissa*." He laid stress on the expression "*malikan*

sharik khata " in the third category of pre-emptors mentioned in the *wajib-ul-arz* as indicating that, where jointness of interest was signified, the word "*sharik* " was employed. According to this argument, a *hissadar deh* merely means one who owns or holds a share within the area of the village. If that is the meaning, then, notwithstanding the partition, the plaintiff is entitled to pre-emption, for the *deh* or village still remains, and he is still a *hissadar*, or owner of a share, within its area. On the other hand, it was contended for the defendants that *hissadar* means not merely the owner of a share, but a "co-sharer," and that *hissadar deh* means a co-sharer of the entire village for which the *wajib-ul-arz* was framed. If that is the meaning, then, as the effect of the perfect partition was to destroy the class of *hissadaran deh* altogether, neither the plaintiff nor anyone else can now claim pre-emption as a member of it.

The result of the argument is, I think, to show that the word *hissadar* taken by itself, and without reference to any context [28] is ambiguous. In Wilson's Glossary it is translated "a shareholder, a sharer, a co-parcener, one who pays his share of revenue to a zamindar or to the State." Mr. *Durga Charan* has pointed out in the written statement of one of the defendants and in the deposition of a witness instances of the description of persons as *hissadars* of the village Serai Sitam, though, since the partition, no one has been a co-sharer of the entire village. All depends, I think, upon the context. There are two main considerations which have led me to the conclusion that in this *wajib-ul-arz* *hissadar deh* means a co-sharer of the undivided village for which the *wajib-ul-arz* was framed. The first is that the word "*hissadar*" as used in the fourth category of pre-emptors must be construed in the same sense as the same word in the opening words of the clause "if any *hissadar* wishes to transfer his share (*apna hissa*). " The word "*hissadar*" is there used without the word *deh*. Considering that a *wajib-ul-arz* is framed under the Land Revenue Act for a mahal, and that its chief purpose is to record the usages of co-sharers of the mahal in the sense of the Act, I think there is a strong presumption that the word "*hissadar*" when used in such a document means, in the absence of other expressions implying a different meaning, a co-sharer in that sense, a person jointly and severally responsible to Government for the revenue for the time being assessed on the entire mahal for which the *wajib-ul-arz* was framed, and, in cases of zamindari tenure, having a joint and undivided share in the whole of that mahal. The opening words of the clause mean therefore, in my opinion, "if any co-sharer of this mahal wishes to transfer his share therein." If so, the subsequent words "*hissadaran deh*" mean "co-sharers of the undivided village," not "owners of shares in any sub-division of the village." The second consideration is this. We are interpreting and applying a particular custom of which the plaintiff claims the benefit. In considering who is entitled to the benefit of a custom it is essential to see who are the persons among whom it has in fact habitually prevailed. It cannot be claimed by anyone [29] who is not a member of the class thus determined. Now there can be no doubt as to what was the class of persons who at the time when the *wajib-ul-arz* was framed, habitually exercised the right of pre-emption by virtue of the custom. They were the co-sharers of the undivided mahal which the village Serai Sitam then formed and no others. There was no distinction between shareholders in the village and co-sharers of the entire village; there was only a single class of co-sharers. That is the only class among whom the custom actually prevailed, and to whom therefore the right belonged. It is now sought to apply the custom for the benefit of the plaintiff, who stands in a totally different relation to the village, to the vendor, and to the property

sold. He is not a co-sharer of the entire village. He is not a member of the class who exercised the right of pre-emption at the time when the custom was recorded. He is a member of a class which only came into existence through the partition—persons who have shares in a particular sub-division of the village. He is not even a co-sharer of the vendor. To allow him to pre-empt under the old *wajib-ul-arz* would be, in my opinion, to change the custom while professing to apply it.

For these reasons I am of opinion that the sale which the suit seeks to avoid was not a transfer within the meaning of the *wajib-ul-arz*, that the plaintiff is not entitled to pre-emption as a *hissadar deh*, and that his suit and this appeal must be dismissed with costs in all Courts.

Knox, J.—I concur in all that the learned Chief Justice has written, and have nothing more to add.

Burkitt, J.—I am of the same opinion.

Banerji, J.—I have arrived at the same conclusion as the learned Chief Justice.

A claim for pre-emption not founded on Muhammadan law must be based on custom, or contract, or both. A *wajib-ul-arz*, in so far as it relates to pre-emption, is the record of the custom of pre-emption which prevails in the village or *mahal*, or of the contract by which the co-sharers have agreed to be bound: [30] when therefore a *wajib-ul-arz* is referred to as the foundation of a claim for pre-emption, the real basis of the claim is the custom or contract which is evidenced by the *wajib-ul-arz*. Even if the *wajib-ul-arz* has become inoperative as a part of the record-of rights, it does not necessarily follow that the custom or contract embodied in it has ceased, and that a suit cannot be brought upon the basis of such custom or contract. It seems to me that the conflict of opinion which arose in the numerous cases cited to us at the hearing and considered in detail by the learned Chief Justice was to a great extent due to the fact that in many of those cases the provisions of the *wajib-ul-arz* were treated as representing a contract between the co-sharers, whereas in fact they were, and professed to be, the record of a custom prevailing in the particular village or *mahal*. It was, I suppose, in consequence of this disregard of the exact nature of the claim that it was laid down in some of those cases that after a perfect partition has been effected a co-sharer in one *mahal* is not entitled to pre-empt property in another *mahal* "unless at the time of partition there has been some specific arrangement by which reciprocal rights of pre-emption have been maintained between the co-sharers of the different *mahals*." In my opinion the mere fact that a perfect partition has taken place does not abrogate a custom or contract as to pre-emption which was in force before partition. If after partition a new *wajib-ul-arz* has been prepared recording a custom or contract different from the custom or contract embodied in the old *wajib-ul-arz*, the presumption will be that the custom which obtained in the village or the *mahal* at the time of the preparation of the old *wajib-ul-arz* has fallen into desuetude, and a new custom has sprung up, or that the co-sharers have set aside the old contract and entered into a new one. But where a fresh *wajib-ul-arz* has not been prepared at partition, it does not follow, as a matter of law or principle, that the custom or contract in force before partition is no longer to have effect and operation. As observed by the learned Chief Justice, the question in each case is that of the construction of the nature of the particular custom or [31] contract on which the claim for pre-emption is based, and whether the custom or contract can apply to the altered state of things which has come into existence since a perfect partition has been effected.

In the case before us the *wajib-ul-arz* which was referred to as the basis of the claim professes to be the record of a custom and not of a contract. What we have to consider is whether under that custom the plaintiff has a preferential right of pre-emption. It is admitted that the plaintiff does not belong to the first three classes of pre-emptors mentioned in the *wajib-ul-arz*, nor does he come under the fourth category. Since partition he has admittedly ceased to be a co-sharer of the vendor. He no doubt holds a share in the village. But, in my opinion, the true construction of the custom as recorded in the *wajib-ul-arz* is that it is only such a shareholder as is also a co-sharer who has the right of pre-emption as a pre-emptor of the fourth class. At the time when the *wajib-ul-arz* was prepared all the shareholders were also co-sharers. The custom which was embodied in the *wajib-ul-arz* evidently had reference to that description of shareholders. Therefore by virtue of such a custom the plaintiff, who is the holder of a share in the village, but not a co-sharer of the vendor, has no right of pre-emption and his suit has been properly dismissed. I would dismiss this appeal with costs.

Aikman, J.—The question raised in this appeal is whether, when no new *wajib-ul-arz* has been prepared on the perfect partition of a mahal, a claim for pre-emption can be maintained on the basis of the old *wajib-ul-arz* framed for the former mahal, which has by partition been broken up into two or more mahals. I agree with the learned Chief Justice in holding that it is incorrect to say that upon partition the former *wajib-ul-arz* necessarily disappears or ceases to exist. If a fresh *wajib-ul-arz* is prepared for each of the new mahals the old *wajib-ul-arz* is thereby superseded, but until this is done the old *wajib-ul-arz* must be considered as in force, but only so far as it is applicable to the altered state of things.

[32] The cases in this Court which held that, because, under a *wajib-ul-arz* in force before partition there had been a right of pre-emption amongst those who were then co-sharers of the village, the same right subsisted after partition amongst those who owned shares in the different mahals of the village, lost sight, it appears to me, of the material alteration in the circumstances brought about by the partition.

Where the *wajib-ul-arz* of an undivided mahal, whether reciting a custom or embodying a contract, lays down that a right of pre-emption prevails amongst the "shareholders" of the mahal, it refers to a body of men between whom there is this common bond that they each own a fractional share of an integer made up of all the shares held by each, in virtue of which ownership they incur reciprocal liabilities and are entitled to reciprocal rights. When this common bond has disappeared it cannot be assumed that the reciprocal rights and liabilities which formerly existed are still in force. Where the old *wajib-ul-arz* recites the existence of a custom amongst a body of men between whom a common link subsists, I do not see how, after a perfect partition, it can reasonably be held that the custom continues to prevail amongst those between whom that common link is no longer in existence. Where, however, the *wajib-ul-arz* embodies a contract, I concur with the learned Chief Justice in holding that the question whether, in the altered state of things, the contract is still in force, must depend on the language of the old *wajib-ul-arz*. It is quite conceivable that the old *wajib-ul-arz* might set forth an express agreement that no future partition would destroy existing rights of pre-emption. But where there is no such express contract, and the old *wajib-ul-arz* merely records a right of pre-emption as existing by way of a contract amongst those who are *hissadars* of the village, the inference

is that the language of the *wajib-ul-arz* refers to persons who stand to one another in the mutual relation of owning shares in the same integer.

In the present case the claim of the plaintiff was based on a clause in the *wajib-ul-arz* which occurs in a chapter dealing with [33] the rights of co-sharers amongst themselves. According to this clause a *hissadar* could not sell his share to an outsider until he had first offered it to the other shareholders in the village (*hissadaran deh*). This was the record of a custom. From the language used, the inference I draw is that the custom was one which prevailed amongst those who each owned a fractional share or *hissa* of one undivided estate, and cannot be held to subsist amongst those between whom there is now no such common bond. To use the words of OLDFIELD, J. :—"The condition of pre-emption only affected the shareholders of the mahal as long as they remained shareholders, and ceased to have effect on those shareholders and their property who separated themselves and their property by forming a separate mahal," (1885) I. L. R., 7 All., 720, at p. 730. The plaintiff in this case owns no property in the mahal in which the share sold is situated, and cannot therefore be held to be standing in the relation of *hissadar* to the *hissadar* who has sold.

For these reasons I think the plaintiff's suit was properly dismissed by our brother BLAIR, and I would dismiss this appeal with costs.

Appeal dismissed.

NOTES.

(The Privy Council approved this decision in (1915) 37 All., 129.

This decision was followed in:—(1904) 1 A.L.J., 33; (1905) 2 A.L.J., 261; (1905) 27 All., 602; (1907) Punjab Record, 133; (1907) 29 All., 295; (1909) 32 All., 63; 6 A.L.J., 958; (1909) 1 I.C., 504; (1909) 6 A.L.J., 715; 3 I.C., 534; (1909) 3 I.C., 927.

See also (1905) 28 All., 286; (1906) 28 All., 614; (1909) 31 All., 274; (1910) 7 A.L.J., 133; (1911) 33 All., 605; 12 I.C., 98; (1912) 34 All., 434; 16 I.C., 361.]

[22 All. 33]

The 12th June, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, MR. JUSTICE
BURKITT AND MR. JUSTICE AIKMAN.

Bhagwanta and others.....Plaintiffs
versus

Sukhi and others.....Defendants.*

Hindu law—Reversioners—Suit to set aside alienation by Hindu widow—similar suit barred by limitation as against a prior reversioner—suit by subsequent reversioner not thereby barred—Limitation—Act No. XV of 1877 (Indian Limitation Act), section 7, sch. ii, Art. 120.

Held that, where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one such reversioner can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being [34] to contest an alienation or an adoption by the widow is allowed to become

* Second Appeal No. 879 of 1896, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 13th July 1896, confirming a decree of Maulvi Siraj-ud-din Ahmad, Subordinate Judge of Agra, dated the 23rd April 1896.

barred by limitation as against him, this will not bar the similar rights of the subsequent reversioners. *Beni Prasad v. Hurdai Bibi*, F. A. No. 35 of 1888, decided February 4th 1892; *Ramphal Rai v. Tula Kuari*, (1883) I. L. R., 6 All., 116; *Jumona Dassya Chowdhrahi v. Bamasoonderai Dassya Chowdhrahi*, (1876) L. R., 3 I. A., 72; and *Isri Dut Koer v. Mussamut Hansbutti Koerain*, (1883) L. R., 10 I. A., 150; S. C., I. L. R., 10 Cal., 324, referred to. *Chhaganram Astikram v. Bai Motigavri*, (1890) I. L. R., 14 Bom., 512, and *Pershad Singh v. Chedee Lall*, (1871) 15 W. R., C. R., 1, dissented from.

A minor plaintiff instituting a suit which falls within article 120 of the second schedule of the Indian Limitation Act, 1877, is not excluded from the benefit of section 7 merely because the right of some other person through whom he does not claim to sue for similar relief has become time barred. The "right to sue" mentioned in the third column of article 120 means the right to sue of the plaintiff or of some one through whom he claims. The "period of limitation" mentioned in section 7 means the period of limitation for the suit which the plaintiff or some one through whom he claims is entitled to institute. *Siddhesur Dutt v. Sham Chand Nundun*, (1875) 23 W. R., C. R., 285; *Mrino Moyee Debia v. Bhobun Moyee Debia*, (1874) 23 W. R., C. R., 42; *Gobind Coomar Chowdhry v. Huro Chunder Chowdhry*, (1866) 7 W. R., C. R., 131; and *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar*, (1869) 2 B. L. R., A. I. C., 313, referred to.

THIS was a suit by certain plaintiffs, who claimed, as reversioners under the Hindu law, to get rid of the effect, as against their interests, of certain alienations of property which had been of their maternal grandfather, Richpal, in his lifetime. The plaintiffs asked for a declaration, first, that an alienation made in 1876, by a Hindu widow, their maternal grandmother, Sabej Kunwar, in favour of one Musammatt Hanso, was void as against the plaintiffs; secondly, that a further alienation made by Musammatt Hanso in 1893 to one Kirpa Ram was also void as against the plaintiffs; thirdly, that the plaintiffs were entitled, after the death of their mother, Musammatt Matta, to possession of the property in suit. At the time of the alienation in 1876 by Sabej Kunwar, the plaintiff's mother, Musammatt Matta, was the nearest living reversioner. She became entitled to possession of the property in 1889, when her mother, the widow Sabej Kunwar, died: she took no steps to [35] question the alienation made in 1876. She was made a *pro forma* defendant to the suit, and in her written statement she pleaded that she did not wish to question either the alienation of 1876 or that of 1893. The suit was brought in 1894, all the plaintiffs being then minors, represented, for the purposes of the suit, by their father, Jewa Ram, as guardian *ad litem*.

The Court of First Instance (Subordinate Judge of Agra), dismissed the suit as barred by limitation, holding that limitation began to run from the date of the alienation by Sabej Kunwar in 1876, and that the case was governed either by Article 120 or by Article 125 of the second schedule to the Indian Limitation Act, 1877. The plaintiffs appealed and the Lower Appellate Court (District Judge of Agra) dismissed their appeal, holding the suit to be barred by either Article 120 or Article 126. The plaintiffs appealed to the High Court.

Pandit Baldeo Ram Dave, for the Appellants.

Article 125 of the Indian Limitation Act, 1877, is not applicable to this suit. That Article is applicable to a suit brought during the life-time of a Hindu or Muhammadan female by a Hindu or Muhammadan who, if the female died at the date of instituting the suit, would be entitled to have an alienation of land made by such female declared to be void except for her life. In the present case, the female who made the alienation was dead before the institution of the suit. It has not been brought by a person who was entitled to possession immediately after the death of that female. The appellant's mother, Musammatt Matta, is still alive, and she is the person entitled to immediate

possession. She is a defendant to this suit. There is no Article in the Limitation Act applicable to a suit of this class. Article 126, referred to by the Court of First Instance, has no bearing on the question. Article 120 of the second schedule to the Act has been held by this Court to apply to suits for declaratory decrees—*Legge v. Ram Baran*, (1897) I. L. R., 20 All., 35. Under it a period of six years is provided, and the time from which it [36] begins to run is “when the right to sue accrues.” The right to impeach an alienation made by a Hindu widow having a limited interest belongs to the presumptive reversionary heir—*Rani Anund Koer v. The Court of Wards*, (1880) L. R., 8 I. A., 14: s.c., I. L. R., 6 Cal., 764. The present plaintiffs have no right to sue for the declaration sought by them during the lifetime of their mother, who is the presumptive reversionary heir, unless they show that their mother has refused to sue without any sufficient cause, or has precluded herself by her own act or conduct from suing, or has colluded with the widow or concurred in the act which we say is wrongful—*Rani Anund Koer v. The Court of Wards*, (1880) L. R., 8 I. A., 14: s.c., I. L. R., 6 Cal., 764. We allege facts to that effect in the 8th paragraph of our plaint. So long as Sabej Kunwar was alive, the transferees had a right to be in possession of the property alienated to them, and Musammat Mattra could have abstained from taking any steps to impeach the alienation. But the moment she was dead, Musammat Mattra ought not to have allowed the alienees to remain in possession of that property to the prejudice of the plaintiff's right. If the plaintiff's allegations be true, the alienees become trespassers on the death of Musammat Sabej Kunwar. It is the conduct of Musammat Mattra, on the death of Musammat Sabej Kunwar, which gave the plaintiff a right to sue. The suit is within six years of the date of Musammat Sabej Kunwar's death. There is only one case of this Court, in which MAHMOOD, J., has ruled that a daughter's son could, during the life-time of his mother, maintain a suit to impeach an alienation made by his maternal grandmother without proof of collusion or other circumstances on the part of the daughter—*Balgobind v. Ram Kumar*, (1884) I. L. R., 6 All., 431. OLDFIELD, J., who was one of the Judges who decided that case, held that the suit was maintainable as one coming within the exceptional circumstances under which a daughter's son could maintain such an action. The view of MAHMOOD, J., has been based on the doctrines of the English law concerning life estates, whilst the estate of a Hindu widow inheriting from her [37] husband is not, strictly speaking, what a life estate is under the English law—*Tagore Law Lectures for 1879*, pp. 239—245. The view of MAHMOOD, J., is in direct conflict with the ruling in *Madari v. Malki* (1884) I. L. R., 6 All., 428, decided by STRAIGHT, officiating C.J., and BRODHURST, J. Following the latter ruling, TYRRELL and BLAIR, JJ., have in *Ishwar Narain v. Janki*, (1893) I. L. R. 15 All., 132, expressly dissented from the ruling of Mr. Justice MAHMOOD. That ruling is also opposed to the principles laid down in *Musammat Golab Koonwer v. Shib Sahai*, (1867) N.-W.P. H.C. Rep., 1867, p. 54; *Radha Kishen v. Bukhtawur Lal*, (1866) N.-W.P. H.C. Rep., 1866, p. 1; *Bal Gobind Ram v. Hirusranee*, (1865) 2 W. R., C. R., 255, and *Bama Soonduree Dossee v. Bama Soonduree Dossee*, (1868) 10 W. R., C. R., 301. In *Kandasami v. Akkammal*, (1889) I. L. R., 13 Mad., 195, and in *Raghupati v. Tirumalai*, (1892) I. L. R., 15 Mad., 422, the Madras High Court seems to have taken the same view as MAHMOOD, J., has in *Bal Gobind v. Ram Kumar*, (1884) I. L. R., 6 All., 431. But the weight of authority appears to be in favour of the plaintiff's case.

The ruling of the Bombay High Court in *Chhaganram Astikram v. Bai Motigavri*, (1890) I. L. R., 14 Bom., 512, has no application to a case governed by the Mitakshara law. In the Bombay case, to which the Mayukha law was

applicable, the daughter took a full estate, and the daughter's son inherited to his mother. Under the Mitakshara law, a daughter takes only a widow's estate in the property left by her father, and a daughter's son inherits to his maternal grandfather. The case of *Pershad Singh v. Chedee Lall*, (1871) 15 W. R., C.R., 1, relied on by the Court below, has been decided on a misconception of the principle that under the Mitakshara law a daughter's son does not inherit to his mother but to the maternal grandfather in respect of the property left by him. In order to substantiate the proposition that the plaintiff's suit was barred by limitation, because a right to sue for a declaration had accrued to Musammatt Mattra in 1876, it must be shown that the plaintiffs derived their right to sue from or through Musammatt Mattra. [38] [Definition of the word "plaintiff" in section 3 of the Indian Limitation Act.]

Any act or omission on the part of Musammatt Mattra cannot be prejudicial to the right of the plaintiffs by way of *res judicata* or estoppel—*Isri Dut Kher v. Mussumat Hansbutti Koerain*, (1883) L. R., 10 I. A., 150; s. c., I. L. R., 10 Cal., 324. MAHMOOD, J., sitting with YOUNG, J., has fully considered this question in the case of *Beni Prasad v. Hardai Bibi* in an unreported judgment which was delivered on a preliminary point before the appeal was referred to the Full Bench [F. A. No. 35 of 1888]; and has held that a suit under similar circumstances was not barred by any rule of limitation.

I further contend that as the plaintiffs were minors at the time of the institution of this suit, and as they do not derive their right to sue from, or through, any person to whom a right to sue might have accrued, the suit is not barred by limitation. The plaintiffs can claim the benefit of section 7 of the Indian Limitation Act, 1877, even if they sue through their next friend—*Mussumat Phoolbas Koonwur v. Lalla Jogeshur Sahoy*, (1875) L. R., 3 I. A., 7; s. c., I. L. R., 1 Cal., 226.

Munshi *Gulzar Lal*, for the Respondents.

Article 125 of the Limitation Act is applicable to this suit. Although the present suit has been brought after the death of the female making the alienation, the prayer of the plaintiffs is that all alienations should be declared ineffectual. They could have sought for this declaration in the life-time of Sabej Kunwar, and should have done so within six years of the alienation of 1876. Not having done so, their remedy is barred. Such a suit would lie even during the lifetime of Musammatt Mattra, who has only a life estate like that of her mother, Musammatt Sabej Kunwar—*Bal Gobind v. Ram Kumar*, (1884) I. L. R., 6 All., 431. This ruling has been followed by the Madras High Court in *Raghupati v. Tirumalai*, (1892) I. L. R., 15 Mad., 422, and to the same effect is the ruling in *Kandasami v. Akkammal*, (1889) I. L. R., 13 Mad., 195. The judgment of MAHMOOD, J., in *Bal Gobind v. Ram Kumar*, (1884) I. L. R., 6 All., 431, [39] sets out fully the reasons for his conclusions. Even if Musammatt Mattra was entitled to sue in preference to the plaintiffs, she not having availed herself of her remedy, the plaintiff's suit would be barred on the authority of *Chhaganram Astikram v. Bai Motigavri*, (1890) I. L. R., 14 Bom., 512. That case was not decided upon any special doctrine of the Hindu law under the Mayukha, but was decided upon the authority of the case of *Pershad Singh v. Chedee Lall*, (1871) 15 W. R., C. R., 1, which has been relied on by the plaintiff. Under these circumstances the plaintiff's suit is barred by limitation. As to the application of section 7 of the Limitation Act, I say that that section does not apply if the suit is by a guardian. The ruling of the Privy Council was decided under the old Limitation Act, which has been repealed. The word "plaintiff" has not been used in section 7 of the Act or in Article 120 of the schedule. The definition of that word in section 3 has no application.

[The case was again put up at a subsequent date for further argument with reference to the principle enunciated in the case of *Siddhessur Dutt v. Sham Chand Nundun*, (1875) 23 W. R., C. R., 285.]

On this point Pandit *Baldeo Ram Dave*, for the Appellants—

In the case of *Siddhessur Dutt v. Sham Chand Nundun*, (1875) 23 W. R., C. R., 285, the suit was one to set aside an adoption and was governed by Article 129 of the Indian Limitation Act of 1871. Under that Article, which has now been replaced by Article 118 of the present Act, the period of limitation began to run from "the date of the adoption, or (at the option of the plaintiff), the death of the adoptive father." There a particular date was fixed and the period of limitation began to run from that date. No subsequent disability or inability to sue could stop it. But the Article applicable to the present suit is Article 120 of the Limitation Act of 1877, which provides six years from the date "when the right to sue accrues," that is, when the right to sue accrues to the "plaintiff" as defined in section 3 of the Act. As the plaintiffs in this case do not derive their right to sue from or through any person, but they sue [40] in their own right, no right to sue could accrue to them before their birth. No cause of action can exist "unless there be also a person in existence capable of suing"—*Murray v. The East India Company*, (1821) 5 Barn. and Ald., 204; S. C., 24 R. R., 325. As the right to sue did not accrue to the plaintiffs before their birth, no period of limitation could begin to run prior to their birth. As the plaintiffs were minors at the time of the institution of this suit, they could avail themselves of the provisions of section 7 of the Indian Limitation Act, 1877, and present suit was not barred by limitation.

Munshi Gulzari Lal, *contra*:

I rely on the terms of section 7 of the Limitation Act, according to which the plaintiff must be in existence at the time from which the period of limitation is to begin, to enable him to avail himself of the provisions of that section. In this suit the plaintiffs were not in existence. In support of this I also rely upon *Siddhessur Dutt v. Sham Chand Nundun*, (1875) 23 W. R., C. R., 285; *Mrino Moyee Debia v. Bhoobun Moyee Debia*, (1874) 23 W. R., C. R., 42; *Gobind Coomār Chowdhry v. Huro Chunder Chowdhry*, (1866) 7 W. R., C. R., 134, and *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar*, (1869) 2 B. L. R., 313.

These authorities have not been overruled by any subsequent decisions. The change in the terms of section 7 of the present Act does not alter the law. We have now the words "the right to sue" in Article 120, which is applicable to this suit, instead of in section 7 of the Act.

Strachey, C J.—The only question which we have to consider is whether the Court below has rightly dismissed this suit as barred by limitation. The suit was brought for a declaration, first, that an alienation made in 1876 by a Hindu widow, the plaintiffs' maternal grandmother Sabej Kunwar, in favour of Musammāt Hanso was void as against the plaintiffs; secondly, that a further alienation made by Hanso in 1893 to Kirpa Ram was also void as against the plaintiffs; thirdly, that the plaintiffs [41] are entitled after the death of their mother Musammāt Mattra to possession of the property in suit. At the time of the alienation of 1876 by Sabej Kunwar, the plaintiff's mother Musammāt Mattra was the nearest living reversioner. She became entitled to possession of the property in 1889, when her mother, the widow Sabej Kunwar, died. She took no steps to question the alienation made in 1876. She has been made a *pro forma* defendant to this suit, and in her written statement she pleads that she does not wish to question either the alienation of 1876 or that of 1893.

Several questions have been discussed, which, in the view we now take of the case, it is not necessary to consider further, such for instance, as whether the plaintiffs could during the life-time of Sabej Kunwar have sued for a declaration in respect of the alienation of 1876, their mother Musammat Mattra being then the nearest reversioner, though having only an estate similar in nature and extent to that of the widow, and whether on the death of Sabej Kunwar in 1889, or on the further transfer made by Hanso to Kirpa Ram in 1893, any fresh cause of action for a declaratory suit accrued to the plaintiffs. As I have said, the only question which it is necessary to consider is whether this suit is barred by limitation.

Admittedly during the life-time of Musammat Mattra all that the plaintiffs can claim is declaratory relief in respect of these alienations. It is clear that the suit does not fall within article 125 of the second schedule of the Limitation Act, which refers only to suits brought during the life-time of the widow whose alienation is impeached. That article could not apply to the suit as regards the transfer made by Sabej Kunwar, who died in 1889. The only article applicable to the suit is article 120 which prescribes a period of six years from the time when the right to sue accrues. A right to sue for a declaration impugning the alienation of 1876, accrued to Musammat Mattra at the date of that alienation, and, having regard to article 125, became barred in the year 1888, in the absence of any special circumstance extending the limitation period. The right of the present plaintiffs, the sons of Musammat [42] Mattra, to impugn that alienation accrued on one view of the law at their birth, and on another view of the law when, by the death of Sabej Kunwar in 1889, they first occupied the position of next reversioners to the estate. It is, however, admitted that all the present plaintiffs were minors at the date of the institution of the suit which they brought in February 1894. They claim the benefit of section 7 of the Limitation Act, which has been held by the Privy Council in *Phoolbas Koonwur v. Lalla Jogeshur Sahoy*, (1875) L.R., 3 I.A., 7 : S.C., I.L.R., 1 Cal., 226, to apply not only after the disability of minority has ceased, but during its continuance, to suits brought on behalf of the minor by his next friend ; so that in any view it would appear that, having regard to section 7, the suit cannot be defeated on the ground of limitation.

It has, however, been argued that section 7 pre-supposes a right to sue in existence at the time of the institution of the suit, and that the fact that a suit by Musammat Mattra was long ago time-barred would operate as a bar to the plaintiffs, even though they are minors and notwithstanding section 7. In support of that contention the case of *Chhaganram Astikram v. Bai Motigavri*, (1890) 1. L. R., 14 Bom., 512, has been cited. There the mother of the plaintiffs was originally the nearest reversioner. There was a sale of the property in suit in execution of a decree against the widow for a debt due by her husband, and in consequence the widow was dispossessed in 1869. The nearest reversioner, the plaintiff's mother, died in 1879. In 1883, the plaintiffs sued as reversioners, the widow being still alive, for a declaration that they were not bound by the sale, that the decree in execution of which the property was sold was collusive and fraudulent, and that they were entitled to the property on the widow's death. One of the plaintiffs was a minor up to the year 1881. The other was still a minor in 1883, when the suit was brought. It was held that all right to sue for a declaration in respect of the sale and dis-possession of the widow was barred in 1875, that is, when both the plaintiffs were minors, under article 120 of the second schedule of the Limitation [43] Act. The ground of the decision is thus stated at p. 515 of the report :—
" Cause of action having, therefore, been given to the plaintiffs' mother both

by the sale and dispossession, no new cause of action can be held to have remained to the plaintiffs on their mother's death. It could not have been the intention of the Legislature, in giving a right to sue for a declaration within six years from the accrual of the right, to give successive rights to a series of successive reversioners to harass the alienees of an estate with repeated suits in respect of the same alienation. It has been held that when the widow dies, a new right of action (for possession) will be given to the reversioner then living, but, till then, at any rate, any right to seek a declaration possessed by any reversioner whose title to sue had accrued after the alienation must be regarded as derived from the person who was the heir-presumptive at the time of the alienation." Now, it is quite clear that such a reversioner does not in fact derive his title from the person who was the heir-presumptive at the time of the alienation. The judgment seems to me in effect to hold that although one reversioner does not derive his title from another and nearer reversioner, he must be deemed to do so in order to avoid the consequence of the alienees of the estate being harassed by a multiplicity of suits. The reversioner derives his title, not from any other reversioner but from the last full owner of the estate, and I can see no justification for introducing a fiction to the contrary effect merely to avoid a result which the Court may consider inexpedient. That judgment, having regard to the passage which I have just read, does not depend, as was suggested to us in argument, upon any special view entertained in Bombay as to the position in Hindu law of a daughter as being a full owner of the estate through whom the plaintiffs, in that case her sons, might have been held to claim. It follows a judgment of the Calcutta High Court in *Pershad Singh v. Chedee Lall*, (1871) 15 W. R., C. R., 1. In that case a Hindu widow was sued for acts of waste and alienation alleged to have taken place during the [44] lives of the mothers of the plaintiffs who were, when those acts were committed, the next heirs to the property. "At the time when the alienation complained of occurred, the mothers of the plaintiffs were alive and were then the next heirs entitled to this property, and they might have brought the suit which the plaintiffs have now brought, but they did not do so. They allowed more than 12 years to elapse, and this cause of action is not revived in favour of the plaintiffs who have since been born and have now arrived at majority." That is to say, the plaintiffs' right of suit was held barred by the omission of their mothers to sue, through whom they did not claim, and it was assumed that the cause of action accruing to the plaintiffs' mothers and the cause of action on which the plaintiffs themselves came into Court were one and the same, so that what barred the mothers would equally bar the sons. We have very carefully considered these two cases. It appears to me that they are contrary to well recognized principles, and that we ought not to follow them. If the nearest reversioner could be held, as the Hindu widow has been held, to represent fully the whole estate, it would no doubt follow that the limitation which would bar that reversioner would bar other reversioners, just as a decree passed against the nearest reversioner would, in that case, operate as *res judicata* against the more remote. But so far as I know, that has never been held to be the relation in which one reversioner stands to another, and we are not, I think, at liberty to act on an incorrect view of that relation in order to achieve the desirable result of preventing multiplicity of suits. A similar question has been considered with great fulness and care by Mr. Justice MAHMOOD in an unreported case—*Beni Prasad v. Hardai Bibi*.* That case has recently been decided by the Privy Council in connection with the validity in Hindu law of the adoption of an only son; but the question of limitation was apparently not raised by the defendants

* F. A. No. 35 of 1888, decided 4th February 1892.

before the Privy Council ; it was disposed of by Mr. Justice MAHMOOD and Mr. Justice YOUNG as a preliminary point in the appeal before them. [46] In that case there was an adoption by a Hindu widow in 1858. At that time the nearest reversioner was one Kedar Nath. He died in 1881, a declaratory suit to impugn the adoption being then barred so far as he was concerned by article 118 of the Limitation Act. The plaintiff was the son of Kedar Nath. He was born in 1852, but until he became, on Kedar Nath's death in 1881, the nearest reversioner, he could not have brought a declaratory suit to impugn the adoption. He brought such a suit in 1886, it was found, within six years from the date on which he acquired knowledge of the adoption. So far it was clear that the suit was within limitation. But it was argued that as a suit by Kedar Nath when he was the next reversioner became barred by limitation long before his death in 1881, on which the plaintiff acquired his right to sue, the plaintiff's suit was also barred. Mr. Justice MAHMOOD held, with the concurrence of Mr. Justice YOUNG, first that one reversioner cannot be held to claim through or to derive his title from another, even if that other happens to be his father, but derives his title from the last full owner ; secondly, that the limitation which barred a suit by the nearest reversioner for the time being to contest an alienation or an adoption by a Hindu widow, would not bar a similar suit brought by another person after he became the nearest reversioner. At p. 160 of the paper book in that case Mr. Justice MAHMOOD thus sums up his elaborate consideration of the question :— " I think it is quite clear from what I have said that there is no authority, and there can be no reason in juristic principle for maintaining the proposition that the reversionary right under the Hindu law is a kind of heritable estate which descends from the father to the son, maintaining a kind of privity of blood for purposes of estoppel, the plea of *res judicata*, or the bar by limitation." Again at p. 161, after referring to the ruling of the Full Bench in *Ramphal Rai v. Tulakuari*, (1883) 1. L. R., 6 All., 116, he said :— " Applying the principle of that case together with that I have said as to the nature of reversionary right under the Hindu law, I hold that the circumstance [46] that the plaintiff's father Kedar Nath, whilst being the nearest reversioner, had allowed the period of limitation for such a suit to elapse during his life-time, does not operate as barring the plaintiff's present suit by limitation." In support of his conclusion Mr. Justice MAHMOOD refers by way of analogy to the judgment of the Privy Council in *Junoon Dassya Chowdhuran v. Bamasonderai Dassya Chowdhuran*, (1876) L. R., 3 I. A., 72, where their Lordships expressed a doubt as to whether a decree in favour of an adoption passed in a suit by a reversioner to set aside the adoption is binding upon any reversioner except the plaintiff and whether a decision in such a suit adverse to the adoption would bind the adoptive son as between himself and any other than the plaintiff. In a later Privy Council case not referred to by Mr. Justice MAHMOOD, *Isri Dut Koer v. Mussumat Hanshutti Koerain*, (1883) L. R., 10 I. A., 150, their Lordships (at p. 157 of the report) indicate strongly that such a decision would not be binding as *res judicata* in the case of a new reversioner.

It was further argued that, having regard to the terms of section 7 of the Limitation Act, a plaintiff, to be entitled to the benefit of that section, must have been in existence and under disability at the time from which the period of limitation commences, and that therefore a minor cannot avail himself of the section in respect of a right of suit which came into existence before his birth. That contention in effect seeks to apply to the case the principle of section 9 that " when once time has begun to run, no subsequent disability or inability to sue stops it." In support of that contention the following cases were cited :— *Siddhessur Dutt v. Sham Chand Nundun*, (1875) 23 W. R., C. R., 285 ; *Mrino*

Moyee Debia v. Bhoobun Moyee Debia, (1874) 23 W. R., C. R., 42; *Gobind Coomar Chowdhry v. Huro Chunder Chowdhry*, (1866) 7 W. R., C. R., 134, and *Gobind Chandra Sarma Mazoomdar v. Anand Mohan Sarma Mazoomdar*, (1869) 2 B. L. R., 313. None of those cases were decided with reference to the present Limitation Act, and in none of them was the suit of the exact description of [47] that now before us. None of them, so far as I am aware, have been applied to suits brought since Act No. XV of 1877 came into force for a declaration impugning the validity of an alienation made by a Hindu widow. They are cases of suits to set aside an adoption falling under article 129 of Act IX of 1871, which article has been replaced by the totally different provisions of article 118 of the present Act. Instead of straining the language of these decisions to meet a case of this kind, it appears to me to be safer to look to the precise terms of the provisions applicable to this present case, i.e., article 120 of the second schedule and section 7. As regards article 120, when the Legislature said that a suit may be brought within six years from the time when the right to sue accrues, I think it clearly meant the right to sue of the plaintiff himself or some one through whom he claims, not a right of somebody else to sue through whom the plaintiff does not claim. The Legislature cannot have meant a right of anybody to sue, a right at large of some person wholly unconnected with the plaintiff. Similarly, if section 7 is read giving the terms used their ordinary and natural signification, I think the expression "the period of limitation" means the period of limitation for the plaintiff's suit, the period of limitation for the suit which the person under disability or some one through whom he claims is entitled to institute, not the period of limitation for a similar suit which some other person may have been entitled to institute. In my opinion nothing has occurred to deprive the plaintiffs, who are still minors, of the benefit of section 7 by extinguishing or barring their right to sue for a declaration in respect of the alienations of 1876 and 1893. I am therefore of opinion that the Court below ought not to have dismissed the suit as barred by limitation, but should have disposed of it on the merits. I think that the proper course is to allow this appeal, set aside the decree of the Court below, and remand the case to the Court of First Instance for disposal on the merits. The plaintiffs are entitled to their costs of this appeal. The other costs will abide the result.

[48] **Knox, J.**—I also agree that the plea of limitation should not have been allowed, and concur in the order proposed by the learned Chief Justice.

Blair, J.—I concur in the order proposed by the learned Chief Justice and the reasons by which that order is supported.

Banerji, J.—I have arrived at the same conclusion as the learned Chief Justice. The Lower Appellate Court dismissed the suit as barred by limitation under article 125 of the second schedule of the Indian Limitation Act, 1877. As the suit was not one to set aside an alienation during the lifetime of the Hindu female who made the alienation, that article clearly did not apply. There being no other provision of the Limitation Act applicable to a suit of the kind brought by the plaintiffs, it was governed by article 120, which prescribes a limitation of six years, calculated from the date on which the right to sue accrued. I am of opinion that the right therein referred to is clearly the right of the plaintiff as defined in section 3 of the Act, and that the article does not refer to the right of a person other than the plaintiff. In the present case the right of the plaintiffs to question the alienation made by Sabej Kunwar could arise at the earliest on their birth. During the whole of the period subsequent to their birth they have been under a disability, and consequently they are entitled to the privilege which is accorded to plaintiffs of that description by section 7 of the Act. The rulings of the Calcutta High Court on which the

learned vakil for the respondents has relied, and which are referred to in detail in the judgment of the learned Chief Justice, had reference to suits of a particular description and were based on the peculiar phraseology of the Limitation Act applicable to those suits. I am unable to hold that by reason of their not being in existence at the date of the alienation in question, the plaintiffs are not entitled to bring their suit at any time during the period of their minority, after the accrual of their right of suit. As regards the only other contention which was raised in this case, namely whether the fact of the omission of the plaintiff's [49] mother to question the alienation made by Sabej Kunwar barred the plaintiffs from maintaining the present suit, and the rulings by which that contention was sought to be supported, it is sufficient to say that those rulings evidently proceed upon the assumption that one reversioner derives title from another. I am unable to hold that that is a true proposition under the Hindu law. There is no privity of estate between one reversioner and another *qua* reversioners; therefore the act or omission of one reversioner cannot bind another, on the general principle that no one can be bound by the act or omission of a person through whom he does not derive title. For these reasons I agree in the order proposed by the learned Chief Justice.

Burkitt, J.—I have arrived at the same conclusion. In my opinion no cause of action for the present suit accrued before these plaintiffs' birth, and therefore it cannot possibly be barred by any limitation.

Aikman, J.—I concur in the judgments of the learned Chief Justice and my brother BANERJI, J., and in the order proposed.

Appeal decreed and cause remanded.

NOTES.

[1. A distinction was drawn between suits to set aside *adoption* etc. and suits to set aside *alienations* in (1906) 29 Mad., 390; (1901) 24 Mad., 405; 27 Cal., 379; 24 Bom., 260. See, however, (1904) 32 Cal., 62; 22 All., 33.

2. As regards *the right to sue*, it has been held by the Privy Council in (1915) 38 Mad., 406 that in *both classes* of suits, the suit is of a representative character, that the right of suit does not abate but that the suit may, on the death of the presumptive reversioner maintaining the suit, be continued by the next one, and that even during his life, the others may intervene and even take the conduct of the suit out of his hands on due cause shown. The case of estoppel or *res judicata* was distinguished.

Previously thereto, the doctrine that one reversioner does not claim through another was rigidly applied:—(1912), 36 Mad., 570; (1905) 29 Mad., 390; (1908) 31 Mad., 366 (estoppel held to apply); (1905) 28 Mad., 57 (*minors*); (1904) 27 Mad., 588 (abatement of appeal); (1902) 13 M.L.J., 359 (*res judicata*); (1900) 22 All., 382 (*res judicata*); (1907) 27 All., 37 at 45; (1909) 32 All., 33 (acknowledgment); (1905) 8 O. C., 124 (abatement); (1908) 12 C. W. N., 857; (1906) 36 Cal., 780 (estoppel); (1905) 9 C. W. N., 795 (minority); see also (1905) P. R., 68; 58; (1907) P. W. R., 21.]

[22 All. 49]

PRIVY COUNCIL.

The 27th April and 21st June, 1899.

PRESENT :

LORD HOBHOUSE, LORD MACNAGHTEN AND SIR RICHARD COUCH.

In the matter of Rajendro Nath Mukerji.

[On appeal from the High Court for the North-Western Provinces.]

Para. 8 of the Letters Patent, 1866—Removal of a vakil from the roll for reasonable cause—A conviction under section 471, Indian Penal Code.

A vakil of the High Court was convicted, under section 471 of the Indian Penal Code of fraudulently using as genuine a document which he knew to be forged. This was

affirmed on appeal, when the punishment to which he had been sentenced was reduced to two years.

The High Court, while not allowing the propriety of the conviction and sentence to be questioned, had considered whether his culpability was such as to disqualify him for his profession, and had decided in the affirmative, removing him from the roll, under para. 8 of the Letters Patent, 1866.

Held, that, in the present case, the conviction, followed by the sentence, was sufficient without further inquiry, to justify the High Court in making that order. The appellant could not be allowed to have an indirect appeal [50] against the judgment of the Sessions Judge confirmed by the High Court. The judgment of Lord MANSFIELD in *ex parte Brounsall* (1778) 2 Cowper's Rep., 829, referred to as well explaining the disqualification of a member of the legal profession that attends such a conviction and sentence.

In re Weare, (1893) L. R., 2 Q. B., 439, where the Court of Appeal looked to see what was the nature of the offence and would not, as a matter of course, strike a solicitor off the roll because he had been convicted, distinguished from the present case.

In re Durgu Charan, (1885) I. L. R., 7 All., 290, dealt with under section 12 of Act XVIII of 1879, referred to as a case where the nature of the offence admitted of further inquiry and also distinguished.

In regard to the finality of the judgment of the High Court in deciding the appeal from the conviction and sentence, *In re the petition of Macrea*, (1891) I. R., 20 I. A., 90; I. L. R., 15 All., 310, was referred to.

APPEAL from an order (4th January 1896) of the High Court, (1896) I. L. R. 18 All., 174, in the matter of a vakil of the Court.

The appellant was enrolled as a vakil on the 8th April 1885, and practised till 1895. On the 9th August 1895 he was convicted at the Sessions, at Allahabad, of an offence under section 471 of the Indian Penal Code and was sentenced to a term of rigorous imprisonment for three years. On the 1st November 1895 his appeal was dismissed by the High Court with a reduction of the sentence to two years. The ground of his conviction was the making use of an official copy, filed by him in the High Court, for the purpose of presenting an appeal from a decree of the Saharanpur District Court, in which copy, as he knew, the date had been fraudulently altered, to make it appear that the appeal was not time-barred, as in fact it was.

A question now raised on this appeal was whether the conviction and the sentence of the Sessions Court, affirmed by the Court of Criminal appeal, sufficiently established the unfitness of a vakil to belong to the legal profession, forming a reasonable cause for his exclusion under para. 8 of the Letters Patent, or there should be further consideration of the degree of his culpability as affecting the justice of his removal or suspension from practice.

[51] The conviction and sentence had been brought to the notice of the High Court by the Registrar on the 26th November 1895. The proceedings thereupon, under the above para. 8, the hearing by the Chief Justice and five Judges, and their judgment, are reported in Volume 18, p. 174, of the Indian Law Reports, Allahabad series.

The High Court decided that the propriety in law, or in fact, of the conviction, maintained by the Court of appeal, could not be brought into question. That was final. They, however, considered it incumbent on them to consider whether there existed reasonable cause or not for removing the vakil from practice in the fact of the conviction itself. Their opinion was that the prisoner's Counsel was not precluded from showing, if he could, that the conduct of the vakil was not such as to render him unfit to be retained on the roll, and that the case presented was that the Court should consider the degree of culpability involved in the act which constituted the offence in regard to his removal, or suspension, from practice. Their conclusion was that he had proved himself unfit to remain a member of an honorable profession, and that he must be excluded from it.

The appellant obtained a certificate for appeal under section 595, Civil Procedure Code. On this appeal,

Mr. J. H. A. Branson, for the Appellant, referred to *In re Weare*, (1893) L. R., 2 Q. B., 439, where the Court had held that it had a discretion to remove a solicitor or not to do so after a conviction. Also to *In re a solicitor, ex parte the Incorporated Law Society*, (1889) 61 Law Times Rep., Q. B. D., 842, where the fact of the conviction of a practitioner was not taken to add necessarily to the gravity of his offence in regard to the question of his remaining on the roll. *In re Hill*, (1868) 18 Law Times Rep., 564; 3 Q. B., 543, there referred to. *In re Durga Charan*, and section 12 of Act XVIII of 1879, (1885) I. L. R., 7 All., 290, as reported contained the expression of a former Chief Justice that the pleader in that case could "go behind the [52] order" of the Criminal Court. *In re Dillet*, (1887) L. R., 12 App. Cas., 459, was also referred to. Afterwards on June 17th their Lordships' judgment was delivered by SIR RICHARD COUCH :—

This is an appeal against an order of the High Court of Judicature at Allahabad made on the 4th of January 1896 whereby it was ordered that the appellant's name should be struck off the roll of vakils entitled to practice before the said Court and his certificate should be cancelled. On the 9th of August 1895 the appellant was found guilty by the Sessions Judge of Allahabad concurring with the assessors under section 471 of the Indian Penal Code of fraudulently using as genuine a document which he knew to be forged, and sentenced to be rigorously imprisoned for three years. He appealed to the High Court by which on the 21st November 1895 the conviction was affirmed and the sentence altered to two years' rigorous imprisonment. On the 27th November 1895 the High Court ordered notice to be given to the appellant to show cause why he should not be removed from the roll of vakils and his certificate be cancelled in consequence of the offence of which he had been convicted. On the 3rd of January 1896 the case came before the Chief Justice and five Judges of the High Court and it was held that the propriety in law or in fact of the conviction could not be questioned, but the Counsel for the appellant was not precluded from showing, if he could, that the conduct of his client in the matter was not such as to render him an unfit person to be retained on the roll of the vakils of the Court. On the next day the same Judges in their judgment after stating the circumstances connected with the offence said that the appellant had attempted to deceive the Court by representing by means of a forged endorsement on a copy of a decree that an appeal was within time when he knew or must have known that it was time-barred; that this offence was not committed by an ignorant man or by a new practitioner unaccustomed to the examination of documents, nor in the hurry of the moment and without due consideration, and [63] made the order now appealed against. The printed case in this appeal for the appellant consists of a statement of the facts previous to the using by him of the forged document, the evidence of witnesses examined at the trial, and the judgment of the High Court on the 21st November 1895. The reasons given for the appeal are that the High Court was wrong in law in not allowing the propriety of the conviction to be questioned, that the conviction was not justified either in law or in fact, that the appellant did not fraudulently or dishonestly use the copy of the decree, that no reasonable cause had been shown to justify his removal from the roll of vakils, and the evidence given on his trial did not prove any act or practice on his part justifying the order for it. It is plain that the object of the present appeal is to have the judgment of the Sessions Judge and of the High Court on the appeal reviewed and reversed in substance if not in form. This ought not to be allowed. In effect the appellant would indirectly have an appeal against the conviction

when if he had petitioned for leave to appeal against it the leave would certainly have been refused. *Ex parte Macrea*, (1891) L. R., 20 I. A., 90. Mr. Branson, who appeared for the appellant, admitted that if this review of the conviction was not allowed there were no extenuating circumstances that he could rely upon against the order. He referred to *In re Weare*, L. R., 1893, 2 Q. B., 439. In that case a solicitor had been convicted by two justices of Bristol of being a party to the continued use of premises as a brothel and sentenced to a term of imprisonment, which sentence was, on appeal to the quarter sessions, set aside, and a fine of 20*l.* substituted. An application was made by the Incorporated Law Society to strike his name off the roll, which was ordered by the Divisional Court, and he appealed from that order to the Court of Appeal. The Court looked at the evidence given at the trial to see what was the nature of the offence, holding that it had a discretion and would not as a matter of course strike him off the roll because he had been convicted. This is a very different case from the present [54] one. The judgment of Lord MANSFIELD in *In re Brounsall*, 2 Cowper's Reports, 829, quoted by Lord ESHER in his judgment is more appropriate to the present case. That was an application to the Court to strike an attorney off the roll, he having been convicted of stealing a guinea, for which offence he was sentenced to be branded in the hand and to be confined in the House of Correction for nine months. Lord MANSFIELD said: "This application is not in the nature of a second trial or a new punishment. But the question is whether after the conduct of this man" (*i.e.*, in stealing the guinea—it does not say when, where or how—"it is proper that he should continue a member of a profession which should stand free from all suspicion.....and it is on this principle that he is an unfit person to practise as an attorney. It is not by way of punishment, but the Court in such cases exercise their discretion, whether a man whom they have formerly admitted, is a proper person to be continued on the roll or not. Having been convicted of felony we think the defendant is not a fit person to be an attorney." Lord ESHER in *Weare's* case adds: "There it seems to me is the whole law on the matter laid down as distinctly as can be, and in a way the propriety of which nobody, as it appears to me, can doubt." The case in 61 Law Times, 842, also referred to by Mr. Branson is only an authority that the Court has a discretion. The case in 7 All., 290, was under Section 12 of Act XVIII of 1879, which gives power to the High Court to suspend or dismiss any pleader holding a certificate who is convicted of any criminal offence implying a defect of character which unfits him to be a pleader. It does not appear in the report whether the Court considered that the conviction of the pleader of cheating was wrong, or that in the exercise of its discretion he should not be suspended or dismissed. It was a case where the nature of the offence might reasonably be inquired into. Their Lordships do not agree with the Chief Justice where he says that the pleader's Counsel was entitled to go behind the conviction in order to show that he had committed no offence at [55] law. In the present case the conviction of forgery, followed by a sentence of two years' rigorous imprisonment, is sufficient without further inquiry to justify the Court in removing the appellant from the roll of vakils and cancelling his certificate. Their Lordships will therefore humbly advise Her Majesty to affirm the High Court's order and to dismiss the appeal.

Appeal dismissed.

Solicitors for the Appellant :—Messrs. *Barrow, Rogers and Nevill*.

NOTES.

[See also (1906) 29 All., 95 ; (1908) 32 Bom. 106 ; (1910) 14 C. W. N., 1073 ; (1912) 37 Mad., 238 at 242.]

[22 All. 56]

APPELLATE CIVIL.

The 3rd July, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE KNOX.

Basdeo.....Defendant

versus

John Smidt and others.....Plaintiffs.*

Civil Procedure Code, Sections 51, 578—Plaint not signed by plaintiff or his authorized agent—Effect of such want of signature—Plaint not necessarily void—Breach of contract—Measure of damages.

Held, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf as required by section 51 of the Code of Civil Procedure will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and, having regard to section 578 of the Code of Civil Procedure, is not a ground for interference in appeal. *Rajit Ram v. Katesar Nath*, (1896) I. L. R., 18 All., 396, and *Mohini Mohun Das v. Bungsi Buddan Saha Das*, (1889) I. L. R., 17 Cal., 580, referred to. *Marghub Ahmad v. Nihal Ahmad*, (1899) Weekly Notes, 1899, p. 55, overruled. *Mahabir Prasad v. Shah Walid Alam*, (1891) Weekly Notes, 1891, p. 152, distinguished. *Katesar Nath v. Aggyan*, (1894) Weekly Notes, 1894, p. 95, and *Badri Prasad v. Bhagwati Dhar*, (1894) I. L. R., 16 All., 240, discussed.

The plaintiffs sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of or pay for the rest. The plaintiffs re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. *Held*, that the proper measure of damages was the difference between the contract price [56] of the goods which the defendant had refused to accept, and the price realized by the plaintiffs on the re-sale. *Moll Schutte & Co. v. Luchmi Chand*, (1898) I. L. R., 25 Cal., 505, followed. *Yule & Co. v. Mahomed Hossain*, (1896) I. L. R., 24 Cal., 121, dissented from.

THIS was a suit to recover damages alleged to have been incurred by the plaintiffs by reason of the defendant's refusal to take delivery of and to pay for certain goods which he had contracted to purchase from the plaintiffs. The Court of First Instance (Subordinate Judge of Cawnpore) gave the plaintiffs a decree. The defendant appealed, but his appeal was dismissed by the Lower Appellate Court (District Judge of Cawnpore). The defendant appealed to the High Court, and there a new point was raised, which had not been taken in either of the Courts below, namely, that "the suit of the plaintiffs is defective in point of law and is wrongly framed and should have been dismissed." This ground of appeal was explained at the hearing to convey an objection to the form of the plaint, the contention being that inasmuch as the person who had signed the plaint on behalf of the plaintiffs was not duly authorized so to sign on their behalf, the plaint was in effect unsigned, and there had never been before the Court any suit of which cognizance could legally be taken. There

* Second Appeal No. 474 of 1897, from a decree of J. E. Gill, Esq., District Judge of Cawnpur, dated the 29th March 1897, confirming a decree of Rai Kishen Lal, Subordinate Judge of Cawnpur, dated the 5th October 1896.

was on the record no power of attorney authorizing the signature of the plaintiff and nothing otherwise to show that the person who signed it was authorized to sign within the meaning of section 51 of the Code of Civil Procedure.

Mr. *R. Malcomson* (with whom Pandit *Sundar Lal*) for the Appellant.

The suit ought to have been dismissed on the ground that the plaintiff was not signed by the plaintiffs or by anyone duly authorized by them in that behalf. No Civil Court can take cognizance of a suit without having before it in the first instance a properly constituted plaintiff, that is to say, a plaintiff which complies with the requirements of sections 49, 50, 51 and 52 of the Code of Civil Procedure. In this case the plaintiff was signed on behalf [57] of the plaintiffs by Mr. C. G. Sanders, but Mr. Sanders was not authorized to sign plaintiffs, or this particular plaintiff, on behalf of the firm. The plaintiff must therefore be regarded as unsigned. This being so, the so-called plaintiff was, within the rulings of this Court, no more than a "piece of waste paper"—*Mahabir Prasad v. Shah Wahid Alam*, (1891) Weekly Notes, 1891, p. 152; *Katesar Nath v. Aggyan*, (1894) Weekly Notes, 1894, p. 95; *Marghub Ahmad v. Nihal Ahmad*, (1899) Weekly Notes, 1899, p. 55.

In view of the rule laid down in the last mentioned case, the Court has no power to amend an unsigned plaintiff or to allow amendment thereof. The defect is much more than a mere irregularity which may be cured by amendment: it is an absolute bar to the entertainment of the suit. Section 578 of the Code of Civil Procedure could not be applied, inasmuch as there was here no suit before the Court of which cognizance could be taken or in the course of which any error, defect or irregularity could possibly be committed. I would adopt the reasoning set forth in the judgments in *Katesar Nath v. Aggyan* and *Marghub Ahmad v. Nihal Ahmad*.

Babu *Durga Charan Banerji*, with the Hon'ble Mr. *Conlan* and Munshi *Ram Prasad*, for the Respondents.

I contend that the provision contained in section 51 of the Code of Civil Procedure as to signature and verification is a rule of Procedure merely and any defect in signature does not affect the merits of the case. In order to show that the omission to sign in compliance with section 51 will not lead to the dismissal of the suit it is necessary to show that the plaintiff was not the plaintiff's plaintiff. In this case there is no room for such contention upon the admitted facts. If the defect had been pointed out it could and would have been remedied. The defect is certainly covered by section 578 of the Code. Moreover, the defendant by his pleadings and conduct must be held to have waived the irregularity. There was a valid plaintiff as required by law, and any defect in the prescribed formality as to signature could be remedied [58] as well as waived. The plaintiff without the signature is not necessarily a piece of waste paper as contended for on the other side. I rely on *Ranjit Ram v. Katesar Nath*, (1896) I. L. R., 18 All., 396, and *Fateh Chand v. Mansab Rai*, (1898) Weekly Notes, 1898, p. 110. The plaintiff, although he may not have signed the plaintiff, is none the less plaintiff in the suit, and it cannot be contended upon the admitted facts of this case that he has in any way or at any stage repudiated the plaintiff as his.

Strachey, C. J.—There are in substance two objections taken on behalf of the appellant. The first objection is not set forth in the memorandum of appeal, but upon an application made to us under section 542 of the Code of Civil Procedure, we allowed the learned counsel for the appellant to argue in support of it. That objection is that the plaintiff was not signed as it should have been in accordance with section 51 of the Code, and that conse-

quently all the proceedings in the suit have been bad and void *ab initio*. Now, with regard to that objection, the plaint purports to be signed on behalf of the plaintiffs by an advocate of this Court, who, as the Munsarim's note shows, himself filed the plaint, and also by a gentleman named C. G. Sanders who purports to sign as "agent" for the plaintiffs, who are a firm of foreign merchants, residing out of, but trading within, British India. There is no finding which would justify us in holding that Mr. Sanders was a recognised agent of the plaintiffs within the meaning of section 37 of the Code, so that the point considered in *Maharanee Surnomoye v. Poolin Behary Mundal*, (1878) 3 C. L. R., 15, and *Roy Dhunptut Singh v. Jhoomuk Khawas*, (1879) 3 C. L. R., 579, does not arise. There is on the record no power of attorney authorizing Mr. Sanders to sign the plaint on behalf of the plaintiffs, and there is nothing which otherwise shows that he was so authorized within the meaning of section 51. The most probable reason why there is nothing of the kind on the record is that, until the point was raised for the first time in second appeal, the defendant appears [59] never to have thought of suggesting that Mr. Sanders was not authorized to sign the plaint, or that there was any sort of defect or irregularity in the institution of the suit. There is no such suggestion in the defendant's written statement, in the issues, the judgments of the Courts below, the defendant's memorandum of appeal in the Lower Appellate Court, or his memorandum of appeal to this Court. Now, in the first place, as I have said already, the plaint is signed and was filed by an advocate of this Court, who thus claimed to represent the plaintiffs named in the plaint. The decrees of both the Courts below show that throughout the trial of the suit in both Courts the same advocate appeared and conducted the case as representing the plaintiffs. There is no plea, no suggestion, still less any finding, that that advocate did not possess in fact the authority to represent the plaintiffs named in the plaint which he claimed throughout to possess. On the contrary it is clear that the suit was throughout contested entirely on the merits, and on the assumption of everybody that it was properly brought by the right parties. Under section 39 of the Code an advocate of this Court does not depend for his authority to represent a party upon any document empowering him to act. It appears to me that in the total absence of any finding, evidence or suggestion to the contrary, it must be presumed that the plaintiffs named in the plaint were throughout represented in the suit by the counsel who claimed to represent them, and that the suit was therefore instituted and conducted throughout with the knowledge and authority of those plaintiffs. Bearing this in mind, I have come to the conclusion first, that the defect in the plaint arising from non-compliance with section 51 has been waived by the defendant and that therefore the suit cannot on that ground be now dismissed. Secondly that the defect falls within section 578 of the Code, which prohibits our interference with the decrees below on the ground of any error, defect, or irregularity which affects neither the merits of the case nor the jurisdiction of the Court. If it were necessary, I should be prepared to hold, having regard [60] to the judgment of this Court in *Rajit Ram v. Katesar Nath*, (1896) I. L. R., 18 All., 396, that we are, even at this stage, competent under section 53 (c) of the Code to direct that the plaint be amended by the addition of the signature of the plaintiffs or of any person duly authorized by them in that behalf. But for the reasons which I have indicated, I am of opinion that any such amendment is unnecessary. The argument on behalf of the appellant is shortly this, that where a plaint is not signed in accordance with section 51, not merely is there "an error, defect or irregularity," but there is no suit: the plaint is "waste paper," and the Court has no suit before it which it can

legally decree. From this argument I entirely dissent. Section 48 of the Code shows that a suit is instituted by presenting a plaint to the Court or to the proper officer. The Code contains no definition of a plaint, but section 50 shows what a plaint substantially is, and states the various particulars which it must contain. It says nothing about signature, and in no way suggests that what it describes as a plaint is not a plaint if it is unsigned or if the signature is in any way defective. Section 51 deals with the signature and verification of the plaint. It places the signature and the verification on exactly the same footing. In that connection I observe that at page 400 of the report in *Rajit Ram v. Katesar Nath*, the Full Bench of this Court observed:—"It would be difficult to imagine any case in which a defective verification of a plaint could affect the merits of the case or the jurisdiction of the Court." There is nothing whatever in section 51 to suggest that, if its terms are not complied with, the defect stands on any different footing from the other defects mentioned in section 53 (b), or involves any other consequence than rejection of the plaint if not amended in accordance with an order for amendment, or that the defect cannot be waived like other initial irregularities, or that the plaint by reason of the defect is necessarily "waste paper," or that there is no suit legally before the Court. The object of the verification of the plaint [61] is to fix upon the plaintiff the responsibility for the statements which it contains, and to afford a guarantee of his good faith. The object of the signature to the plaint is to prevent, as far as possible, disputes as to whether the suit was instituted with the plaintiff's knowledge and authority. I do not underrate the importance of this; but there may be other ways of establishing the plaintiff's responsibility besides signature; and the fact that the Code contains no provision requiring an appellant to sign his memorandum of appeal supports this view. In a work by a learned American author, Mr. Vanfleet, "*The Law of Collateral Attack on Judicial Proceedings*," there is stated what, I think, is the true principle as to verification, and the whole context shows that the principle is equally applicable to signature, which section 51 places on the same footing. At page 235 he says:—"The statutes require many kinds of petitions to be verified. This includes generally all complaints and petitions in special proceedings, the bill in equity, the libel in admiralty, and, in some states, the complaint or petition in all cases. Such verification adds no allegation to the pleading and tenders no issue. Its only object is to show the good faith of the petitioner. In other words, if he will not swear that he believes his cause to be just, the law does not care to bother with it. But when the adversary comes in, such verification is of no moment. It is not even evidence. The justice of the cause must then be proved by competent evidence. Like any other formal matter its absence is waived by a failure to object. And if its entire absence does not affect the jurisdiction, of course, mere defects in it cannot."

Section 53 (b), (i) clearly shows that there may be a plaint within the meaning of the Code, although the plaint is not signed and verified as required by section 51. If such a plaint were "waste paper," or not a plaint at all within the meaning of the Code, the section would not have called it a plaint and would not have provided for its amendment. It is only upon the plaintiff's failure to comply within the time fixed by the Court, with the order allowing the amendment, that such a plaint has to be [62] rejected under section 54 (d). The doctrine that the plaint is waste paper because it is not duly signed in accordance with section 51 of the Code, and that there is consequently no legal suit before the Court, is opposed to the judgments of this Court in three connect-

ed unreported cases, First Appeals Nos. 170, 126 and 29 of 1895, in which the plaintiff was, at the stage of first appeal, returned for amendment under section 53, on the ground that the person who had signed it was not duly authorized in that behalf by his power of attorney. In these cases the objection was taken by the defendant in his memorandum of appeal; and, in two at least out of the three, was specifically pleaded by him and put in issue in the Court below. The doctrine that a plaintiff not duly signed is necessarily waste paper also appears to me to be opposed to the judgment of the Privy Council in *Mohini Mohan Das v. Bangsi Baddan Saha Das*, (1889) I. L. R., 17 Cal., 580. In that case there were three plaintiffs named in the plaint as joint creditors. Only one of them signed and verified the plaint. Some time after the plaint was filed, the Court made an order adding another of the joint creditors as a plaintiff, evidently on the view that he was not one already. The suit was dismissed on the ground that it must be regarded as instituted on the date of the order, and that, so regarded, it was barred by limitation. On appeal the Privy Council set aside the dismissal, holding that all the creditors became plaintiffs when the plaint was filed, that the order was "merely waste paper," and that the suit was not barred. Their Lordships observed:—"On the face of the plaints the three joint creditors are named as co-plaintiffs. The names of Gobind Rai and Khettar Mohun have not been struck out, nor did they, or either of them, attempt to repudiate the suits. There is no rule providing that a person named as a co-plaintiff is not to be treated as a plaintiff unless he signs and verifies the plaint." Observe, they do not say that a person named as a co-plaintiff need not sign and verify the plaint. They could not have said so, for section 51 makes no distinction between a co-plaintiff and a [63] single plaintiff. What they say is, that it does not follow from his omitting to sign and verify the plaint that he is not to be treated as a plaintiff. They further indicate the considerations which, in that case, prevented such a consequence from following. The persons in question were named as co-plaintiffs on the face of the plaint; their names had not been struck out; they had not attempted to repudiate the suit. In other words, there was no reason to doubt that the suit was really theirs, and, that being so, their omission to sign the plaint would not justify the Court in treating them as not plaintiffs. Nothing in the judgment turns upon their being joint creditors with the plaintiff who had signed, or upon any supposed authority in him to sign on their behalf. Several cases have been cited in support of the argument I am considering. The first was *Mahabir Prasad v. Shah Wahid Alam*, Weekly Notes, 1891, p. 152. That case is, I think, clearly distinguishable. The evidence there showed that the so-called plaintiff knew nothing whatever about the suit and was not a party to its institution. The second case was *Katesar Nath v. Aggyan*, Weekly Notes, 1894, p. 95. It does not appear to me quite clear from the report whether the learned Judge held that there was no legal plaint and no legally instituted suit merely because the plaint was not signed in accordance with section 51, or whether he so held on the ground that there was no valid authority given by the plaintiff for the institution of the suit. My doubt arises from the learned Judge's allusion to the case of *Badri Prasad v. Bhagwati Dhar*, (1894) I. L. R., 16 All., 240, which has nothing to do with the signing of the plaint, but relates only to the conditions under which a suit or appeal may be filed under a vakalatnamah. The case of *Katesar Nath v. Aggyan* was a decision of a single Judge of this Court, and if it means that, in all circumstances whatever, whether the plaintiff knew of and authorized the suit or not, whether the defendant waived the defect or not, and notwithstanding section 578 of the Code, an unsigned plaint is necessarily waste paper, [64] and a Court of appeal is at liberty to treat the suit as no suit at all, then, with

the greatest respect for the learned Judge, I cannot agree with him. The last case on the point to which I need refer is the case of *Marghub Ahmad v. Nihal Ahmad*, Weekly Notes, 1899, p. 55. In that case not only did the defendant make no objection that the plaint was not duly signed, but he expressly stated that he desired the suit to be disposed of on the merits. In that suit also, so far as one can gather from the report, although the plaintiff had not signed the plaint, there seems to have been no doubt at all that the suit was instituted with his knowledge and authority, but it was held that, notwithstanding these facts, neither the Court below nor this Court had power to allow any amendment, and that the plaint must be rejected. All I can say as to that case, in which no doubt it was held that the plaint in such cases was "a piece of waste paper," and that there was no suit before the Court, is that it appears to me to be wholly at variance with the three unreported decisions which I have mentioned, that in this conflict of authority it is open to me to adopt the view which I think right, and that I unhesitatingly prefer that taken in the unreported cases. In my opinion, to dismiss a suit at the stage of second appeal upon a point of this kind never raised before by the defendant, would be to sacrifice the substantial merits and justice of the case for the sake of technicality, to an extent to which I could never agree. Although I do not say that an objection founded on section 51 is always and necessarily one of pure form, I think that it is so here, and that this objection therefore to the decrees of the Courts below must be over-ruled.

The only other objection which has been pressed is that the Courts below have applied a wrong principle as to the measure of damages. The damages claimed are the difference between the contract price of the goods which the defendant refused to accept and the price realized by the plaintiffs on the resale. That claim is in accordance with the clause in the indent contract, which is admittedly indistinguishable from the clause under [65] consideration by the Full Bench of the Calcutta High Court in *Moll Schutte and Co. v. Luchmi Chand*, (1898) I. L. R., 25 Cal., 505. That case is exactly in point, and the only question is, whether we ought to follow it or the previous decision of the same Court in *Yule and Co. v. Mahomed Hossain*, (1896) I. L. R., 24 Cal.; 124. For my part I have no hesitation in agreeing with the decision in the later case, and I adopt all that was said by the Chief Justice in delivering the judgment of the Full Bench. In this case, as in that, section 107 of the Contract Act has no application. I think that the Courts below have taken the right view of the measure of damages, and that this appeal should be dismissed with costs.

Knox, J.—I too am of the same opinion, namely, that although the plaint in the case in which this appeal arises was not signed by the plaintiffs as required by section 51 of the Code of Civil Procedure, the circumstances of the case raise a proper presumption that the plaintiffs have been privy to the suit throughout.

As the learned Chief Justice has pointed out the plaintiffs were represented by an advocate of this Court. The appearance in and prosecution of the suit by such advocate can be and must be taken to be an appearance by the plaintiffs themselves, especially as it was never suggested until the case came before the Court in Second Appeal that there could be any doubt upon the matter at all.

In First Appeal No. 170 of 1895, decided on the 22nd July 1898, a decision of which I was one of the Judges, and which more-over is a stronger case, inasmuch as it was a case in which the plaintiffs were not represented in the Court of First Instance by an advocate, my brother Banerji and myself were prepared to hold that the plaint might even in the appellate stage be

amended and rectified. *Marghub Ahmad v. Nihal Ahmad*, (1899) Weekly Notes, 1899, p. 55, is an authority at variance with this ; but I have heard nothing which leads me to differ from the view which I took in F. A. No. 170 of 1895. In that case, the absence of the signature of the [66] plaintiffs was held not to be a defect which affected the merits of the case or the jurisdiction of the Court ; in my opinion no ground has been made out, so far as this appeal is concerned, for interference with the decrees of the Courts below.

The only other question raised before us, namely, as to damages, was fully considered in the case of *Moll Sehutte and Co. v. Luchmi Chand*, (1898) I. L. R., 25 Cal., 505, and I agree with the way in which it was then decided.

Appeal dismissed.

NOTES.

[As regards the point relating to pleadings, see likewise, (1905) 28 All., 244 (execution application) ; (1903) 25 All., 635 (Ruling Chief's agent) ; (1902) 5 O. C., 355 (plaintiff's minority doubtful) ; (1912) 17 C. W. N., 989 (one plaintiff signing on behalf of other minors without authority of next friend) ; (1900) 5 C. W. N., 91 ; (1908) 4 L. B. R., 284 (agent under a power of attorney) ; (1911) 11 I. C., 842 (Punjab, signing only the verification) ; (1911) 10 I. C., 731 (Nagpur, defect in signature).

As regards the measure of damages, see also 23 Mad., 18.]

[22 All. 66] FULL BENCH.

The 3rd July, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BANERJI, AND MR. JUSTICE AIKMAN.

Lalta Prasad.....Applicant

versus

Nand Kishore and others.....Opposite Parties.*

Civil Procedure Code, sections 102, 103, 157—Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an "Appearance."

In construing an order alleged by one side and denied by the other to be an order under section 102 of the Code of Civil Procedure, the order will be considered as an order under section 102 it, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear.

Where, his suit having been dismissed for default of appearance under section 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under section 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law ; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear.

It is not an "appearance" within the meaning of section 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply [67] for an adjournment. *Shankar Dat Dube v. Radha Krishna*, (1897) I. L. R., 20 All., 195, and *Scondlerlal v. Goor*.

* First Appeal No. 22 of 1899 from an order of Pandit Rai Indar Narain, Subordinate Judge of Farrukhabad, dated the 23rd January 1899.

prasad, (1898) I. L. R., 23 Bom., 414, approved. *Mahomed Assem-ool-lah v. Ali Buksha*, (1878) N.-W. P. H. C. Rep., 1878, p. 74, *Kashi Parshad v. Debi Das*, (1875) N.-W. P., H. C. Rep., 1875, p. 77, and *Kanahi Lal v. Naubat Rai*, (1881) I. L. R., 3 All., 519, referred to.

THIS was an appeal under section 588 (8) of the Code of Civil Procedure from an order rejecting an application made under section 103 of the Code by a plaintiff whose suit had been dismissed. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff, two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court rejected the application for an adjournment and proceeded to pass the following order dismissing the suit:—"Up to the present this case has been adjourned four times since June 1898, on applications made by the plaintiff. Finally proclamations and warrants were issued for some of the plaintiff's witnesses, who have with difficulty been got to attend to-day; but the plaintiff has been called, and he himself is not present, and his pleaders being unable to proceed with the case, have made this application for adjournment. In the [68] application no reasonable cause is given for adjournment. Sickness, or a friend being at the point of death, is not a proper ground for non-prosecution, especially when no certificate of sickness has been produced. It appears that for some reason there is intentional inaction of the part of the plaintiff. Under these circumstances the case cannot remain pending. The Court cannot waste its time over the business of such a negligent party. It is therefore ordered that the claim of the plaintiff be dismissed for default of appearance and for want of prosecution, with costs; the costs of the defendant to be borne by the plaintiff."

On the 22nd of December 1898 the plaintiff applied for restoration of the suit to its original number, urging that there was in fact sufficient and reasonable cause for his not having prosecuted the suit on the 25th of November.

The defendants filed a counter application pleading (1) that the case had not been dismissed in default of prosecution, (2) that the case had not been decided *ex parte*, (3) that the petitioner ought to have filed an appeal against the order of the Subordinate Judge, and (4) that no good reason for the petitioner's absence on the 25th November had been, or could be, shown.

The Subordinate Judge disallowed the plaintiff's application on the ground that the order dismissing the suit was not in effect an order under section 102 of the Code, that it was a dismissal for want of proof, and therefore the plaintiff's remedy was by appeal against the decree and not by application under section 103.

Against this dismissal the plaintiff appealed to the High Court.

Munshi *Gulzari Lal*, for the Appellant.

The order of the 25th November 1898 as rightly understood was an order under section 102 read with section 157 of the Code of Civil Procedure. It

clearly says that the suit was dismissed "for default of appearance and want of prosecution" the evidence upon the record was not taken into consideration and the suit was not decided upon the merits. The Court in dealing with the [69] subsequent application under section 103 of the Code was not competent to go behind the order passed under section 102 and say that it was a wrong order and therefore an application under section 103 would not lie. The Court had only to interpret that order and to see whether it was really an order passed under section 102 and then to deal with the application under section 103 on the merits. I submit that the order of the 25th November was in substance and effect an order under section 102. The circumstances under which it was passed were exactly those under which an order under section 102 of the Code would be legally justified. The pleaders who presented the application for adjournment on that date on behalf of the plaintiff-appellant were not instructed to go on with the suit in case the application was refused. The following cases were referred to:—

Fazal Ahmad v. Bahadur Singh, (1892) Weekly Notes, 1893, p. 25; *Hira Dai v. Hira Lal*, (1885) I. L. R., 7 All., 538; *Ramtahal Ram v. Rameshar Ram*, (1886) I. L. R., 8 All., 140; *Shankar Dat Dube v. Radha Krishna*, (1897) I. L. R., 20 All., 195; *Bhimacharya v. Fakirappa*, (1867) 4 Bom. H. C. Rep., 206 A. C. J., *Administrator-General of Bengal v. Lala Dayaram Das*, (1871) 6 B. L. R., 688; *Zeinulabdin Khan v. Ahmed Raza Khan*, (1878) L. R., 5 I. A., 233; *Jonardan Dobey v. Ramdhone Singh*, (1896) I. L. R., 23 Cal., 738; *Bhagwan Dai v. Hira*, (1897) I. L. R., 19 All., 355; *Shrimant Saqajirao v. S. Smith*, (1895) I. L. R., 20 Bom., 736, *Soonderlal v. Goorprasad*, (1898) I. L. R., 23 Bom., 414. The cases in I. L. R. 20 Allahabad and 23 Bombay are exactly in point. There seems to be no conflict of authority upon the point that an un-instructed pleader or counsel cannot represent a party in a Court of justice.

Pandit *Sundar Lal*, for the Respondents.

Under section 157 of the Code of Civil Procedure if on any day to which the hearing of the suit is adjourned, the parties or any of them fail to appear, the Court may dispose of the suit in one of the modes provided in chapter VII of the Code, or make such order as it thinks fit. The 25th November 1898 was the [70] date of adjourned hearing of the case. Documentary evidence had already been filed. The Court could either dismiss the suit under section 102 of the Code, if the plaintiff did not appear, or dispose of the case on the merits on the evidence on the record. In the latter case the plaintiff's remedy is by way of appeal under section 540 of the Code, and not under section 103 of the Code. The plaintiff's pleader was present before the Court. Whether his presence was appearance under section 102 of the Code or not depended upon the instructions he had received—*Soonderlal v. Goorprasad*, (1898) I. L. R., 23 Bom., 414. There is nothing on the record to show that he had no instructions to appear. The order of the 25th of November 1898, read with the order under appeal, shows that the Court did not dispose of the suit under chapter VII of the Code, but on the merits. Therefore no application can be made under section 103 of the Code. There must be an order under section 102 of the Code, before an application under section 103 can be made—*Mahomed Azeem-ool-lah v. Ali Buksh*, (1873) N.-W. P., H. C. Rep., 1873, p. 74, and *Kashi Parshad v. Debi Das*, (1875) N.-W. P., H. C. Rep., 1875, p. 77. The case of *Kanahi Lal v. Naubat Rai*, (1881) I. L. R., 3 All., 519, also supports this contention.

Munshi *Gulzari Lal* in reply—The rulings relied upon by the other side do not really decide the point arising in this case. Some of them are clearly distinguishable and the others, I contend, were not rightly decided. The opening

words of section 103 make it abundantly clear that a court in dealing with an application under that section should not reconsider its order under section 102 of the Code.

Strachey, C. J.—This is an appeal under section 588 (8) of the Code of Civil Procedure from an order rejecting an application by a plaintiff under section 103. The suit was instituted on the 19th of May 1898. Issues were fixed, and there were several adjournments of the hearing. On one of the adjourned dates certain evidence was taken, that is, the plaintiff gave evidence, one of the defendants was examined as a witness for the plaintiff, [71] two other witnesses were examined on the same side, and certain documentary evidence was filed. There was then a further adjournment for the purpose of obtaining the attendance of certain other witnesses for the plaintiff who were not present. There were other adjournments which need not further be referred to, and at last the case came on for hearing on the 25th of November 1898. On that occasion the plaintiff was not present. There were present certain pleaders who had been engaged by the plaintiff, and also the defendants. The plaintiff's pleaders presented on his behalf an application for adjournment of the suit on the ground of his illness and also the illness of a friend. The pleaders in presenting this application stated that they were unable to proceed with the case, apparently by reason of the plaintiff's absence. The Court made an order rejecting the application for adjournment and also dismissing the suit. The earlier part of that order referred to the number of adjournments already granted, and then continued :—"The plaintiff was called and he himself is not present, and his pleaders, being unable to proceed with the case, have made this application for adjournment. In the application no reasonable cause is given for adjournment." The order went on to criticise the reasons put forward in the application, and to say that the plaintiff seemed to be "intentionally negligent." The order concludes with these words:—"Therefore it is ordered that the claim be dismissed for default of appearance and for want of prosecution, with costs." It will be observed that the order makes no reference to the evidence, oral and documentary, which had already been taken in the case. We construe that order as an order passed under the earlier portion of section 157 of the Code. In other words, the Court, in our opinion, regarded the case as one in which the plaintiff had failed to appear at the adjourned hearing, and proceeded to dispose of the suit in one of the modes directed in that behalf by Chapter VII, that is, under section 102 of that chapter. We have arrived at this construction by a consideration of the terms of the order as a whole, and more especially with regard [72] to three points. The first is the expression *baghair haziri*, or "default of appearance." That is the expression which a Court ordinarily uses when dismissing a suit for default of the plaintiff's appearance. The second point is that if the suit had been dismissed otherwise than under section 102, one would have expected the order to have at least referred to the evidence previously adduced by the plaintiff. The third point is that in awarding costs to the defendant the Court awarded half the pleader's fees only, and in doing so obviously acted with reference to Rule 458 of the Rules of the 4th April 1894, which is applicable only to cases in which one of the parties does not appear, and which is not applicable where both parties appear and the case is decided after contest. We also construe that order as meaning that the pleaders for the plaintiff, though present and applying for an adjournment, were not duly instructed for the purpose of proceeding with the suit, or instructed otherwise than for the purposes of the application. The order refers to those pleaders as unable to proceed with the case, that is unable in consequence of the plaintiff's

absence; and when, notwithstanding the presence of the pleaders, it describes the suit as dismissed for default of appearance, we think that the Court was presumably referring to those cases in which it has been held that the mere physical presence of a pleader not instructed except for the purpose of applying for adjournment, is not an appearance in the suit in the sense of Chapter VII of the Code.

That being our construction of the order, what next happened was that on the 22nd of December 1898 the plaintiff made an application under section 103 of the Code for an order to set the dismissal aside. The Court rejected that application on the ground that the dismissal of the suit could not be treated as a dismissal for want of appearance of the plaintiff under section 157 read with section 102, but must be treated as a dismissal on the merits, and for want of proof, having regard to the fact that evidence had been taken and was on the record. The Court observed that the contention of the pleaders, that on the 25th [73] of November they had had no instructions, could not be maintained. It, however, did not go into any evidence as to the nature or extent of the pleader's instructions, no doubt because, in the view which it took of that case, that question was not material. The Court held that as the suit had not been dismissed for default of appearance, the application under section 103 could not be maintained. It therefore dismissed the application, and the plaintiff now appeals to us from that decision.

The contention of the plaintiff in this appeal is that the suit was in fact dismissed under section 157 read with section 102, and that his application under section 103 ought therefore to have been determined as such an application properly made, and on the merits. He contends that as he was not present on the 25th of November, and as his pleaders, though present, were not duly instructed in the suit, there was a dismissal of the suit for default of appearance under section 102. In support of that contention he relies on, amongst other authorities, the decision of this Court in *Shankar Dat Dube v. Radha Krishna*, (1897) I. L. R., 20 All., 195, and of the High Court of Bombay in *Soonderlal v. Goorprasad*, (1898) I. L. R., 23 Bom., 414.

The defendants support the decision of the Court below. They contend on two grounds that section 102, and therefore section 103, is not applicable to the case. The first ground is, that the order of dismissal does not purport to be passed under section 102, and on its true construction is not an order under that section. The second ground is that, even if the Court purported to act under section 102, or intended so to act, it could not legally dismiss the suit under section 102, because there was in law an appearance of the plaintiff within the meaning of section 102. It was further argued that the order dismissing the suit, as it could not be considered a legal order under section 102, must be treated as an order dismissing the suit in the ordinary way on the merits, or at all events not for want of appearance, and that the plaintiff's remedy was not by way of application under section 103, but by way of appeal. In support of this contention the learned advocate for the [74] defendants cited, amongst others, the cases of *Mahomed Azeem-ool-lah v. Ali Buksh*, (1873) N.-W. P., H. C. Rep., 1873, p. 74; *Kashi Parshad v. Debi Das*, (1875) N.-W. P., H. C. Rep., 1875, p. 77; and *Kanahi Lal v. Naubat Rai*, (1881) I. L. R., 3 All., 519.

The reply of the plaintiff to this contention is, first, that the order on its true construction is an order of dismissal under section 102; and secondly, that a defendant cannot, in reply to an application under section 103, be heard to say that an order purporting to be passed under section 102, was one which the Court had no power to make under that section, or to contend for any

reason that, contrary to the meaning and effect of that order, the plaintiff had actually appeared when his suit was dismissed for non-appearance.

Now in the first place, as I have already stated, we construe the order of the 25th of November 1898, as an order by which the Court intended to act and believed itself to be acting under section 157 read with section 102. It is not necessary to repeat the reasons which I have already given for that construction. In the second place, what is the meaning of the opening words of section 103 of the Code "when a suit is wholly or partially dismissed under section 102?" Is it a dismissal under section 102 merely if the order says that it is passed under section 102? Or is it only a dismissal under section 102, if, irrespective of the language of the order, the suit was dismissed upon an actual non-appearance of the plaintiff in fact or law? Or is the suit dismissed under section 102 if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiff's appearance, or non-appearance, the real meaning and substance of the Court's action is that it dismisses the suit on the view, whether right or wrong, that the defendant appears and the plaintiff does not appear? We think that the third of these views is the correct one. The mere naming of the section is not conclusive though, no doubt, it may be a useful piece of evidence in construing the order, which must be [76] read and construed as a whole. But, although the Court may describe an order of dismissal, as being made under section 102, the order, taken as a whole, may show that the description is an error, and that the Court was not really dismissing the suit on the view that the plaintiff was not appearing. So, too, if section 102 is not named, and even if some other section, whether section 158 or any other, is named, still it may be that that is a mere misdescription, and that nevertheless the real reason for the dismissal is that in the Court's view the defendant appears and the plaintiff does not appear. In such a case, notwithstanding the misdescription, there is in substance and in fact a dismissal of the suit for non-appearance of the plaintiff, and therefore a dismissal under s. 102, although that dismissal may be absolutely wrong, either because the Court was mistaken in supposing that the plaintiff did not appear, or for any other reason. If the Court was mistaken in supposing that the plaintiff did not appear, still, whether the mistake was one of fact or of law, the appearance would not make the dismissal one not ordered under section 102, it would only make the dismissal under that section a wrong one. In other words, a suit is dismissed under section 102 if the dismissal is based on the state of things contemplated in that section, that is, if the Court's reason for the dismissal is its view that the plaintiff has not appeared.

If that is the correct view of the meaning of the opening words of s. 103, referring to a suit being dismissed under section 102, it follows that a plea by the defendant, in answer to the plaintiff's application under section 103, that the order under section 102 was illegally made, is irrelevant. Section 103 allows the plaintiff to apply for an order to set the dismissal aside, where the suit has been in fact wholly or partially dismissed under section 102. If there has been such a dismissal in the sense I have explained, whether right or wrong, the plaintiff is entitled to apply to the Court to set it aside, and it is no answer to such an application to say that the order sought to be set aside was illegal for any reason whatever. Therefore the defendant cannot contest the [76] application *in limine* as one which cannot be entertained at all under s. 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law. But what can the defendant do? He is entitled to meet in any way that is relevant the plaintiff's allegation, which is the only

ground on which such an application can succeed, that the plaintiff was prevented by any sufficient cause from appearing when the suit was called on for hearing. In order to succeed the plaintiff must prove that he was so prevented from appearing. The defendant may prove that the plaintiff was not prevented from appearing. Those terms would undoubtedly cover a contention by the defendant that the plaintiff was not prevented from appearing because, in fact, he did appear, so that the contention that there was such an appearance in fact and in law, though it cannot be used as a bar to the application under s. 103 *in limine* would still be material on the merits of the application and as a ground for dismissing it under the section.

Now in the present case the plaintiff did not appear in person. If he appeared at all, it was by his pleaders. If his pleaders were not duly instructed and able to answer all material questions relating to the suit, if they were instructed only to apply for an adjournment, then Pandit Sundar Lal concedes that according to the authorities, and particularly according to *Shankar Dat Dube v. Radha Krishna* and *Soonderlal v. Goorprasad*, with which we agree, the plaintiff did not appear at all. Therefore all depends on two questions : first, were the pleaders duly instructed in the sense of these authorities ? and, secondly, if they were not, and if consequently there was no appearance by the plaintiff on the 25th of November 1898, was he prevented by any sufficient cause from appearing ?

These questions have not been considered by the Court below. It did not consider them because of the erroneous view which it formed of the nature of the order of dismissal. It should have treated that order as a dismissal of the suit under section 102, and [77] disposed of the application solely with reference to the circumstances contemplated by section 103. The order must be set aside as in effect passed on a preliminary point, and the case must go back to the Court for the application under section 103 to be disposed of on the merits. In this judgment I have not thought it necessary to discuss in detail the various cases that have been cited. If any of them, being decisions of this Court, and especially the cases reported in N.-W. P., H. C. Rep., 1873, p. 74, N.-W. P., H. C. Rep., 1875, p. 77, and I. L. R., 3 All., 519, contain anything inconsistent with the views expressed in this judgment, they must be considered overruled to that extent. The appellant will have his costs of this appeal. The other costs will abide the result.

Knox, J.—I fully agree with the order proposed and with the reasons given for the same.

Banerji, J.—I am of the same opinion, but desire to make a few observations. Two points have been conceded, and in my opinion rightly conceded, by the learned advocate for the respondents. The first is that if the dismissal of the plaintiff's claim was in fact and in law a dismissal under the first part of section 157 of the Code of Civil Procedure, that is, a dismissal under section 102, on the ground of the plaintiff's failure to appear at the adjourned hearing of the suit, the plaintiff has a remedy under section 103. The second point is, that the mere presence of a pleader at the hearing is not an appearance within the meaning of the Code unless the pleader was duly instructed and able to answer material questions relating to the suit. On both these points the course of rulings in this Court in recent years, and in the other High Courts is to the effect that in the former case an application can be made under section 103, and in the latter, that the party represented by a pleader without instructions must be deemed not to have appeared. There is no reason to depart from this consensus of rulings. The learned advocate for the respondents contends that whenever an application is made under section 103, the

first question to be determined is, whether the order which is sought to be [78] set aside could legally have been made under section 102. With this contention, and the rulings which support it, I am unable to agree. What the Court has to determine is, whether the order of dismissal was, in fact, made under section 102; that is, whether it was made on the ground that the plaintiff did not appear and the defendant did appear, not whether that order was rightly or legally made. When a Court has dismissed a suit on the ground that the defendant has appeared and the plaintiff has not appeared, that is a dismissal under section 102, and an application can be made under section 103 to set aside such a dismissal. The plaintiff's success upon that application depends on his ability to prove that he was prevented by any sufficient cause from appearing when the suit was called on for hearing. The defendant may, for the purpose of showing that no such cause existed, prove that, in fact, the plaintiff had appeared, and that he was not prevented by any sufficient reason from appearing at the hearing: but that is a question which must be determined for the purpose of considering whether the plaintiff has been able to substantiate his application under section 103 to set aside the dismissal. In this case, as has been shown in the judgment of the learned Chief Justice, the Court did, in fact, dismiss the suit on the ground that there was no appearance on behalf of the plaintiff. That being so, the plaintiff was entitled to apply under section 103 for the setting aside of that dismissal, and the Court below was wrong in refusing to entertain the application. I agree with the order proposed by the learned Chief Justice.

Aikman, J.—I also am of the same opinion. The learned Subordinate Judge says that the order of dismissal which was passed on the 25th November 1898, amounted to a dismissal for want of proof. I am clear that this is a mistake. It would have been open to the Subordinate Judge in the present case to say that the evidence on the record was insufficient to prove the plaintiff's case, and that therefore the suit was dismissed. Had he said so, that would have been a decree against which the plaintiff's remedy would have been by way of appeal. But what he did say [79] was that the suit was dismissed for default of appearance. That is clearly an order passed under the first part of section 157 read with section 102 of the Code, and the plaintiff adopted the proper course by applying under section 103 for an order to set the dismissal aside. The argument that because the Court may have been mistaken in thinking that there was no appearance by the plaintiff, the order must be taken to have been one not passed under section 102 is, in my opinion, utterly fallacious, and I would dissent from anything there may be in the judgments cited which would support such reasoning. I concur in the order proposed.

Appeal decreed and cause remanded.

NOTES.

[A person instructed only to apply for adjournment does not make an appearance :—(1904) 8 C. W. N., 621; (1907) 34 Cal., 403; (1907) 30 Mad., 274; (1908) 18 M. L. J., 51; (1907) 1 S. L. R., 115; (1908) 1 S. L. R., 224. A case decided under C. P. C., 1908, O. 17, r. 3, amounts to a decree and the remedy is by way of appeal:—(1911) 34 All., 123. See also (1909) 19 M. L. J., 760.]

[22 All. 79]

APPELLATE CIVIL.

The 6th July, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE
AND MR. JUSTICE BANERJI.

Dhan Kunwar and another.....Opposite Parties

versus

Mahtab Singh and others.....Objectors*

Civil Procedure Code, Section 244—Execution of decree—Sale in execution—Decree satisfied—Amendment of decree in favor of judgment-debtors—Application by judgment-debtors to recover surplus from decree-holders.

Where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwards amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, it was held that it was competent to the judgment-debtors by application under section 244 of the Code of Civil Procedure to recover such surplus from the decree-holders.

THIS was an appeal under section 10 of the Letters Patent from the judgment of a single Judge of the Court. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment, which was as follows :—

“This appeal relates to a decree bearing date the 25th July 1895. Of that decree the ancestors of the present respondents [80] were decree-holders, and the ancestors of the present appellants were the judgment-debtors against whom the decree ran. The decree was a decree for sale passed under section 88 of Act No. IV of 1882. The order absolute for sale had followed in due course, the property was sold, and the proceeds of the sale dealt with as provided by section 88. The amount due had been paid to the plaintiffs, when the judgment-debtors discovered that there was an error in the decree, applied for amendment and got the decree amended. The result of the amendment was the discovery that a sum of Rs. 500-11-4 had been paid to the plaintiffs in excess of what was due to them under the decree as now amended. The judgment-debtors then applied under section 244 of the Code of Civil Procedure to recover this sum in the execution department. Their application has been dismissed on the ground that the loss is due to the negligence of the appellants.”

The single Judge thereafter proceeded to dismiss the appeal before him. The appellants appealed under section 10 of the Letters Patent.

Mr. D. N. Banerji, and Babu Satish Chandar Banerji, for the Appellants.
Pandit Moti Lal Nehru, for the Respondents.

Strachey, C. J., (Banerji, J., concurring).—We are of opinion that this appeal must be dismissed. At the same time we are unable to concur in the view of the law on which the learned Judge has dismissed the appeal to this Court. The learned Judge's view was this. He considered that where there had

* Appeal No. 11 of 1899, under section 10 of the Letters Patent.

been a sale in execution of a decree, and by that sale the decree as passed was fully discharged, but the judgment-debtor afterwards obtained an amendment of the decree, and the decree as amended showed that the decree-holder had realized at the sale more than he was entitled to, the judgment-debtor had no right under section 244 of the Code of Civil Procedure to apply to recover the excess realized. We cannot agree with that view at all. It appears to us that the question whether the decree-holder had realized more than he was entitled to under the decree as it finally stood, was undoubtedly [81] a question relating to the execution, discharge or satisfaction of the decree, and that therefore under section 244 the judgment-debtor was entitled to apply for the recovery of what the decree-holder had taken in excess. The learned Judge says :—"As soon as the decree ceased to subsist section 244 had no application." It would, we think, be impossible to maintain that after the sale in execution, the decree ceased to subsist in the sense that no amendment of it could be made, and if so the answer is that as soon as the decree was amended, and the amendment showed that the decree-holder had realized too much, the application of section 244 was revived. So long as there is no question which can be raised under section 244, that section, of course, could have no application; but as soon as any such question arises the section again becomes applicable. Take the converse case. Suppose that after the execution sale it appeared that the decree awarded less to the decree-holder than he was entitled to according to the judgment. Surely he could apply, notwithstanding the sale, for an amendment of the decree so as to entitle him to recover in execution the full amount decided in the judgment to be due to him, and, if the amendment were made, surely he could then execute his decree for the balance due, and any application for such execution would be made under section 244. If so, the judgment-debtor, in the converse case of too much having been realized, can equally apply for amendment and afterwards recover the excess under section 244. According to the principle laid down by the learned Judge, neither the judgment-debtor nor the decree-holder would have any remedy under sections 206 and 244, and a separate suit would be necessary, if it were discovered that too much or too little had been realized at the sale in consequence of a clerical or arithmetical error in the decree. Section 244 was intended to make a separate suit unnecessary in such cases.

On other grounds, however, we think that the appeal must fail. The whole question is whether the decree-holders in fact realized Rs. 500 odd in excess of what they were entitled to. That is a question of the construction of the decree for sale under section [82] 88 of the Transfer of Property Act. That decree provides for future interest. It does not expressly state that the future interest is payable until realization, but it does not state that it is to stop at any earlier date. Therefore, unless there is anything to preclude us from so doing, we must construe the decree according to the recent Full Bench ruling in *Bakar Sajjad v. Udit Narain Singh*, (1899) I. L. R., 21 All., 361, as a decree in accordance with section 88, that is, as a decree awarding interest until the date of realization. On that view of the decree the decree-holders have not realized too much, and this application of the judgment-debtors must fail. Then is there anything which does preclude us from applying the principle laid down by the Full Bench? The only thing which, it is suggested, precludes us is an order passed on the 4th of December 1897, on the judgment-debtor's application, by which the Court amended, not the decree under section 88, but the order absolute for sale under section 89. Of course, the decree to be executed was the decree under section 88, and no alteration of the order absolute could affect the rights of the decree-holders under that unamended decree. But

it is said that the amending order placed a construction on the decree under section 88 to the effect that interest beyond six months from the date of the decree should not be allowed. It is suggested that we are bound to construe the decree under section 88 according to that construction and not on the construction which would be right according to the Full Bench decision. We do not think that the order of December 1897 has any such effect. It was not an order passed in execution proceedings, nor an interlocutory order which could have an effect analogous to that of *res judicata* in accordance with the well-known rulings of the Privy Council. At the time when it was made, execution proceedings had been completed by the sale. It was not until some time later that proceedings in execution were resumed by the present application under section 244. We do not think that the principle of the Privy Council rulings can be held to cover an [83] order of this kind. It is difficult, indeed, to say under what provision of the law the order was made. It cannot be regarded as an order under section 206 of the Code, because the Court did not profess to act on any ground stated in that section. Nor can it be regarded as an order of review. We think that the principle laid down in the Full Bench case must be applied; that the decree-holders did not realize anything in excess of what was due to them under the decree, and that this appeal of the judgment-debtors must be dismissed with costs.

Appeal dismissed.

NOTES.

[This was followed in (1903) 25 All., 441; (1902) 24 All., 291; (1907) 29 All., 348. See also C.P.C., 1908, sec. 144 (2).]

[22 All. 83]

The 12th July, 1899.

PRESENT :

MR. JUSTICE BANERJI.

Zubeda Bibi.....Defendant

versus

Sheo Charan.....Plaintiff.*

Act No. XII of 1881 (N.-W. P. Rent Act), s. 36—Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.

Held that the mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser.

THE plaintiff in this case was the purchaser of the rights of the mortgagor in certain property which was the subject of a usufructuary mortgage. The defendant, Zubeda Bibi, was the representative in interest of the mortgagees. The plaintiff redeemed the mortgage by deposit of the whole mortgage money in Court, and obtained possession of the mortgaged property with the exception of four plots of land on which the mortgagee during the continuance of the

* Second Appeal No. 196 of 1899, from a decree of Maulvi Syed Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated the 31st December 1898, confirming a decree of Mr. H. David, Munsif of Basti, dated the 6th November 1897.

mortgage had planted trees. The plaintiff accordingly brought the present suit for the recovery of these four plots.

The Court of First Instance (Munsif of Basti) decreed the plaintiff's claim. The defendant appealed and urged, *inter alia*, that the suit was not cognizable by a Civil Court because on a former occasion the plaintiff had sought to eject the defendant as [84] a tenant by proceedings under the North-Western Provinces Rent Act, 1881. This was so; but in those proceedings the Board of Revenue had found that the relation of land-holder and tenant did not subsist between the parties, and had directed the plaintiff to seek his remedy in a Civil Court. The Lower Appellate Court (Subordinate Judge of Gorakhpur) dismissed the appeal confirming the decree of the Court of First Instance.

The defendant thereupon appealed to the High Court.

Munshi *Haribans Sahai*, for the Appellant.

Pandit *Moti Lal Nehru* (for whom Pandit *Tej Bahadur Sapru*), for the Respondent.

Banerji, J.—This is an untenable appeal. The plaintiff respondent is the purchaser of the rights of two persons who mortgaged certain property to the defendant appellant. The amount of the mortgage was deposited by him in Court, and was withdrawn by the mortgagee in full discharge of the mortgage. The mortgagee delivered possession to the plaintiff of the whole of the mortgaged property except a grove which is claimed in this suit. The Courts below have decreed the claim. The first contention urged in this appeal is that the suit is cognizable by a Court of Revenue and not by the Civil Court. That contention is based upon the argument that the plaintiff, by reason of his having applied to the Revenue Court for the ejectment of the defendant under section 36 of Act No. XII of 1881, is precluded from denying that the relationship of landlord and tenant exists between him and the defendant. It appears that the plaintiff did issue a notice for the ejectment of the defendant under section 36 of the Rent Act. That notice was contested, and in the result the appellate Court held that the plaintiff was not entitled to eject the defendant under the proceedings taken by him in the Revenue Court. The order of the Board of Revenue, which is the only order on the record of this case, is to the effect that the plaintiff ought to seek his remedy in the Civil Court. From that order it is clear that the Revenue Court did not find that the relation of landlord and tenant existed between the parties. The mere fact [85] of the plaintiff having applied to the Revenue Court for the ejectment of the defendant does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is as a trespasser. The application made by the plaintiff in the Court of Revenue did not amount to anything more than an admission which was rebuttable. In this case he asserted that the defendant, after having received the mortgage money, had no right to continue in possession of a part of the property, and that she was thus in possession as a trespasser. A suit brought upon such an allegation can only be brought in the Civil Court. It has been found that the relation of landlord and tenant does not exist between the parties. It was never stated in the pleadings that such relation subsisted between the parties. The only ground upon which the defendant contended in the Courts below that the suit was not cognizable by the Civil Court was the ground stated in the first plea in the memorandum of appeal to the Lower Appellate Court, namely the fact that the plaintiff had issued a notice of ejectment under section 36 of Act No. XII of 1881. Upon the allegations made in this case and the findings of the Court below this was a suit which was exclusively cognizable by the Civil Court. The Lower Appellate Court has found that the grove in question was planted

during the time when the defendant was in possession as an usufructuary mortgagee, and that it is thus an accession to the mortgaged property. It has found that separate possession and enjoyment of the grove without detriment to the principal property is not possible. It has further found that the planting of the grove was not necessary to preserve the property from destruction, forfeiture, or sale, and that the grove was not planted with the consent of the mortgagor. Consequently under section 63 of the Transfer of Property Act the mortgagor is entitled to obtain delivery of possession over the accession made to the mortgaged property. It is true that the Lower Appellate Court in its judgment uses the word plaintiff when referring to the question of consent; but having regard to the fact that the Court in distinct terms referred [86] to the provisions of the second paragraph of section 63, and that it was considering whether all the conditions mentioned in that section applied, it is clear that the Court meant to find that the grove was not planted with the consent of the original mortgagors. Upon the findings of the Lower Appellate Court the second contention raised in this appeal cannot be sustained. It is urged, lastly, that the plaintiff ought to have sued for redemption of the mortgage. It has been found, and it is a fact which was evidently admitted on the pleadings, that the defendant received the whole of the mortgage money in full satisfaction of the mortgage. That being so, there has been a redemption of the mortgage, and as the bulk of the property has been restored to the representative of the mortgagor, the only suit which the plaintiff, as such representative, had to bring was a suit for recovery of possession of the property which was withheld from him. I dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1899) 22 All., 93.]

[22 All. 86]

The 15th July, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE AIKMAN.

Dhani Ram.....Defendant

versus

Chaturbhuj and another.....Plaintiffs.*

Civil Procedure Code, section 244—Execution of decree—Questions for the Court executing the decree—Sale in execution—Suit by decree-holder and judgment-debtor against auction purchaser to set aside sale alleging an uncertified adjustment of the decree prior to the sale.

Held, that the provision of section 244 of the Code of Civil Procedure disallowing a separate suit to determine questions arising between the parties to the suit in which a decree has been passed and bearing upon the execution thereof, operates not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. *Basti Ram v. Fattu*, (1886) I. L. R.,

* First Appeal from order No. 46 of 1899, from an order of W. F. Wells, Esq., District Judge of Agra, dated the 6th May 1899.

8 All., 146, and *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683, referred to.

[87] THE facts of this case sufficiently appear from the judgment of AIKMAN, J. Pandit Sundar Lal, for the Appellant.

Babu Jogindro Nath Chaudhri (for whom Munshi Gulzari Lal), for the Respondents.

Blair, J.—The plaintiffs' suit, out of which this second appeal arises, is a suit by a decree-holder and a judgment-debtor as plaintiffs against an auction-purchaser at a sale in execution of a decree in which the plaintiffs occupied the position I have mentioned on the ground that an adjustment had been arrived at between them before sale. The Court of First Instance dismissed the suit of the plaintiffs, applying the provisions of section 244 of the Code of Civil Procedure. The appellate Court reversed that decision and remanded the case under section 562 of the Code of Civil Procedure for decision upon the merits. It is against that order of remand that the present appeal is brought. The ground taken by Pandit Sundar Lal, who appears for the appellant, is that the Court of First Instance was right in applying section 244 as a bar to this suit. That practically is the substantial ground of appeal. The fact alleged is, that the plaintiffs had really effected an adjustment, which, if duly certified to and sanctioned by the executing Court, would have put an end to the suit in the execution proceedings. It was manifestly the duty of the decree-holder under section 258 of the Code of Civil Procedure to certify such adjustment. It was open to the judgment-debtor, upon the decree-holder failing to perform that duty, to protect himself from the further execution of the decree by himself certifying to the Court the fact of such adjustment, whereupon due notice would have been given to the decree-holder to show cause why the adjustment should not be recorded as certified. As a matter of fact neither party took the course which is imposed upon one, and, in case of his default, is allowed to the other by that section. The consequence was that the sale proceeded and the defendant became a purchaser. It is now sought to set aside that sale. Apart altogether from authorities to [88] which I am bound to conform, it does seem contrary to elementary principles of right and justice to allow two persons, either of whom could have prevented the sale, to put their hands in their pockets till the sale was over, and then to proceed against an innocent auction purchaser by suit in order to set aside the sale which ought never to have taken place. However, we have abundant authority in the Full Bench decision of this Court in *Basti Ram v. Fattu*, (1886) I. L. R., 8 All., 146, and the decision of the Privy Council in *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683. The only distinction that appears to us which could possibly be urged between this case and those that have been decided is that the sole defendant here is the auction purchaser, and it has been contended before us that upon that fact the provisions of clause (c) of section 244 of the Code of Civil Procedure do not apply. In my opinion the question as to the fact and propriety of this adjustment did arise between the parties to the suit in which the decree was passed, and ought to have been by them decided in the executing Court as provided for by section 244. I would allow this appeal, and, setting aside the order of remand by the Court below, restore with costs the decree of the Court of First Instance.

Aikman, J.—I am of the same opinion. The suit out of which this appeal arises was brought to set aside an auction sale held in execution of a decree on a mortgage. The plaintiffs are the decree-holder and the judgment-debtor in the mortgage suit. The defendant, who is the appellant

here, is the auction purchaser of the mortgaged property. It appears from the statement of facts that on the 10th of March 1898, the decree-holder and the judgment-debtor in the mortgage suit entered into an arrangement, whereby the judgment-debtor executed a fresh mortgage in favour of the decree-holder in adjustment of the decree which the latter had obtained upon the previous mortgage. Neither of the parties took any steps to have this adjustment certified to the Court, whose duty it was to execute the decree. For anything we know to the contrary, the agreement entered into between the decree-holder [89] and the judgment-debtor may have come within the provisions of the second paragraph of section 257A of the Code of Civil Procedure, and may have required the sanction of the Court. The 21st of March 1898 was the date fixed for the sale which, under the provisions of section 320 of the Code of Civil Procedure, had been transferred to the Collector. On that date the son of the decree-holder presented an application to the officer conducting the sale, asking him to stay the sale on the ground that the decree had been satisfied. That officer refused the prayer of the applicant. The property was sold, and was purchased by the appellant before us. The judgment-debtor applied under section 311 of the Code of Civil Procedure to have the sale set aside. That application was refused, and no appeal was preferred against the order of refusal. The Court of First Instance held that the present suit was barred by the provisions of section 244 of the Code, and on that ground dismissed it. On appeal the learned District Judge came to the conclusion that section 244 did not apply to the case, set aside the decree of dismissal, and remanded the suit for decision on the merits. The defendant appeals against this order of remand, contending that the decision of the first Court was right. In my judgment the suit is clearly barred by section 244. The case is, in my opinion, governed by the decision of the Full Bench of this Court in *Basti Ram v. Fattu*, (1886) I. L. R., 8. All., 146. That was a case in which a judgment-debtor, whose property had been sold in execution of a decree, brought a suit against the auction purchaser to have the sale set aside on the ground that the property, an occupancy tenure, could not be sold in execution. The Full Bench held that the provisions of section 244 disallowing a separate suit to determine questions arising between the parties to the suit in which a decree had been passed and bearing upon the execution, discharge or satisfaction of the decree, or stay of the execution thereof, operated not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction purchaser in execution of the [90] decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to execution, discharge or satisfaction of the decree. If the question be of this nature in this suit it is one which by section 244 must be determined by order of the Court executing the decree and not by a separate suit, and it is immaterial whether the party did or did not raise it prior to the auction sale in execution proceedings. If he did not, "suit is not the remedy which the Legislature has provided." These remarks in my judgment apply clearly to the present case. A purchaser at an auction sale held in execution of a decree is entitled to take it for granted that questions as to whether the decree under execution is or is not barred by limitation, as to whether the property advertised for sale is or is not saleable under the decree, and as to whether the decree has or has not been satisfied, have been decided by the Court executing the decree. If a suit like the present were held to be maintainable against an auction purchaser, it would have a most injurious effect upon auction sales. If parties will not adopt the course provided by law for deciding whether a decree has or has not been satisfied, they cannot take advantage of their own laches and

neglect of the law to harass an innocent auction purchaser. I concur in the order proposed.

Appeal decreed.

NOTES.

[This was applied in (1902) 24 All., 239 (*fraud*); (1904) 26 All., 447; (1909) 11 Bom. L.R., 699; (1909) 2 I.C., 983 (All.).]

[22 All. 90]

The 26th July, 1899.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE.

Muhammad Baqar.....Defendant

versus

Mango Lal.....Plaintiff.*

Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, art. 120—

Suit by auction purchaser of mortgaged property to cancel a perpetual

lease granted by the mortgagor in contravention of

a covenant in the mortgage.

During the continuance of a mortgage which contained a covenant against alienation of the mortgaged property, the mortgagor made a perpetual lease of that property. The mortgagee brought a suit on his mortgage, and [91] having obtained a decree, put the mortgaged property up to sale. The auction purchaser of the mortgaged property on becoming aware of the existence of the perpetual lease, sued for its cancellation and for a declaration that the defendant had no right to interfere with or obstruct the plaintiff in respect of the property in question. *Held*, that the limitation applicable to such suit was that prescribed by article 120 of the second schedule to the Indian Limitation Act, 1877, and not that prescribed by article 91 or article 95. The main prayer of the plaint was for a decree declaring and establishing the plaintiff's title and the prayer for cancellation of the lease could be treated as merely subsidiary to the main relief asked. *Pachamuthu v. Chinnappan*, (1887) I. L. R., 10 Mad., 213, and *Uma Shankar v. Kalka Prasad*, (1883) I. L. R., 6 All., 75, referred to. *Din Dial v. Har Narain*, (1893) I. L. R., 16 All., 73, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Ghulam Muftaba, for the Appellant.

Mr. B. E. O'Connor, for the Respondent.

Knox, Acting C. J.—The suit out of which this second appeal arises was brought by one Mango Lal, who is now respondent, on the basis of a bond executed by Fazal Husain. The bond is said to have been executed on the 1st of July 1889, in favour of the predecessor in interest of the plaintiff, and to have been followed by a second bond executed by the same person and in favour of the same ancestor of the plaintiff. On the 26th of January 1890, a suit was brought upon these bonds, and a decree obtained for the enforcement of the hypothecation lien on the 28th of March 1891. The plaint in that case was filed by the father of the present plaintiff. He died before the close of the suit.

* Second Appeal No. 777 of 1898 from a decree of Babu Baijnath, Rai Bahadur, Additional Judge of Saharanpur, dated the 5th July 1898, confirming a decree of Maulvi Shah Amjadullah, Munsif of Saharanpur, dated the 27th July 1897.

The plaintiff and his brother obtained a decree under section 89 of Act IV of 1882, on the 25th of June 1892, and in execution of the decree the entire hypothecated property was brought to sale. The plaintiff purchased the property when it was put up for sale, and the date of his purchase was the 20th of August 1894.

It appears that on the 7th July 1890, Fazal Husain executed a perpetual lease in respect of a portion of the hypothecated property in favour of Muhammad Baqar.

[92] The plaintiff contends that the execution of this lease was in contravention of a covenant not to alienate, which was contained in the mortgage deed executed by Fazal Husain in favour of Bhagwan Das, and accordingly prays in this suit that the lease be declared null and void.

The date on which the cause of action accrued is entered in the plaint as November 1896, and is set out as being a decision which the Revenue Court gave against the plaintiff when he tried to realize rent from his tenants and found himself opposed by Muhammad Baqar.

The learned Judge found that the suit was within time and rejected the defence set up by the appellant that limitation barred the claim. He also found that the lease was in contravention of the covenant contained in the mortgage-deeds of 1889 and 1890, and granted the respondent the decree prayed for.

It is now contended before me in appeal that the suit is barred by limitation, as the article which applies is either article 91 or 95 of the second schedule of Act No. XV of 1877. It is also contended that the respondent was aware of the lease on the 5th of July 1893, the date on which Mango Lal, plaintiff, in his defence filed by him in answer to a suit brought by one Musammat Saidunnissa, expressly made mention of this lease, and time began to run from that date; and lastly, that, even if article 120 of the abovenamed schedule is the article which governs the case, then also time began to run from the date of the execution of the lease, the 7th of July 1890, and in this event also the suit brought was beyond time.

The learned Judge held that the article which governs the suit was article 120 and the right to sue did not accrue to the plaintiff until he purchased the property in August 1894. In support of his judgment I have been referred to the case of *Pachamuthu v. Chinnappan*, (1887) I. L. R., 10 Mad., 213. The difficulty about applying that precedent is that in that suit there was no prayer that the deed which prejudiced the plaintiff's title might be cancelled **[93]** or set aside. I was also referred to the case of *Uma Shankar v. Kalka Prasad*, (1883) I. L. R., 6 All., 75. This is more in point, for the relief claimed by the plaintiffs was proprietary possessions by establishment of ownership and by removal of the defendants' opposition based on the collusive mortgage. The learned Judges in that case held that the suit was not for relief on the ground of fraud, but for possession of property by right of auction purchase. Similarly in the case before me the prayer is for a declaratory decree declaring and establishing the plaintiff's title, and also declaring that the lease of the 7th of July 1890 is null and void. I think the suit before me may be considered as one in which I should follow the principle laid down in the ruling just quoted of this Court. I find that my brother AIKMAN in *Din Dial v. Har Narain*, (1893) I. L. R., 16 All., 73, had a similar point to decide, and held that the prayer for the cancelment of the deed, which was in the plaint before him, could be treated as merely incidental to the main relief asked. In the present case I too would treat the subsidiary prayer in the declaration prayed for as purely subsidiary. What the plaintiff wants is a declaration that the shadow cast upon his title

may be dispersed. It is otherwise nothing to him whether the lease between Fazal Husain and Muhammad Baqar is or is not binding upon those who were parties to it. Accordingly, following it, I dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See also (1902) 26 Mad., 410; (1904) 1 C.L.J., 73.]

[22 All. 93]

The 2nd August, 1899.

PRESENT :

MR. JUSTICE AIKMAN.

Hamid Ali Shah.....Plaintiff

versus

Wilayat Ali.....Defendant.*

Act No. XII of 1881 (N.-W. P. Rent Act), sections 36, 96 (b)—Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.

Held that the fact that a plaintiff in a civil suit for ejectment of an alleged trespasser has on a previous occasion taken proceedings against the [94] defendant under section 36 of the Rent Act, 1881, is not of necessity fatal to the suit in the Civil Court. *Baldeo Singh v. Imdad Ali*, (1893) I. L. R., 15 All., 189, and *Deo Narain Rai v. Sheo Charan Rai*, Weekly Notes 1893, p. 166, distinguished. *Zubeda Bibi v. Sheo Charan*, (1899), *supra* p.83, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gulzari Lal, for the Appellant.

Babu Jogindro Nath Chaudhri (for whom Babu Harendro Krishna Mukerji), for the Respondent.

Aikman, J.—This appeal arises out of a suit which was brought by the appellant to eject the defendant from certain plots of land as being a trespasser. The Court of First Instance decreed the plaintiff's suit. The Lower Appellate Court reversed that decree and dismissed the suit upon the ground that it was not cognizable by the Civil Court. It appears that the plaintiff issued a notice to the defendant under section 36 of the North-Western Provinces Rent Act, 1881, seeking to eject him from the land in suit. The defendant made an application to the Assistant Collector contesting his liability to be ejected. He contended in this application that he was not the plaintiff's tenant, but was himself the owner of the land. The Assistant Collector came to the conclusion that the present plaintiff, Hamid Ali Shah, had proved his ownership of the land, and upon that finding maintained the notice of ejectment. The defendant appealed to the Commissioner, who pointed out that the finding of the Assistant Collector in favour of the plaintiff's ownership of the land was not sufficient to give the Revenue Court jurisdiction. The Commissioner held that the relation of landlord and tenant did not exist between the parties, and reversed the order of the Assistant Collector, holding that the case was "essentially one for the Civil Court." The learned Subordinate Judge refers to a decision of BURKITT,

* Second Appeal No. 278 of 1899, from a decree of a Rai Pandit Indar Narain, Subordinate Judge of Farrukhabad, dated the 10th January 1899, reversing a decree of Babu Hari Mohan Banerji, B.A., Munsif of Farrukhabad, dated the 31st August 1898.

J., in *Baldeo Singh v. Imdad Ali*, (1893) I. L. R., 15 All., 189. That decision, I may mention, was followed by me in the case of *Deo Narain Rai v. Sheo Charan Rai*, Weekly Notes, 1893, p. 166. But the circumstances [96] of the cases dealt with in these two decisions were entirely different from those of the present case. The plaintiffs in both those cases had endeavoured to eject the defendant by taking action under section 36 of the Rent Act, but the Revenue Court had, on the defendant's objection, held that the defendant was a tenant with right of occupancy. Under these circumstances my brother BURKITT and I held that no suit was maintainable in a Civil Court to eject the defendant as a trespasser. That this view is right is quite evident from the provisions of section 96, clause (b) of the Rent Act, although that was not referred to in our judgments. The present case is on all fours with an unreported case decided by my brother BANERJI—Second Appeal No. 196 of 1899, decided on the 12th July 1899 (since reported. *Vide supra* p. 83.) In that case, as in this, the Revenue Court held that the relation of landlord and tenant did not exist between the parties. With the following passage of the judgment, I fully concur:—"The mere fact of the plaintiff having applied to the Revenue Court for the ejectment of the defendant does not estop him from asserting, as he has done in the present suit, that the defendant is unlawfully in possession, that is, as a trespasser."

In my judgment the suit was cognizable by the Civil Court. I therefore allow the appeal, and, reversing the decree of the Lower Appellate Court, remand the suit to that Court under the provisions of section 562 of the Code of Civil Procedure, with directions to readmit the appeal under its original number on the register, and proceed to dispose of the remaining grounds raised in the memorandum of appeal to it. The appellant will have the costs of this appeal. Other costs in the case will abide the event.

Appeal decreed and cause remanded.

[96] *The 9th August, 1899.*

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BANERJI.

Balbir Singh and another.....Plaintiffs

versus

The Secretary of State for India in Council.....Defendant.*

Construction of document—Grant of land—Presumption as to boundaries where grant is described as bounded by a river or a road—Meaning of "river."

If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption; and this, though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, and

* First Appeal No. 96 of 1896 from an order of B. Lindsay, Esq., Subordinate Judge, Dehra Dun, dated the 14th December 1895.

although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road. And this rule of construction cannot be departed from merely because it is shown that it would have been to the interest of the grantor to retain half the bed of the river. This rule of construction applies equally whether the subject matter be a grant from the crown or a subject. *Micklethwaite v. Neway Bridge Co.*, (1886) L. R., 33 Ch. D., 133; *Ecroyd v. Coullhard*, L.R., 1897, 2 Ch. D., 554, and *Lord v. The Commissioner for the City of Sydney*, (1859) 12 Moo., P. C., 473, followed.

THIS was a suit for the demarcation of the western boundary of the plaintiffs' estate. The plaintiffs were owners of two villages known as upper and lower Ghamandpur. These villages originally formed part of a Government grant of land made to the widow of Captain William Raynor, V. C., and one of the boundaries of that grant, the boundary in question in the present suit, was the bed of a hill stream called the Jakhan Rao. The plaintiffs claimed that the original grantee was in possession of the Jakhan Rao up to the line of mid-stream, the western boundary of the grant being described as the Jakhan Rao. They claimed that possession of the villages purchased by them had been always held according to the boundary alleged. The plaintiffs did indeed admit that in 1883 the Forest Department set up boundary pillars on the east bank of the Jakhan Rao and that on a dispute arising as to the boundary the question had been decided against [97] them by the Collector, but they claimed to have always remained in possession notwithstanding that decision and that the Collector's order could not affect their rights. The defendant pleaded that ever since the erection of the boundary pillars on the left bank the Forest Department had been in possession, and that the suit was barred by limitation. It was denied that any portion of the Jakhan Rao was included in the original grant and it was further alleged that the plaintiffs' predecessor had compromised her claim to the Rao by accepting an additional grant of 400 acres.

The Court of First Instance (Subordinate Judge of Dehra Dun) dismissed the plaintiffs' suit, holding that the presumption as to the boundary being the middle line of the bed of the Jakhan Rao, applied only in cases where Government makes no claim to the soil of a river-bed—not in cases like the present where the Government claims the whole of the river-bed as of right and as being the proprietor of all the land in Dehra Dun. The Court also found that the area of the original grant would be made up without including half the bed of the Jakhan Rao, and that therefore the boundary set up by the defendant was correct.

The plaintiffs appealed to the High Court.

The Hon'ble Mr. Conlan and Pandit Sundar Lal, for the Appellants.

Mr. E. Chamier and Mr. A. E. Ryves, for the Respondent.

Knox and Banerji, JJ.—The plaintiffs-appellants are the owners of certain villages in the district of Dehra Dun, which originally formed part of a grant made by Government to the widow of Captain Raynor in 1865. To the west of those villages lies a hill stream called the Jakhan Rao, and to the west of the stream is a forest belonging to Government.

It is alleged on behalf of the plaintiffs that the western boundary of their villages extends to the mid-stream of the Jakhan Rao, and that they are thus the owners of one-half of the bed of the stream. On behalf of the defendant it is asserted that the western limit of the plaintiffs' villages is the eastern bank of the Jakhan Rao, and that the whole of the bed of that stream belongs

[98] to the Government. An order to that effect was passed by Mr. Church, Superintendent of Dehra Dun, on the 26th February 1883.

The present suit has been brought by the plaintiffs to have the western limit of their grant determined, and for a declaration that their property extends to the mid-stream of the Jakhan Rao.

The defendant denied the title set up by the plaintiffs and pleaded limitation.

The Court below has dismissed the claim.

The sanad of grant in favour of Mrs. Raynor is printed on page 5 of the appellants' book, and is dated the 3rd of August 1865. By it the Government of the North-Western Provinces, "in consideration of the good services performed by the late Captain William Raynor, V.C., of the Veteran Battalion, one of the gallant defenders of the Delhi Magazine in 1857," granted to "his widow and to his heirs, representatives and assigns, the proprietary right rent-free in perpetuity in the tract of land measuring 2,000 acres." The boundaries of the land are specified, the western boundary being "Jakhan Rao."

It is contended on behalf of the plaintiffs that the legal effect of this conveyance was to pass to Mrs. Raynor the bed of the Jakhan Rao *usque ad medium filum*.

The rule of law on the subject was laid down by COTTON, L. J., in the well-known case of *Micklethwaite v. Newlay Bridge Co.*, (1886) L. R., 33 Ch. D., 133, at p. 145, in the following terms:—"In my opinion the rule of construction is now well settled, that where there is a conveyance of land, even although it is described by reference to a plan, by colour, and by quantity, if it is said to be bounded on one side either by a river or by a public thoroughfare, then on the true construction of the instrument half the bed of the river or half of the road passes, unless there is enough in the circumstances, or enough in the expression of the instrument to show that that is not the intention of the party. It is a presumption that not [99] only the land described by metes and bounds, but also half the soil of the road or of the bed of the river by which it is bounded, is intended to pass, but that presumption may be rebutted." This rule has been followed in subsequent cases, of which we may only mention the recent case of *Ecroyd v. Coulthard*, L. R., 1897, 2 Ch. D., 554. The Court below refused to apply it to the present case on the ground that it is not applicable to a case in which the Crown lays claim to the soil of the bed of a river. We are unable to agree with this view which the learned counsel for the respondent has conceded to be erroneous. In *Lord v. The Commissioner for the City of Sydney*, (1859) 12 Moo., P. C., 473, it was held that the grant by the Crown of land bounded by a creek passed the soil of the creek *ad medium filum aquæ*, and that this rule "equally applies, whether the subject-matter be a grant from the Crown or a subject." And the rulings to which the learned Judge has referred do not lay down a different view.

It was, however, contended on behalf of the respondent that the Jakhan Rao was not a river, and that the rule of midstream did not apply to it. With reference to this contention which, we may observe, was not raised in the Court below, we referred certain issues to that Court. Upon the findings on those issues the Jakhan Rao must be held to be a river. It has a perennial source, a bed and well-defined banks on either side: water flows in it for a part of the year, and it discharges itself in a continuous flow into another river, the Suswa. It has thus all the elements which constitute a river to which riparian rights attach. The water, it is true, dries up, and the bed remains

dry for several months in the year, but it is not necessary that "water should flow in it continually." (See Tagore Law Lectures on the Law of Riparian Rights, p. 81, and the authorities cited therein). We therefore hold that the Jakhan Rao is a river. It is so described in the *wajib-ul-arzes* of the villages through which it passes. It was treated as such in the reports of the revenue officers, and the parties and the Court below proceeded on [100] the assumption that it is a river. It is too late therefore now to contend that the presumption of law which arises in the case of rivers does not apply to the Jakhan Rao.

The presumption that by a conveyance of land abutting on a river the bed of the river *ad medium filum* passes to the grantee may no doubt be rebutted, but do any circumstances exist in this case which rebut the presumption? The circumstances relied upon are, that the quantity of land granted is specified in the grant; that when the land was measured and entered in the *khasra* the bed was not included in the measurement; that in some of the maps the bed was not shown as a part of the grant; that as the bed yields lime-stones, which are a valuable source of income, it would have been to the interest of the Government to retain the bed and it is not likely that it was intended to be conveyed by the grant. All these arguments are fully met by the observations made by LOPES, L. J., and COTTON, L. J., in *Micklethwaite v. Newlay Bridge Co.* Lord Justice LOPES said:—"If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption, and this, though the measurement of the property which is granted can be satisfied without including half of the road or half of the bed of the river; and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road." And COTTON, L. J., observed:—"When the rule is once established as a rule of construction, we are not at liberty to depart from it merely because it is shown that it would have been to the interest of the vendor to retain the half of the bed of the river." As in that case, so in this, there is nothing in the language of the *sanad*, or in the nature of the property, or in the surrounding circumstances to exclude the presumption of a grant of a half of the bed of the Jakhan Rao to Mrs. Raynor. [101] On the contrary, it appears from a memorandum, dated the 14th April 1874, on the recently settled boundaries in the Dun Forests, forwarded by the Conservator of Forests to Captain Bailey, Superintendent, Forest Surveys, that it was declared by the Forest authorities that "the centre of the Jakhan Rao constitutes the boundary between the Government forests and the several grants." (*cf.* appellants' book, p. 17). It was urged by the learned counsel for the respondent that had it been intended to make a grant to Mrs. Raynor of any portion of the bed of the Jakhan Rao, the Forest Officers would not have raised objections, so far back as 1877, and asserted that the western boundary of the grant was the eastern bank of the Rao. This argument has no doubt much force, and it derives support from the correspondence printed on page 17 of the appellants' book. It must, however, be remembered that the grant had been made twelve years before, *i.e.*, in 1865. In 1871, Mrs. Raynor asserted that her boundary extended into the bed of the Jakhan, and that she had been taking lime-stones from it for five years preceding the date of her letter. It has been proved by the oral evidence adduced in the case, and specially by that of Mr. Raynor, that pillars were erected shortly after the grant along

the middle of the bed of the river, and that lime-stones were appropriated by Mrs. Raynor and her son. The statement of Mr. Reynolds that permission was obtained from Forest Officers by Mrs. Raynor for burning lime is contradicted by that evidence. The inability of Mr. Reynolds to produce any application for permission very much weakens his statements (see correspondence, p. 11, respondent's book). Mr. Reynolds has admitted in his deposition that he was not aware of any facts which would prove actual possession of the Rao. The same may be said of the evidence of the other witnesses for the defendant. It has been fully established that in spite of the objections of the officers of the Forest Department, Mrs. Raynor and her successors in title remained in possession of the bed of the Rao, and prevented Government contractors from taking lime-stones from it. The possession of Mrs. Raynor is [102] admitted, even in Mr. Church's order of the 26th of February 1883 (pp. 18 and 19, appellants' book). We are unable to agree with Mr. Ryves' contention that this order operates as *res judicata*. We are not satisfied on the evidence that the plaintiffs or their predecessors have been out of possession, that the defendant has been in adverse possession, and that the claim is beyond time.

A faint attempt was made to show that Mrs. Raynor relinquished all claim to the bed of the Jakhan Rao on obtaining 400 acres of land. But there is no satisfactory evidence to connect the grant of the 400 acres with the claim to the land now in question. Mr. Raynor has stated that it had reference to another claim which his mother had against Government.

We hold that the western boundary of the plaintiff's property is the centre of the bed of the Jakhan Rao, and that the plaintiffs are entitled to a declaration to that effect.

We allow the appeal, set aside the decree of the Court below, and decree the claim with costs in both Courts.

Appeal decreed.

NOTES.

[See also 37 Mad., 322 ; 29 M.L.J., 389 : 30 I.C., 609.]

[22 All. 102]

The 9th August, 1899.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE AIKMAN.

Qurban Husain.....Plaintiff

versus

Chote and others.....Defendants.*

Muhammadan Law—Pre-emption—Shias and Sunnis—Pre-emption claimed on ground of vicinage—Vendors and vendee Sunnis, pre-emptor a Shia.

Held that a Muhammadan of the Shia sect could not maintain a claim for pre-emption based on the ground of vicinage under the Muhammadan law when both the vendors and the vendee were Sunnis. *Gobind Dayal v. Inayat-ullah*, (1885) I. L. R., 7 All., 775, and *Pir Bakhsh v. Sughra Bibi*, Weekly Notes, 1892, p. 34, referred to.

* Second Appeal No. 193 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 17th December 1896, confirming a decree of M. Muhammad Shafi, M. A., Munsif of Aligarh, dated the 30th March 1896.

THE facts of this case sufficiently appear from the judgment of AIKMAN, J.

Maulvi Karamat Husain, for the Appellant.

Maulvi Ghulam Mujtaba, for the Respondent.

[103] Aikman, J.—This appeal arises out of a suit brought to enforce a right of pre-emption based on Muhammadan law and custom.

The plaintiff's suit was dismissed by the Court of First Instance, which held that the plaintiff had no right to pre-empt the property sold. This decision was, on appeal, affirmed by the Subordinate Judge.

The plaintiff comes here in second appeal and the sole question for decision is whether, under the circumstances of the case, the plaintiff-appellant has a right of pre-emption in respect of the property sold.

The plaintiff and the vendors are neighbours residing in the town of Koil in which the house property sold, and claimed in this suit, is situated. The plaintiff claims to be allowed to pre-empt the property sold on the ground of vicinage. The plaintiff is a Shia governed by the Imamiya law, whereas the vendors are Sunnis governed by the Hanifeea law. The vendee is also a Sunni. Now by the Imamiya law, a neighbour, as such, has no right of pre-emption. It is admitted by the learned counsel who appears in support of the appeal that the plaintiff in this case might sell his house to anyone he likes, and that his Sunni neighbours could not successfully assert any right of pre-emption against him. But it is argued that, as according to the doctrines of the Sunni school, neighbours have a right of pre-emption, the plaintiff being a neighbour is entitled to take advantage of this right, even though he is not a Sunni. It is admitted by the learned counsel on both sides that in disposing of this case the Court ought to be guided by the rule of justice, equity and good conscience. But whilst one side argues that it would be in accordance with that rule to let the plaintiff have the benefit of the law governing the defendant-vendor, the other side contends that it would not be consonant with that rule to do so.

Very learned and able arguments were put forward by the counsel on either side in support of their respective positions. I do not propose to follow them in these arguments. For, admitting the appellant's contention that the case should be governed by [104] the law of the school to which the vendor belongs, the learned counsel for the appellant has failed to satisfy me that, according to the doctrines of that school, a neighbour against whom a Sunni has no right of pre-emption has nevertheless a right of pre-emption against the Sunni. In my judgment the principle of reciprocity lies at the root of the law of pre-emption.

It is true that according to the Hanifeea law it is not necessary that the pre-emptor should be of the same religion as the vendor. On p. 477 of Baillie's Digest, 2nd edition, that learned author says :—"Islam on the part of the pre-emptor is not a condition." He goes on to say, "so that *zimmes* (i. e., infidels subject to and under the protection of a Muhammadan Government) are entitled to exercise the right of pre-emption *as between themselves* or against Mooslims." Those words *as between themselves* are to my mind an indication that though a person need not be of the same religion as the vendor to entitle him to take advantage of the Hanifeea law of pre-emption, he must yet belong to a class of persons against whom a right of pre-emption can be enforced.

At p. 793 of his exhaustive judgment in the Full Bench case *Gobind Dayal v. Inayatullah* (1885) I. L. R., 7 All., 775, MAHMOOD, J, observes:—"The rights and obligations created by that law (i. e., the Muhammadan law of pre-emption), as indeed by every other system with which I am acquainted, must necessarily

be reciprocal." It has not, I repeat, been shown to my satisfaction that it was ever the intention of the Hanifesa law to confer a right of pre-emption on a neighbour regardless of the fact that no reciprocal right could be enforced against him.

The case relied on by the lower Courts, namely, *Pir Bakhsh v. Sughra Bibi*, Weekly Notes, 1892, p. 34, differs from the present case, for there the plaintiff and the vendor were both Shias, whilst the vendee was a Sunni. But the following observation of the learned Judge who decided that case appears to me to be in point:—"I do not think that any rule of justice, equity and good conscience exists that [105] would enable us to allow the plaintiff, who from the fact of her being a Shia necessarily abhors the doctrines of the Sunni school, to take advantage of the law of that school in regard to pre-emption, and to maintain the pre-emption suit, any more than if the plaintiff stood in the position of the defendant-vendee she could be made liable to the doctrines of the Sunni school if the present vendee stood in the position of the plaintiff pre-emptor." For the above reasons I am of opinion that this appeal cannot succeed, and I would dismiss it with costs.

Knox, J.—I also am of opinion that this appeal must be dismissed. The plaintiff, now appellant, is a Muhammadan gentleman of the Shia faith. He says in his plaint that he has a right of pre-emption under the Muhammadan law and custom in respect of the house sold, the subject-matter of the suit.

The appellant has not proved the custom alleged, and the sole question is whether he has any right of pre-emption under the Muhammadan law.

Now if by the Muhammadan law the plaintiff means the Imamiya doctrines, he has no standing, and he sees this, and therefore urges that the decision should be in accord with the doctrines of Abu Hanifa, and if not with these, still under the general rule of justice, equity and good conscience, which he considers would award him his claim.

His learned counsel addressed us very able arguments on this view of the question, but I think the question must be decided upon the general principles of Muhammadan law.

The appellant is claiming what has been properly described as a weak right. He is trying to place a restriction upon liberty of transfer of property. It is for him to show that he is vested with some right or power to make such restrictions. The Shia law gives him—a Shia—no such right under the present circumstances, and it is for him to show us that he can take advantage of the Sunni law, which he would be the first to repudiate did it place any similar restriction upon himself. As he has shown no law or precedent to the above effect, I would hold that he has not proved [106] the existence of any such right of pre-emption in himself, and would dismiss the appeal with costs.

ORDER.—Appeal dismissed with costs.

Appeal dismissed.

NOTES.

[See also (1908) 30 All., 372, (under the *wajib-ul-urz*) ; (1914) 36 All., 488 (in which the vendor's law—the Shiah Law—was applied not following (1905) 32 Cal., 982).]

[22 All. 106]

REVISIONAL CRIMINAL.

The 7th November, 1899.

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Queen-Empress

versus

Adam Khan and another.*

Procedure—Complaint—Criminal Procedure Code, Section 203—Dismissal of complaint—Subsequent complaint arising out of the same matter.

When a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it. *Nirratn Sen v. Jogesh Chundra Bhuttaeharjee*, (1896) I. L. R., 23 Cal., 983, and *Komal Chandra Pal v. Gourchand Audhikari*, (1897) I.L.R., 24 Cal., 286, followed, *Queen-Empress v. Puran*, (1886) I. L. R., 9 All., 85, and *Queen-Empress v. Umedan*, Weekly Notes, 1895, p. 86, referred to.

THIS was a reference, under section 438 of the Code of Criminal Procedure, made by the Superintendent of Dehra Dun through the Sessions Judge of Saharanpur. One Hira Lal brought a complaint against Adam Khan and Pandey Khan under section 406 of the Indian Penal Code in the Court of an Honorary Magistrate. The Magistrate took the complainant's statement and dismissed the complaint under section 203 of the Code of Criminal Procedure. The complainant then made a similar complaint arising out of the same circumstances against the same men in the Court of a Deputy Magistrate. The Deputy Magistrate entertained the complaint and issued warrants for the arrest of the accused, who were put in the lock-up.

The case being brought to the notice of the Magistrate of the District, he made the present reference to the High Court with a view to having the order of the Deputy Magistrate set aside.

Mr. C. Dillon, in support of the Reference.

Pandit Moti Lal (for whom Babu Durga Charan Banerji), for the Complainant, Hira Lal.

[107] Blair and Burkitt, JJ.—This case has been referred to a Divisional Bench upon the ground of the extreme probability that similar cases occur and are likely to occur with great frequency, and it is therefore important that there should be a clear decision of this Court upon the point at issue. The case comes before us upon a reference from the District Magistrate of Mussoorie, forwarded through the Sessions Judge of Saharanpur. It contains a recommendation that the proceedings in the Court below should be set aside as illegal.

The facts are that one Hira Lal lodged a complaint before a Bench of Honorary Magistrates at Mussoorie against Adam Khan and others, charging them with criminal breach of trust under section 406 of the Indian Penal Code. The Bench after examining the complainant dismissed the complaint upon the ground that the matter complained of was one which ought to be tried in a Civil and not in a Criminal Court. At a later period the same Hira Lal preferred precisely the same complaint in the Court of another Magistrate, who thereupon took cognizance of it and issued warrants for the arrest of the

* Criminal Reference No. 463 of 1899.

accused. The warrants were executed. The accused were taken into custody, and remained there for a month before they were liberated by an order of a superior Court. It is upon the petition of the person so imprisoned that this reference, with the recommendation of the District Magistrate, has been forwarded to us. Mr. *Dillon*, who appears to support the recommendation, has cited to us two recent rulings of the High Court at Calcutta: one *Nilratan Sen v. Jogesh Chundra Bhattacharjee*, (1896) I. L. R., 23 Cal., 983, and the other *Komal Chandra Pal v. Gourchand Audhikari*, (1897) I. L. R., 24 Cal., 286, which simply follows the ruling in the previous case. We have also been referred by Mr. *Dillon* to a recent unreported decision of this Court in *Karim Bakhsh v. Adil Khan*, decided by Mr. Justice AIKMAN on the 17th of June of the present year. The facts in the Calcutta cases are on all fours with those in the case which we have to decide. The rule laid down in those cases appears to us to be founded upon thoroughly satisfactory [108] reasons. The facts in the case decided by our brother AIKMAN in no way resemble those in the Calcutta cases, and our brother AIKMAN'S decision is not inconsistent with the rule laid down in them. On the other hand, we have had cited to us the case of *Queen-Empress v. Puran*, (1886) I. L. R., 9 All., 85, and the case of *Queen-Empress v. Umedan*, Weekly Notes, 1895, p. 86, in which it has been held that a Magistrate who has dismissed a complaint is not thereby precluded from himself entertaining again what is in substance the same complaint. That is the only authority upon which Mr. *Durga Charan* relies. It does not, in our opinion, conflict with the rulings either of the Calcutta Court or of our brother AIKMAN. We think it utterly contrary to sound principles that one Magistrate of co-ordinate jurisdiction should, in effect and substance deal with, as if it were an appeal or a matter for revision, a complaint which had already been dismissed by a competent tribunal of co-ordinate authority. For these reasons, we accept the recommendation of the District Magistrate and set aside the proceedings pending in the Court below. We desire it to be distinctly understood that we decide nothing except the question actually raised by the facts in this case, which is, that when a competent tribunal has dismissed a complaint, another tribunal of exactly the same powers cannot re-open the same matter on a complaint made to it.

NOTES.

[The previous order need not be set aside :—(1913) 36 All. 53 ; (1914) 36 All. 129 : 29 All., 7 ; 31 Mad. 543 ; 29 Mad., 126 ; 27 Bom., 84 ; 9 Bom. L. R. 250 ; 28 Cal., 652 ; 29 Cal., 726 ; 36 Cal., 415 ; 16 C. W. N., 983.]

[22 All. 109]

APPELLATE CIVIL.

The 10th November, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE
BANERJI.

Daulat Singh and another.....Defendants

versus

Jugal Kishore.....Plaintiff.'

Execution of decree—Civil Procedure Code, section 244—Question " arising between the parties to the suit "—Sale of property by the Collector as ancestral property.—Suit to set aside sale on the ground that property was not ancestral.

Certain property of a judgment-debtor having been sold by the Collector acting under section 320 of the Code of Civil Procedure as being ancestral [109] property the judgment-debtor sued the decree-holder and the auction-purchaser to have the sale set aside upon the two main grounds that the property was not ancestral, and therefore could not legally be sold by the Collector, and that the real purchaser at the auction sale was the decree-holder himself who had not obtained the leave of the Court to bid. Held that the questions thus raised were questions arising between the parties to the suit within the meaning of section 244 of the Code of Civil Procedure and that the suit would not lie. *Basti Ram v. Fattu*, (1896) I. L. R., 8 All., 146, and *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683, referred to.

THE facts of this case are sufficiently stated in the judgment of the Chief Justice.

Maulvi Ghulam Muftaba, for the Appellants.

The respondents were not represented.

Strachey, C. J.—The plaintiff in this case claims to recover certain immoveable property, which was sold by the Collector in execution of a decree transferred to the Collector for execution under the rules made under section 320 of the Code of Civil Procedure, from the second defendant, who was the purchaser at that sale. The plaintiff was the judgment-debtor: the first defendant is the decree-holder: and the object of the suit is to recover possession of the property, notwithstanding the execution sale, on the ground that the sale by the Collector was vitiated by certain defects. After a remand made by the Lower Appellate Court to the Court of First Instance, both Courts have decreed the claim. The question raised by this appeal on behalf of the defendants is whether the suit will lie.

Now the first ground on which the suit is based is that the property in question was not ancestral property, and that consequently the decree ought not to have been transferred for execution to the Collector. Before making its order of transfer the Civil Court, in accordance with the rules made by this Court, issued notice to the decree-holder and the judgment-debtor for the determination of the question whether the property was ancestral or not. The

* Second Appeal No. 937 of 1896, from a decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 3rd August 1896, confirming decree of Babu Shiva Charan Lal, B. A., Munsif of Nagina, dated the 27th May 1896.

judgment-debtor the present plaintiff, did not contest that application, and the order for transfar was thereupon made. It is clear, therefore, that the question whether the [110] property was ancestral or not was a question arising between the parties to the suit—the decree-holder and the judgment-debtor. That being so, the present suit, so far as this first point is concerned, is barred by section 244 (c) of the Code of Civil Procedure, having regard particularly to the interpretation placed on that clause by the Full Bench of this Court in *Basti Ram v. Fattu*, (1886) I. L. R., 8 All., 146. It was there pointed out that the section prohibits not only a separate suit between the parties to the decree or their representatives, but also a suit by a party or his representatives against a purchaser at a sale in execution of a decree, the object of which is to determine a question which properly arose between the parties or their representatives, and which relates to the execution, discharge, or satisfaction of the decree. As I have already stated, the question whether this property was ancestral did arise between the parties to the suit. It clearly related to the execution of the decree, because on it depended the Court which should have jurisdiction to execute the decree and the procedure by which the decree should be executed. The Full Bench decision to which I have referred is supported by the case of *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683, decided by their Lordships of the Privy Council. For these reasons it appears to me that, so far as the suit is based upon an allegation that the property was being wrongly treated as ancestral for the purposes of execution, it is barred by section 244 of the Code.

The second ground upon which the suit is based is that the auction-purchaser in this case in execution of the decree, although nominally the second defendant, who is the son of the decree-holder, was really the first defendant, the decree-holder himself, and that as the purchase by the decree-holder was without the permission of the Court, it was in violation of section 294 of the Code. As to that it is sufficient to say that this question too falls within section 244 of the Code, because, on the plaintiff's own showing, it is a question arising between the parties to the suit and relating [111] to the execution of the decree. So far as regards the second point, therefore, the suit is also barred by section 244.

The third point raised by the suit is that the sale was effected by the Collector in disregard of an order directing the postponement of the sale passed by the Munsif who had transferred the execution of the decree to the Collector. As to that it is sufficient to say that no such order of postponement could be legally made by the Munsif. The execution having been transferred to the Collector, the Munsif, so long as it remained with the Collector, had no power to interfere with the proceedings, as by postponing the date of sale: only the Collector himself could do that.

These are the only grounds on which the suit has been brought. It follows from what I have said that the suit ought to have been dismissed. This appeal is allowed, the decrees of the Courts below set aside, and the suit dismissed with costs in all Courts.

Banerji, J.—I am of the same opinion.

Appeal decreed.

NOTES.

[See also (1902) 24 All., 239 ; (1904) 26 All., 447.]

[22 All. 111]

REVISIONAL CRIMINAL.

The 18th August, 1899.

PRESENT :

MR. JUSTICE BLAIR.

W. J. Ellis.....Applicant

versus

The Municipal Board of Mussoorie.....Opposite Parties.*

Act No. XV of 1883 (N.-W.P. and Oudh Municipalities Act), Section

46—Issue of distress warrant for recovery of alleged arrears of

Municipal tax—Jurisdiction of Magistrate.

Held that where a Magistrate, acting under section 46 of Act No. XV of 1883, issues a warrant for the realization of arrears of Municipal taxes alleged to be due, the Magistrate is acting in a ministerial capacity only and has no jurisdiction to inquire as to whether such arrears are really due or not.

THIS was an application for revision arising out of the following circumstances. The Secretary of the Municipal Board of Mussoorie wrote to the Magistrate of Mussoorie, on the 2nd May 1899, stating that a sum of Rs. 135-9-9 was due from one W. J. Ellis, Esq., of Kenneth Lodge Mussoorie, on account of Municipal taxes from 1894 to 1898, and requesting the Magistrate to realize such amount under section 46 of Act. No. XV of 1883. [112] Orders were thereupon issued by a Magistrate of the first class to the police for the realization of the sum in question, no intimation of the application of the Board having apparently been given to the alleged defaulter. Mr. Ellis declined to pay the sum demanded and applied to the High Court for revision of the Magistrate's order for realization of the said sum. The main grounds of the application were that no arrears of any tax imposed under Act XV of 1883 were due by the applicant to the Municipal Board and, that no opportunity was given to the applicant to show cause why distress should not be levied on his property. Applicant's counsel relied on *Municipality of Ahmedabad v. Jamna Pamja*, (1891) 1. L. R., 17 Bom., 731.

Mr. W. Wallach, for the Applicant.

The Government Pleader (for whom Munshi Gulzari Lal) for the Municipal Board.

Blair, J.—In this case a Municipality has levied a tax ; it has charged the present applicant with certain arrears alleged to be due. It has applied to a Magistrate for recovery of those arrears by distress and sale of the movable property of the applicant. Under protest payment was made. The applicant here challenges the right of the Magistrate to make such an order, and contends that the Magistrate ought to have judicially heard and determined the question whether any such arrears were due at all. The action which was taken by the Municipality and the Magistrate was apparently taken under section 46 of Act No. XV of 1883. That section is couched in the following words :—
“ Arrears of tax imposed under this Act may be recovered, on application to a Magistrate having jurisdiction within the limits of the Municipality, by the distress and sale of any movable property belonging to the defaulter within those limits.” There are no provisions indicating that the Magistrate is applied to in a judicial capacity, and no provision for a judicial dealing with

* Criminal Revision, No. 438 of 1899.

the case by him. I do not find my mind influenced by a decision cited from I. L. R., 17 Bom., 731, because that decision was upon a section of an Act containing words which did import a judicial determination. Nor do I find myself able to draw any inference from the statutory provisions [113] for the enforcement of the recovery of incometax or land revenue. It seems to me that, had the Legislature intended to impose upon the Magistrate the duty of judicial inquiry and finding, it would have used appropriate words. In the absence of such words I find it impossible to believe that the Legislature intended to confer upon the youngest and most inexperienced officer a function of trying such a question, for instance, as the legality of the imposition of a tax.

In my opinion the duty imposed on the Magistrate is purely ministerial, and provides the means whereby the recovery of the taxes could be enforced by a legal authority. This petition is therefore dismissed.

[22 All. 113]

The 6th November, 1899.

PRESENT :

MR. JUSTICE KNOX, AND MR. JUSTICE AIKMAN.

Queen-Empress

versus

Nanni and others.*

Act No. XLV of 1860 (Indian Penal Code), sections 268, 290—Public nuisance—Soliciting for purposes of prostitution.

Held that the soliciting for purposes of prostitution of passers by on a public road is not a public nuisance as that term is defined in section 268 of the Indian Penal Code.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Shahjahanpur. Three persons, prostitutes, being on a public road in Shahjahanpur about midnight, accosted a person who was going along the road and solicited him to go with them. The person thus accosted, being a Reserve Inspector of Police, caused the three women to be taken into custody, and they were tried for and convicted of the offence punishable under section 290 of the Indian Penal Code, *viz.*, a public nuisance. The accused applied for revision of their convictions and sentences to the Sessions Judge, who, being doubtful whether the acts complained of could properly be regarded as constituting a public nuisance, as that term is defined in section 268 of the Indian Penal Code, referred the case to the High Court. On this reference the following orders were passed.

Knox, J.—This is a reference by the Sessions Judge of Shahjahanpur. The District Magistrate at Shahjahanpur has convicted three persons, prostitutes, of an offence which he [114] considered they have committed under section 290 of the Indian Penal Code. The evidence against them shows that all three came out on to a public road, and, thinking that a Reserve Inspector of Police, who was passing by, was a soldier, called out to him and solicited him to go back with them. The District Judge before whom the case was taken

* Criminal Reference, No. 345 of 1899.

in an application in criminal revision was doubtful whether an annoyance caused in a public place to a single person could be brought under the definition of a public nuisance, on the ground that it might have been any member of the public to whom the annoyance was caused. He has accordingly submitted the case to this Court under section 438 of the Code of Criminal Procedure. Section 290 renders punishable what are known as public nuisances in the Indian Penal Code. The definition of public nuisance is to be found in section 268. A person is guilty of a public nuisance when (omitting that part of the section which does not refer to the present case) he does an act which must necessarily cause annoyance to persons who may have occasion to use any public right. Acts of a similar kind, and more particularly the act of loitering or importuning for the purpose of prostitution, can be provided against in Cantonments by the Cantonments Act of 1889. Further, a Municipal Board may, under Act No. XV of 1883, make rules for prohibiting, preventing, and punishing such acts within the Municipality as may, in the opinion of the Board, cause, or tend to cause, annoyance to persons who have occasion to use a public right. The language used in Act No. XV of 1883 at once shows the difference between the powers given to a Municipal Board and the powers given to Magistrates under section 290 of the Indian Penal Code. In the latter case the act done is only punishable when it is an act which must necessarily cause annoyance to persons who have occasion to use any public right. We are not at the present moment considering acts or omissions which are the cause of common injury, danger, or annoyance to the public, or to the people in general, who dwell or occupy property in the vicinity. The difficulty in the present case lies in the words "must necessarily" which occur in section 268. The Magistrate was satisfied that in the present case annoyance was caused, at least so we learn from the remarks which he [115] has sent up to this Court along with the reference, and there can be no doubt that annoyance is frequently caused by acts of this kind. We are not satisfied that the act of the women in this case was one which must necessarily have caused annoyance. If the act, of which these women were found guilty, was an act entirely without a remedy, it might be necessary to call attention to the absence of all remedy. All that need be done in the present case is to say that the Sessions Judge is so far right when he says that the act does not fall within section 290 of the Indian Penal Code. The conviction will have to be set aside, and the fines, if paid, be refunded to the person or persons who paid them.

Aikman, J.—I am of the same opinion. In my judgment persons who are exercising the right of passing along a public road ought to be protected from being importuned for the purpose of prostitution. Within the limits of Cantonments such protection may be afforded by rules framed under section 26, clause 23, of the Cantonments Act of 1889; similarly within the limits of Municipalities, protection may be afforded by rules framed by Municipal Boards under the provisions of section 55, clause 1, of Act No. XV of 1883. But the sole question we have to deal with now is, whether the conduct of petitioners amounted to a public nuisance as defined in section 268 of the Indian Penal Code. I entirely concur with my learned brother in holding that it did not. The conviction and sentence must therefore be set aside.

[22 All. 116]

APPELLATE CRIMINAL.

The 14th November, 1899.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE AIKMAN.

Queen-Empress
versus
 Khem.*

Act No. XLV of 1860 (Indian Penal Code), section 193—Criminal Procedure Code, section 164—Statement made in the course of a "judicial proceeding"—Statement made before a Magistrate under section 164.

Held, that where a witness had made one statement on oath or solemn affirmation before a third class Magistrate under section 164 of the Code of Criminal Procedure and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class he might properly [116] be convicted under the second—if not under the first—paragraph of section 193 of the Indian Penal Code. *Queen-Empress v. Bharna*, (1886) I. L. R., 11 Bom., 702, considered and distinguished.

THIS was an appeal by the Local Government from the acquittal of one Khem by the Sessions Judge of Farrukhabad on a charge under section 193 of the Indian Penal Code. The facts were briefly, that Khem had been put before a Magistrate of the third class as a witness in a case of theft and had made a statement before the Magistrate under section 164 of the Code of Criminal Procedure on solemn affirmation. Subsequently Khem, as a witness before the first class Magistrate who tried the case, made a diametrically opposite statement, also on solemn affirmation. Khem was tried on a charge framed in the alternative in respect of these two statements, and was convicted under section 193 of the Code of Criminal Procedure by a Magistrate of the first class. Khem appealed to the Court of Session, and that Court acquitted him on the ground that the statement made by Khem under section 164 of the Code of Criminal Procedure before the third class Magistrate was not made in the course of a judicial proceeding, and with reference to the case of *Queen-Empress v. Bharna*, (1886) I. L. R., 11 Bom., 702. From this acquittal an appeal was preferred by the Local Government.

The Government Advocate (for whom Mr. W. K. Porter), for the Crown.

Knox and Aikman, JJ.—In this case, as in the cases which have preceded, the accused had been convicted on an alternative charge of giving false evidence in that he made two contradictory statements. The first statement was made before a Magistrate of the third class while a police investigation in a case of theft was pending. The second was made before a Magistrate of the first class who tried the case. Khem in his defence stated that the statement which he had made in the Court of the Magistrate who tried the theft case was a true statement, and that the statement which he had made to the effect that three other persons had been present at the theft, namely, the statement which he made before the Magistrate of the third class, was made through fear and at the instigation of the police. The learned Sessions [117] Judge on Khem's appeal considered himself bound to follow the ruling *Queen-Empress v. Bharna*, (1886) I. L. R., 11 Bom., 702, and to hold that a statement taken down in the course of a police investigation by a third class

Criminal Appeal No. 848 of 1898.

Magistrate is not evidence in a stage of a judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code. Even if this were a right view of the law, the false statement made under such circumstances would fall within the second paragraph of section 193 of the Indian Penal Code. Moreover, the ruling which the learned Sessions Judge has followed is not one which applies to the present case. The statement with which the Bombay Court was dealing was a statement taken by a third class Magistrate in an investigation into a charge of murder, and it was on the ground that such Magistrate had not authority to carry on the preliminary inquiry in the case that the statement so recorded was held not to be evidence in a stage of judicial proceeding within the meaning of sections 191 and 193 of the Indian Penal Code. If the view of the Bombay Court taken in that case is a correct view, it does not apply to the case before us, in which the Magistrate who recorded the statement under section 164 of the Code of Criminal Procedure had himself authority, inasmuch as the case was one of theft only, to complete the trial. We have examined the statements made by Khem on the 18th and 23rd of January. They are statements so contradictory that we cannot see any way of reconciling them, and one or the other of them must have been false to the knowledge of the accused. We accordingly allow the appeal, and setting aside the appellate judgment of acquittal, restore the conviction of the Magistrate. We think, however, that it will be sufficient to direct that the accused suffer rigorous imprisonment for the space of three months with effect from to-day's date. Any portion of the imprisonment or detention since this appeal was filed that the accused has undergone on this charge will be deemed to be part of the substantive sentence.

[See also in this connection *Queen-Empress v. Alagu Kone*, (1892) I. L. R., 16 Mad., 421, and *Queen-Empress v. Puran*, Weekly Notes, 1899, p. 39—ED.]

NOTES.

[See also (1911) 13 I. C., 273 (Sindh); (1910) 9 I. C., 720 (Sindh), wherein this was dissented from; 24 All., 454.]

[118] *The 15th November, 1899.*

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE AIKMAN.

Queen-Empress

versus

Ganga Din.*

Act No. XI of 1878 (Arms Act), sections 19, 27—Exemptions from provisions of Arms Act—Government Notification No. 518 of the 6th March 1879—Government Notification No. 458 of the 18th March 1898—"Personal use" of Arms—Arms carried and used by servant of exempted person.

By a notification under section 27 of the Arms Act (Act No. XI of 1879) issued by the Government of India, certain persons, amongst them Rajas and Members of the Legislative Council of the Lieutenant-Governor of the N.-W. P., were exempted from the operation of sections 13 and 16 of the said Act; but with this proviso, that, "except where otherwise expressly stated, the arms or ammunition carried or possessed by such persons shall be for

* Criminal Appeal No. 569 of 1899.

their own personal use, &c., &c." Held, that the terms of this proviso would allow of a person exempted under the notification above alluded to sending a servant armed with a gun into a neighbouring district to shoot birds for him, and that a gun so carried and used by the servant of the exempted person was in the "personal use" of the exempted person within the meaning of the notification.

THE facts of this case were as follows :—

One Ganga Din, Pasi, a servant of Raja Rampal Singh, a Member of the Local Legislative Council, was found within the district of Allahabad carrying a gun and ammunition and using the gun for the purpose of shooting game. On being asked by the Police for his license he replied that he had none, but that he was a servant of Raja Rampal Singh, to whom the gun and ammunition belonged, and was out shooting under his master's orders and for his master's benefit. Ganga Din was put upon his trial before a Magistrate of the first class for an offence under section 19 of the Arms Act, 1878, but was acquitted with reference to the ruling of the High Court in *In re Hurley*, Weekly Notes, 1881, p. 7. Against this order of acquittal an appeal was filed by the Local Government.

Prior to the year 1898, a notification of the Government of India, (No. 518 of the 6th March 1879) was in force, which, so far as the question raised by the present case is concerned, ran as follows :—"The Governor-General in Council is pleased, under section 27, to exempt from the operation of all prohibitions and direction contained in sections 13, 14, 15 and 16 of [119] the Indian Arms Act, 1878 * * * * the undermentioned persons, namely :—

- (1) All Maharajas, Rajas, &c. &c.
- (2) All Members * * * of the Council of the Lieutenant-Governor of the North-Western Provinces and Oudh.
- (3) All Military and Naval officers, * * * * subject to the proviso that the arms and ammunition carried or possessed by such persons shall be for their own personal use, &c. &c."

By a notification of the Government of India of the year 1898 (No. 458 of the 18th March 1898) the proviso to clause (3) above quoted was removed from its situation at the end of clause (3) and appended to the first paragraph of section I of the Notification preceding clauses (1), (2), (3) &c.

The ground of appeal in the present case was that by reason of the new Notification the proviso above-mentioned applied not only to Military and Naval officers and others mentioned in clause (3), but to the persons designated in clauses (1) and (2) and that it could not be said that a gun in the possession of a servant in another district from that in which the master ordinarily resided was in the personal use of the master within the meaning and intention of Government Notification.

The Government Advocate, (for whom Mr. W. K. Porter), for the Appellant.

Pandit Madan Mohan Malaviya (for whom Pandit Tej Bahadur Sapru), for the Respondent.

Knox and Aikman, JJ.—This is an appeal preferred by Government from an original order of acquittal passed by a Magistrate of the first class, Allahabad. One Ganga Din, servant of Raja Rampal Singh, a Member of the Legislative Council, N.-W. P. and Oudh, was found within the district of Allahabad carrying a gun and ammunition, and using the gun for the purpose of shooting game. Upon being asked by the Police to show his license he

replied that he had no license, but that he was a servant of Raja Rampal Singh, who had ordered him to shoot game for him (the Raja), and that the gun and ammunition belonged to the aforesaid Raja. The Magistrate, we must take it, has found that [120] the pleas raised by Ganga Din are all true, that he is the servant of a master exempted from the operations of sections 13 and 16 of Act No. XI of 1878. Following a precedent of this Court, *In re Hurley*, decided on the 12th January 1880, and to be found at page 7 of the Weekly Notes for 1881, the Magistrate found the accused not guilty of any offence under section 19 of the Arms Act, and acquitted him. It was contended by the Government in this appeal that the accused is guilty, and that the Magistrate has overlooked the fact that the rules in force, when the ruling cited by him was pronounced, have been amended by the Government Notification No. 458 of the 18th March 1898. The last named notification is a notification amending a prior notification No. 518 of the 6th March 1879. So far as this case is concerned, the amendment is one which purports to impose a limit or qualification upon the general exemption which under the notification of 1879 was conferred upon all Rajas. The general exemption thus conferred is now controlled by the proviso that the arms or ammunition carried or possessed by such Rajas shall be, except when otherwise expressly stated, for their own personal use. The learned counsel for the Crown contends that the use by Ganga Din, under the circumstances we have set out above, cannot be deemed the personal use of the Raja. We have considered his argument very carefully in view of the serious results which will follow from so literal an interpretation of these words. We are unable to construe, and have been shown no authority for construing, these words in the strict sense contended for. We are unable to hold, as the learned counsel desires us to, that the meaning is that only the Raja who may be exempted under the above notification, can carry on his own person the arms which he may happen to possess. It was allowed in the argument that personal use might extend to a case where the Raja might be intending to use the arms personally, and such arms were in the meantime being carried for the Raja by some servant or retainer. We cannot believe that the intention of the Government, when they granted the exemption, was that the privilege of the exemption should only extend to personal use by the Raja in the narrow sense contended for. Take, for instance, the case of the Raja's residence being attacked by dacoits; it surely never could be contended [121] that personal use extended only to the use of arms repelling the attack by the Raja, and that the use by any of the Raja's retainers for such purpose was not equally within the intention and scope of the exemption. If the Government did intend to limit the exemption to the extent now contended for, we should expect words of a far more stringent and limiting nature. In the present case we hold that Ganga Din has established to the satisfaction of the Court that he was using the arms he carried for what may fairly be termed the "personal use" of the Raja. We accordingly dismiss the appeal. Let the record be returned.

Appeal dismissed.

[22 All. 121]

APPELLATE CIVIL.

The 21st November, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Jhamman Lal and another.....Plaintiffs

versus

Kewal Ram.....Defendant.*

Execution of decree—Civil Procedure Code, section 244—Suit brought under circumstances where the proper remedy was by application under section 244—Discretion of Court to treat the plaint as an application under section 244.

Where certain judgment-debtors, whose property had been sold in execution of a decree, brought a suit to have the sale in execution set aside under circumstances in which their proper remedy in law, if any, was by means of an application under section 244 of the Code of Civil Procedure, it was held that it was not an improper exercise of the discretion of the Court in which such suit was brought to treat the plaint as an application under section 244 of the Code. *Baru Mahata v. Shyama Churn Khawas*, (1895) I. L. R., 22 Cal., 483, followed. *Mayan Pathuti v. Pakuran*, (1898) I. L. R., 22 Mad., 347, referred to.

THE facts of this case, as stated in the judgment of the Lower Appellate Court, were as follows :—

“ Khushwakt Rai, the father of the plaintiffs, owed a debt to Data Ram and others under a hypothecation bond dated the 11th August 1875. Data Ram and others brought a suit for the debt, and on the 25th August 1887, obtained a decree against the plaintiffs and Chunni Ram, their nephew (brother's son). In execution of this decree the hypothecated and unhypothecated [122] property of the judgment-debtors was sold at auction on the 26th April 1893, and the 20th February 1894, and the said auction sales were confirmed, and mutation of names was effected in favour of the auction-purchasers. The plaintiffs now contend that as they were employed in another district they could not present themselves in Court at the time when the decree was passed in that case, nor could they obtain a knowledge of the execution proceedings ; that the decree is in a great measure contrary to the judgment and is absurd ; that the amount of the decree, in satisfaction of which the auction sales took place, has been overstated and is wrong ; that the invalid and fraudulent proceedings taken by the defendant have caused great loss to the plaintiffs. Hence the plaintiffs pray that the decree passed on the 25th August 1887, so far as the defendant has fraudulently caused it to be prepared contrary to the judgment and prejudicial to the rights of the plaintiffs, may be set aside, and that the auction sale of the plaintiffs' purchased property detailed at the foot of the plaint, which, according to law, could not be sold in execution of the said decree, may be set aside, together with all the other fraudulent application proceedings. The Munsif, considering the suit to be an application under section 244, has set aside the sale of the zamindari share in claim. The substance of the grounds of appeal, as stated by the pleader for the appellant, is as follows :—(1) that

* Second Appeal No. 419 of 1897, from a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 8th April 1897, reversing the decree of Maulvi Muhammad Azim-uddin, Munsif of Aligarh, dated the 1st June 1896.

the Munsif had no jurisdiction to set aside the auction sale, treating the regular suit as an application under section 244. The finding of the lower Court is *ultra vires*."

On this first plea of the defendant-appellant the Lower Appellate Court set aside the decree of the Munsif, who had set aside the sale of the 20th February 1894, and dismissed the plaintiffs' suit.

The plaintiffs appealed to the High Court, their first plea being that "there is nothing in law to prevent the appellants' plaint being treated as an application under section 244 of the Code of Civil Procedure when it fulfils the other requirements of that section."

Babu Durga Charan Banerji, for the Appellants.

Babu Jogindro Nath Chaudhri (for whom Harendra Krishna Mukerji), for the Respondent.

[123] Blair and Burkitt, JJ.—We thoroughly concur in the reasoning which has induced the Calcutta High Court in *Biru Mahata v. Shyama Churn Khawas*, (1895) I. L. R., 22 Cal., 483, and the Madras High Court in *Mayan Pathuti v Pakuran*, (1898) I. L. R., 22 Mad., 347, to pass by the formal defect in bringing a suit instead of making an application under section 244 of the Code of Civil Procedure. It seems to us a reasonable exercise of discretion and one which could do no injury to the parties. The appeal is decreed. The decree of the Lower Appellate Court is set aside, and that of the first Court is restored with costs in all Courts.

Appeal decreed.

NOTES.

[See now C.P.C., 1908, sec. 47, sub-sec. (2), which provides for the conversion of a suit into a proceeding and *vice versa*.

See also (1905) 28 Mad., 64 ; (1909) 32 Mad., 425 ; (1909) 5 Bom. L. R., 1036 ; (1900) 20 A. W. N., 196 ; (1907) P. R., 5 ; (1901) 17 C. P. L. R., 178.]

[22 All. 123]

FULL BENCH.

The 15th December, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, MR. JUSTICE BURKITT
AND MR. JUSTICE AIKMAN.

M. J. Powell.....Applicant

versus

The Municipal Board of Mussoorie.....Opposite party.*

Act No. XV of 1883 (N.-W. P. and Oudh Municipalities Act), section 69—

*Complaint of offence against Municipal bye-law—Power of
Municipal Board to give a general authority to
institute complaints on its behalf.*

Held, that section 69 of the N.-W. P. and Oudh Municipalities Act, 1883, confers upon Municipal Boards in the North-Western Provinces and Oudh the power to delegate generally their authority to make complaints in respect of municipal offences ; and this general delegation includes not merely the giving of authority to do the formal act of presenting a

* Criminal Revision, No. 442 of 1899.

complaint to a Court, but the exercise of discretion as to whether in any given case a complaint shall or shall not be made.

THIS was a reference to a Full Bench of a question arising out of an application for revision of an order convicting the petitioner of an offence against the bye-laws of the Municipal Board of Mussoorie, namely, to what extent a Municipal Board is competent, under section 69 of Act No. XV of 1883, to delegate its powers as to making complaints in respect of municipal offences. The facts of the case, so far as they are necessary for the purposes of this report, appear from the judgment of the Chief Justice.

[124] Mr. *W. Wallach*, for the Applicant.

The Municipalities Act enables municipal boards to frame rules and bye-laws encroaching on ordinary rights of the public and constituting offences of acts which according to the ordinary law of the land are not offences. Section 69 has been passed as a safeguard for the protection of the public and ought as such to be strictly construed. Its object is to prevent people who are innocent or may have been guilty of purely technical offences against municipal rules or bye-laws from being needlessly harassed by prohibiting a Court from taking cognizance of offences punishable under the Act or rules made under the Act, except on complaint of the Municipal Board or "some one authorized by the Board in this behalf," i.e., in behalf of each particular complaint. The Board has a duty imposed upon it, of which it cannot divest itself. The whole object of the section fails if the Board be allowed to delegate its authority to a person to generally institute prosecutions on behalf of the Board. If that construction were adopted the Board could vest a *chaukidar* or police constable with power to institute prosecutions under the Act whenever he thought fit; and the authority thus granted under section 69 would very likely be frequently used as a means of oppression and annoyance. The same might be said in the case of small municipalities, where the authority in question would most likely be vested in a poorly paid secretary.

Counsel referred to kindred English Acts and pointed out that although local governments are of very long standing in England, no English Statute seems to go so far as to enable local bodies to generally vest the power to institute prosecutions in any one. Powers of delegation in English Acts are not granted in a vaguely worded section, but whenever they occur they are strictly specified and limited.

Counsel also referred to the explanations added to the corresponding sections in the recent Punjab Municipalities Act (Act XX of 1891, section 186) and Burma Municipalities Act (Burma Act III of 1898, section 195), to show that in those Acts an explanation was deemed requisite to invest the Board with the power of general delegation.

[125] Mr. *E. Chamier*, for the Municipal Board.

The words "authorized by the Board in this behalf" in section 69 of Act No. XV of 1883 are wide enough to include a general authority; the construction contended for by the applicant is unnatural and would in the case of any large Municipality bring about a dead-lock, as the Board could not itself deal with every breach of the bye-laws and decide whether a prosecution should be instituted. The words "authorized in this behalf" are used in other Acts to denote a general as well as a special authority. See section 59 of Act No. XII of 1881; section 51 of Act No. XIV of 1882; section 19, explanation 2, of Act No. XV of 1877.

No argument can be founded on the desirability or otherwise of allowing the delegation of the power to institute prosecutions. The Act contemplates

the delegation by the Board of important functions : see sections 26, 34 (e), 58, &c.

Unless compelled to do otherwise the Courts should place such construction upon section 69 as will effectuate the obvious intention of the Legislature and not produce serious inconvenience. See Maxwell on Statutes, pp. 319 and 423, Hardcastle on the interpretation of Statutes, pp. 99—102. *Queen-Empress v. Hori*, (1899) I. L. R., 21 All., 391.

Section 69 of Act No. XV of 1883 now in question is a reproduction of section 46 of Act No. XV of 1873 and earlier enactments. The words "authorized in this behalf" have for a great many years been understood as including a general authority. In re-enacting this provision the Legislature must have been aware of the construction which had been placed upon it, and must have intended that the words should be understood in their received meaning. See *Commissioners for Income Tax v. Pemsel*, L. R., 1891, A. C., 531: at pp. 590—91.

Strachey, C.J.—The petitioner in this case has been convicted and sentenced by a Magistrate of the Dehra Dun district for a breach of rule 19, part 2 of the bye-laws made by the Municipal Board of Mussoorie under the North-Western Provinces and Oudh Municipalities Act (No. XV of 1883). The first ground stated in the petition is as follows:—"Because the Magistrate could not legally take cognizance of the offence [126] complained of, as no complaint was made either by the Municipal Board or by any person authorized by the Board on that behalf." That is the only point which the Division Bench dealing with this case has referred to the Full Bench. It relates to section 69 of Act No. XV of 1883, which provides that "a Court shall not take cognizance of an offence punishable under this Act, or the rules made under this Act, except on the complaint of the Municipal Board, or of some person authorized by the Board in this behalf. Now on the 27th April 1897, as appears from a copy of the minutes of the Board, the following resolution was passed under the head of "Appointment of Public Prosecutors." "Resolved that the Chairman, Vice-Chairman, Health Officer and Secretary be vested with authority under section 69, Act XV of 1883, to institute prosecutions on behalf of the Board." In the present case a complaint against the petitioner of a breach of the bye-law in question was made to the Magistrate by the Secretary of the Board. There can be no doubt that the authority under which he professed to make the complaint was the resolution which I have just quoted. It is not shown or suggested that, apart from that resolution, the Board gave any authority for the prosecution. The question is whether, by reason of the resolution, the Secretary was a person authorized by the Board in this behalf within the meaning of the section so as to entitle the Court to take cognizance of the offence on his complaint. On behalf of the petitioner it has been contended that the words "authorized by the Board in this behalf" do not include a general authority to prosecute in regard to offences under the Act or rules generally, such as that given by the resolution, but are confined to a specific authority to be given by the Municipal Board in relation to the specific offence for which the accused is to be prosecuted. In other words, that the case contemplated by the closing words of the section is one in which the determination to prosecute for the offence is the determination of the Municipal Board alone, and in which the Municipal Board having decided that there shall be a complaint, merely authorizes some person to lay that complaint before the proper Court. There is no authority to be found upon this point. It is clear that the section was enacted with a two-fold purpose. The object was, in the first place, to exclude [127] prosecutions for what may be called municipal offences from the interference of irresponsible persons, and to secure that such prosecutions

should have the guarantee of the responsibility of the Municipal Board. A further object, in my opinion, was to relieve the Municipal Board of the necessity of itself dealing with each individual case of prosecution for a municipal offence, and to enable it to assign that particular function to some other person or persons. Now the first complaint spoken of in the section is the complaint of the Municipal Board. It is clear that the Municipal Board can make a complaint. But, as it is a corporate body, the only way in which it can make a complaint is to authorize some person to make one on its behalf, just as it can only do any other act through the instrumentality of some agent. So that, if the section stopped there, such cases could only be prosecuted by the Municipal Board considering the individual case and the propriety of the prosecution, passing a resolution that the prosecution should be instituted, and directing its officer to take the necessary proceedings. That is how the matter would stand if the section ended with the words "Municipal Board." It is clear that the remaining words of the section were intended to provide for another sort of case. If the argument for the petitioner is sound, in a case where a Municipal Board desired not itself to make a complaint, but to authorize some other person to make one, it would have to adopt exactly the same procedure as I have just pointed out, it would have to adopt if making the complaint itself. The argument is that the authority there spoken of only means an authority to file the particular complaint, that authority being conferred after the Board had, as in the other case, itself determined on a prosecution by resolution passed at one of its meetings. It appears to me that such a construction involves two consequences, each of which is sufficient to condemn it. The first is that it renders the concluding words of the section absolutely superfluous. The second is that it entirely defeats what I think was the obvious intention of the Legislature that some relief at all events should be given to the Municipal Board, which has necessarily other and many duties to perform, without forcing on it that detailed and individual examination of every case which is required where the complaint is made by the [128] Board itself. Of course the wording of the section is not quite as exact as might be wished, because to some extent, and taken literally, the two parts of it overlap each other. A "complaint of the Municipal Board" in itself implies the Board authorizing some body to make the complaint, because, as I have said, the Board being a corporate body cannot make a complaint at all without authorizing some one to make it. Again, if the Board does authorize some person in the words of the second part to make a complaint, that complaint is, strictly speaking, the complaint of the Board itself. But when you look at the section with an eye to the object which the Legislature had in view, I think the meaning is pretty clear. "Complaint of the Municipal Board," I think refers to a case where the Board is the real author of the complaint, in the sense that the complaint is the result of the determination of the Board itself. The complaint spoken of in the last words of the section similarly means, in my opinion, a complaint which is the result of a determination, not by the Board itself but by some person authorized by the Board in that behalf. That appears to me to be the only way in which you can give effect to the distinction which the Legislature evidently had in view, and to all the words of the section which the Legislature has enacted. If this view is correct, it follows that the Legislature meant by the concluding part of the section to empower a Municipal Board to give authority to some other person, not merely to do the formal or mechanical act of putting a complaint before the Magistrate, which it would have to do if it desired to make the complaint itself under the first part of the section, but to determine whether there should be a complaint at all. Is there any thing in any word of this section which is inconsistent with this view? The

words used are as general as possible :—" Authorized by the Board in this behalf." A general authority, that is an authority to act in all cases or in a class of cases, is a familiar form of authority to an agent or an officer. The word "authorized" would include it just as much as the narrower kind of authority, which consists in authorizing an agent merely to take specific action in a particular case. That the wider meaning is not an exceptional or anomalous one is further shown by the instances cited by Mr. *Chamier* of [129] other enactments, such as section 59 of the N.-W. P. Rent Act, 1881, section 51 of the Code of Civil Procedure, and section 19, explanation 2, of the Limitation Act, 1877, in which the same words "authorized in this behalf" are clearly used in the sense of a general authority. Then if the language used is wide enough, why should we go out of our way to place restrictions on it? The Government Advocate has pointed out what would be the result of restricting it in the manner suggested. In some of the larger Municipalities constituted under this Act he said—and I think with truth—that the section would be utterly unworkable if so restricted. In a large community with a multiplicity of local business, and where offences against bye-laws of greater or less importance are of constant occurrence, it is impossible that the Municipal Board should meet and deliberate and pass resolutions in every case before any complaint could be instituted. The meetings of the Board are subject to regulations as regards convening, notices to be sent to the members, and as to quorum, and so pre-suppose a machinery which often means considerable delay, and which could not possibly be applied as a preliminary to each and every prosecution for a municipal offence. That is precisely the consideration which induced the Legislature to enact the concluding words of section 69. I can see no *a priori* improbability, no considerations of public policy which would make it unlikely that the Legislature should entrust to a Municipal Board power to confer on other persons not only a specific authority to file a particular complaint, but a general authority to prosecute for municipal offences, including authority to determine whether a prosecution is desirable. Such a power might, it is said, be abused. If it were abused, a remedy might be found in Chapter V of the Act. That the Legislature itself regards such a power as one which may properly be given to a Municipal Board may be inferred from section 186 of the Punjab Municipal Act, 1891, which is in terms practically identical with section 69 of Act XV of 1883, but to which an "Explanation" is appended providing that "the committee may authorize persons to prosecute either generally in regard to all offences under this Act and the rules thereunder, or particularly in regard only to specified offences or offences of [130] a specified class." The Burma Municipal Act, 1898, section 195, contains a similar explanation. These provisions cannot, of course, be used for the purpose of construing Act XV of 1883, but they appear to me to support the view that there is no reason of public policy or convenience why a general authority should not have been included within the words which section 69 uses. For these reasons I have come to the conclusion that the complaint in the present case was made by a person authorized by the Board within the meaning of section 69, and that the first ground for the present petition therefore fails. This is my answer to the reference.

Knox, J.—I concur in the answer given and in the reasons therefor.

Blair, J.—I find myself constrained to give the same answer to the question propounded as has been given by the Chief Justice, and I find myself constrained to that conclusion by the consideration that another construction would impose on Municipal Boards burdens absolutely intolerable. The section appears to me to be unfortunately drawn, and there are points of

view from which I should have been inclined to adopt another interpretation, but I cannot believe that the Legislature intended by that section to make Municipal institutions unworkable.

Banerji, J.—I would make the same answer to the reference as the learned Chief Justice. I find nothing in section 69 of Act No. XV of 1883 to justify the contention that there cannot be a general delegation of authority by a Municipal Board in the matter of initiating and instituting complaints. The language of the section is wide and flexible enough to authorize a general delegation of the Board's discretion, and as the limitation of its provisions for which the petitioner contends will lead to great practical inconvenience, I see no reason for so construing those provisions as to give rise to such inconvenience.

Burkitt, J.—In this matter the argument *ab inconvenienti* is, in my opinion, overwhelmingly strong. It is clear from the arguments which we have heard to-day that unless the construction put on section 69 by the learned Chief Justice be adopted, it will be impossible for any but the smallest Municipalities in these Provinces to cope with the absolutely [131] necessary work of prosecuting persons who have been guilty of breaches of Municipal bye-laws. For that reason, though I cannot wholly adopt the views of the learned Chief Justice, I am not prepared to record a dissentient judgment.

Aikman, J.—I concur in the answer proposed to be given to the reference by the learned Chief Justice and my brother Judges. The language of section 69 of the N.-W. P. and Oudh Municipalities Act, 1883, is, in my opinion, susceptible of the interpretation for which the learned Government Advocate contends. That interpretation is, to my mind, the most natural construction of the section, as it is undoubtedly the most convenient, and it is the construction which has all along been placed on the section by the Boards which have had occasion to act under it.

NOTES.

[See also (1904) 26 All., 482.]

[22 All. 131]

The 21st December, 1899.

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

In the matter of the New Egerton Woollen Mills.*

Stamp—Articles of association—Special resolution—Resolution superseding articles of association—Act No. VI of 1882 (Indian Companies Act) sections 76, 79—Act No. I of 1879 (Indian Stamp Act), sch. i, art. 8.

A company limited by shares and already possessing articles of association proceeded to pass a special resolution, in virtue of which a document was drawn up entitled "articles of association" in supersession of the articles theretofore in force. The record of this special resolution was, under the provisions of section 79 of the Indian Companies Act, 1882, sent to the Registrar of Joint Stock Companies to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as articles of association and was not so stamped. Hereafter a reference was made by the Board of Revenue to the

* Miscellaneous No. 183 of 1899.

High Court under the provisions of section 46 of the Indian Stamp Act, 1879, as to whether the document in question required to be stamped. *Held* that the Indian Companies Act did not contemplate any such thing as new articles of association, and that the document in question was nothing more than the record of a special resolution, and as such did not require to be stamped.

THIS was a reference made by the Board of Revenue for the North-Western Provinces and Oudh, under section 46 of Act No. I of 1879. The circumstances which gave rise to the reference were, briefly, as follows. The new Egerton Woollen Mills, a company limited by shares and already possessing articles of [132] association, came to the conclusion that their articles of association stood in need of amendment. They accordingly passed a special resolution very largely altering and amending the articles, and the result of this resolution was embodied in a document headed "articles of association." This document, or a copy of it, was forwarded to the Registrar of Joint Stock Companies under the provisions of section 79 of the Indian Companies Act, 1882, to be recorded by him. The Registrar impounded it, being of opinion that, owing to the procedure adopted by the company in entirely recasting their articles of association, the document constituted new articles of association and required a stamp of Rs. 25 under article 8 of the second schedule to the Indian Stamp Act, 1879. At the instance of the Company the Board of Revenue referred to the High Court the question whether the document required to be stamped as articles of association, or whether it was merely the record of a special resolution.

Mr. W. K. Porter, for the New Egerton Woollen Mills, contended that the document in question was not articles of association; and did not require to be stamped as such. The Indian Companies Act, 1882, (*vide* sections 37 and 39) contemplated that there should be only one set of articles of association during the existence of a Company. But by section 76 of the Act a Company was empowered to "alter all or any of the regulations of the Company contained in the articles of association" by means of a special resolution, as defined by section 77. This was what had occurred in the present case. The Company had by special resolution altered most of the articles of association, and, instead of publishing what was new in the form of an amendment to the articles of association, had entirely recast the articles. Such procedure was adopted for the sake of convenience, but it was not the making of "new articles of association." In point of law the document in dispute was nothing more nor less than the record of a "special resolution" a copy of which had, by reason of section 79, to be forwarded to the Registrar of Joint Stock Companies for the purpose of being recorded by him; it did not constitute "articles of association" requiring to be registered under section 40.

[133] Mr. E. Chamier, *contra*, argued that articles of association were in *pari materia* with rules which partners might make for themselves for the conduct of the partnership business. As such rules might be changed as often as the partners desired, so might articles of association of a Company. The document in question was on the face of it a complete set of articles of association, and required to be stamped as such. It was not permissible to look outside the document itself to ascertain what it was for the purposes of the stamp law. *Chandrakant Mookerjee v. Kartikcharan Chaile*, (1870) 5 B. L. R., 103, and *Ramen Chetty v. Mahomed Ghouse*, (1889) I. L. R., 16 Cal., 432.

Knox, Banerji and Aikman, JJ.—This is a case stated under section 46 of Act No. I of 1879 by the Board of Revenue for decision of the question raised in the statement. The statement commences by asking for a ruling regarding the question of the stamp-duty payable on what are termed the New Articles of Association of the New Egerton Mills Company, Limited. It

then sets out that an authenticated copy of these so-called "New Articles of Association" was submitted to the Registrar of Joint Stock Companies for registration, and that he impounded them, as he was of opinion that they required to be stamped. The reasons why the Registrar of Joint Stock Companies considered that the document was liable to stamp-duty are that, in his opinion, the New Egerton Woollen Mills Company, instead of altering its existing regulations or making new regulations to the exclusion of those already existing, as they were entitled to do under section 77 of the Companies Act, had, for the sake of greater convenience and perspicuity, preferred to adopt an entirely new set of articles of association as the regulations of the company, to the exclusion of those before in force, they were therefore the articles of association of the company, and required to be stamped under article 3 (presumably article 8) of schedule I of the Stamp Act, 1879. The Board state that they agree with the view thus stated by the Registrar of Joint Stock Companies. Before proceeding further, we would point out that the word "New" is a word imported by the Registrar of Joint Stock Companies into the case. The document, which was presented to the Registrar of Joint [134] Stock Companies, and which is before us, is headed "Articles of Association of the New Egerton Woollen Mills Company Limited," and not "New Articles of Association," as set out in the reference. After carefully considering the provisions of the Indian Companies Act, 1882, and hearing all that has been said to us by the learned Government Advocate, we are of opinion that there can be no such document under the Indian Companies Act of 1882 as "New Articles of Association." Articles of association are specially referred to in section 37 and following sections of the Act. The sections provide that a company limited by shares may, when on the eve of incorporation, draw up a memorandum of association, and may link with that document articles of association signed by the subscribers to the memorandum of association, and prescribing such regulations for the company as the subscribers to the memorandum of association deem expedient. If they do not add articles of association so executed to their memorandum of association, in that case the regulations contained in the table marked A in Schedule I to the Indian Companies Act, 1882, shall be deemed to be the regulations of the Company in the same manner and to the same extent as if they had been inserted in the articles of association and the articles had been duly registered. We have not been referred to any section throughout the Act which provides for the framing of new articles of association, and it seems to us that such would really be a contradiction in terms. We can understand a body of individuals who are about to incorporate themselves into a company drawing up and executing articles of association which shall govern them when so incorporated, and we can understand a company when incorporated resolving that there shall be new regulations which shall supersede or modify the articles which were drawn up at the time when the association was first determined upon. This is provided for by section 76 of the Indian Companies Act, and provision is made in section 79, whereby any and every resolution to this effect shall be printed and forwarded to the Registrar of Joint Stock Companies and be recorded by him. Bearing all this in mind, we are satisfied that the document which was submitted to the Registrar of Joint Stock Companies was submitted to him under section 79 to be recorded by him, and not, as he [135] states, for registration. The document was not new articles of association, or articles of association at all within the meaning of the Indian Companies Act. It was a copy of the special resolution passed by the company, notifying to the Registrar, and through him to the world concerned, that the regulations of the company, which were covered by the resolution, would be the regulations by which the company would in future be bound. These

regulations, even though they were new regulations to the exclusion of all the existing regulations of the company, are, by the second paragraph of section 76, to be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association. The law does not say that they are to be deemed articles of association, but expressly declares that they are to be deemed regulations of the same validity as if they had been contained in the articles of association. The document which has been forwarded to us is certainly not one which falls within article 8 of Schedule I of the Stamp Act of 1879, and is not liable to stamp-duty as provided by that article. This is our decision. Let the Registrar certify it as our answer to this reference.

[22 All. 135]

The 11th December, 1899.

PRESENT :

MR. JUSTICE BLAIR, AND MR. JUSTICE AIKMAN.

Ram Bharose.....Defendant

versus

Kallu Mal and others.....Plaintiffs.*

Partnership—Arbitration—Authority of one partner to sue on behalf of the firm—Authority of one partner to bind the firm by a submission to arbitration—Act No. I of 1877 (Specific Relief Act), section 21.

Held that one partner, though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due to the firm, has no power, in the absence of special authority, to bind the firm by a submission to arbitration of the claim so brought. *Stead v. Salt*, (1825) 3 Bing., 101, and *Strangford v. Green*, (29 Car. II) 2 Mod., 223, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. W. M. Colvin (for whom Wallach), for the Appellant.

Pandit Moti Lal, for the Respondents.

[136] Blair, J.—This suit was brought by the plaintiffs to recover money due to them for groceries sold and delivered to the defendant Ram Bharose. The plaintiff's business was a partnership business. One Udai Ram was called the managing partner, but there appears to be no fact found in this case which would distinguish his powers and rights from those of an ordinary acting partner. Proceedings had been commenced by him to recover the debt due to the firm, and we have the authority of English cases, which seem to us to deal with a state of facts in no way different from similar transactions in this country for the proposition that a partner suing to recover a debt due to the firm is acting within the range of his powers; in other words, that he is authorized to adopt the ordinary method provided by law for the recovery of debts due to the firm. Udai Ram, however, before the suit had been decided, referred the matter to arbitration, undertaking no doubt to bind the partnership concern by the award which should be made. Prior to the date fixed for

* First Appeal No. 29 of 1899, from an order of Babu Nil Madhab Roy, Small Cause Court Judge, Cawnpore, dated the 27th February 1899.

making and publishing the award, a partner, Kallu Mal, gave notice to the arbitrator that he was not bound by the submission to the arbitration, and Udai Ram also repudiated his own liability. The plaintiffs brought this suit to recover their money due to them, narrating in their plaint the general circumstances relating to the arbitration. The substance of their plaint is "we are not bound by those arbitration proceedings. We are entitled to recover just as though they had never taken place." The appellant Ram Bharose set up in his statement of defence that under the true interpretation of section 21 of Act No. I of 1877, and section 251 of the Indian Contract Act, the arbitration agreement constituted a bar to the plaintiff's suit. The Munsif tried the issue of fact as to the liability of the partner Kallu Mal for the act of Udai Ram, and found that Kallu Mal had authorized the reference to arbitration, and thereby bound himself and his minor son, who was also a partner. The Court below found otherwise on the question of fact. It found that there was no authority to refer given by Kallu Mal. It discussed and considered no question of implied liability, and we think it reasonable to draw the inference that the question of implied liability of the partnership for the acts of the managing partner [137] was not raised before it. At all events there is no finding of such implied liability.

The third point which might have been raised before the Lower Appellate Court was that, although there might have been in fact no authority conferred upon Udai Ram to refer matters in dispute relating to partnership business to arbitration, still such a representation might have been made to the public as to the nature and extent of his power as to estop the plaintiffs from saying that he had not the fullest authority to enforce the demands of the firm by any machinery he might choose. That question does not appear to have been raised or decided. The defendant therefore having it found against him that there was in fact no authority, has also failed to obtain a finding upon the question whether there was an implied authority or estoppel made by representation of the partners. There was therefore no bar to the consideration of the details of the plaintiff's claim.

An order of remand has been made upon the basis that the plaintiffs have been held entitled to sue as the defendant has failed to establish any bar to their suit. The order of remand, therefore in our opinion, was right. The appeal should be dismissed, and the costs of this appeal should be costs in the cause.

Aikman, J.—This appeal arises out of a suit brought by Kallu Mal, Gopi Ram and Udai Ram, members of a partnership firm, to recover from the defendant Ram Bharose the price of goods supplied. In answer to the suit Ram Bharose pleaded that the matter in dispute had been, under agreement between him and Udai Ram, the managing member of the firm, referred to arbitration, and that consequently the existence of this agreement barred the plaintiffs' suit. The Court of First Instance sustained this plea and dismissed the suit. On appeal the learned Subordinate Judge set aside the decree of the Court of First Instance and remanded the case under section 562 of the Code of Civil Procedure for decision upon the merits. It is against this order of remand that the present appeal is brought.

It is contended that the reference to arbitration was a valid reference, which binds the partnership, and consequently the suit is not maintainable. The question whether one partner can without special authority, bind the firm by submission to [138] arbitration, does not appear to have been considered in any Indian case. The English authorities are unanimous in holding that one partner cannot, without special authority, bind his firm by such reference.

In case of *Stead v. Salt*, (1825) 3 Bing., 101, a firm consisting of five members, brought a suit against the defendant to recover the price of work, labour and materials. It was pleaded that the subject of the demand, for the enforcement of which the action was brought, was concluded by an award. It appeared, however, that submission to the award was signed by three only out of the five members of the firm, and the Court held that submission by three members would not bind the five. There are other cases to the same effect to which it is not necessary to refer. For the appellant to succeed, it appears to me he must show that the reference to arbitration was either an act necessary for, or such as is usually done in, carrying on the business of the firm in question. He has failed to do so. He attempted to show that the other adult member of the firm had expressly consented to the reference, but the Lower Appellate Court disbelieved the evidence adduced by the defendant and held that no such consent was proved. It appears from the judgment of the Lower Appellate Court that no attempt was made to argue that Udai Ram, as managing member of the firm, had any implied authority to refer matters to arbitration. I am of opinion, therefore, that the plea, based upon the provisions of the last paragraph of section 21 of the Specific Relief Act, 1877, fails.

One other contention was urged by the learned counsel on behalf of the appellant, namely, that in any event Udai Ram, who virtually referred the matter to arbitration, was bound by the submission. An old case, *Strangford v. Green*, (29 Car. II) 2 Mad., 228, is cited as authority for this contention. It may be that in a suit against Udai Ram personally the defendant may be entitled to some relief; but this will not affect the suit brought by the firm of which Udai Ram is a member. I concur in the order proposed.

BY THE COURT.—The order of Court is that the appeal be dismissed. Costs of this appeal will abide the event.

Appeal dismissed.

NOTES.

[See also (1908) 3 S. L. R., 5, wherein this was distinguished; (1902) P.L.R., 103.]

[139] APPELLATE CIVIL.

The 11th December, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Balwant Singh... ..Plaintiff
versus

The Secretary of State for India in Council.....Defendant.*

*Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 241 (i)—Act No. VIII of 1873 (Northern India Canal and Drainage Act), section 45—
Civil and Revenue Courts—Jurisdiction—Suit to recover
alleged excess payments in respect of irrigation dues.*

Held that no suit would lie in a Civil Court to recover payments alleged to have been made in respect of irrigation dues in excess of what was properly leviable on the plaintiff.

* Second Appeal No. 194 of 1897, from a decree of W. F. Wells, Esq., District Judge of Agra, dated the 21st December 1896, confirming the decree of Maulvi Syed Muhammad Sirajuddin Ahmad, Subordinate Judge of Agra, dated the 6th August 1896.

THIS was a suit instituted in the Court of the Subordinate Judge of Agra for the recovery of a certain sum of money alleged to have been paid under the following circumstances as detailed in the judgment of the Court of First Instance:—

"The plaintiff is the zamindar of two villages, namely Kayatha and Gangni, pargana Firozabad, zila Agra, and pays the irrigation (called the owner's) rate for these villages. The owner's rate is levied on those lands alone which at the time of the last settlement were *usar*, or *bunjur*, or *khakee*, or *nautor*, and which are now irrigated through the canal; these have been assessed with an irrigation fee of those lands which did not use to be irrigated.

"On account of the village Gangni for the years 1292 to 1296 F. Rs. 833-11-10 were taken in excess of the real dues from the plaintiff's ancestor through mistake on account of owner's rate, that is, on account of those lands which at the time of the last settlement used to be irrigated by canal or wells, or any other means; that in the same way Rs. 3,709-14-3 were taken in excess of the correct dues for the village Kayatha for the same period; that the lands for which these fees have been taken are entered in the jamabandis as being *Nahree* or *Chahee*, but the owner's rate was taken with respect to them by mistake. That the numbers of these plots are given in the exhibits marked from A to T.

[140] "The ancestor of the plaintiff and the servants of his estate relying upon the jamabandis supplied to the zamindars twice a year paid the said amounts.

"In May 1891, the karindas of the estate discovered the mistake, and therefore on the 14th of May 1891, an application was made to the Collector for a refund of the amount, but it was disallowed on the 1st of August 1891.

"A notice under section 424 of the Civil Procedure Code was served upon the Collector on the 9th of March 1894.

"The cause of action arose on the 13th of May 1891, when the ancestor of the plaintiff and the servants of the estate discovered the mistake, as well as on the 1st of August 1891, when the application for a refund of the amount was disallowed.

"Upon these allegations the plaintiff seeks to recover Rs. 4,543 from the defendant.

"The defence is:—

"That the plaint has not been properly signed and verified by the plaintiff.

"That the claim is barred by limitation, and the plaintiff has given a wrong cause of action.

"That the amounts in dispute as stated in the plaint are incorrect and greatly differ from the entries in the jamabandis filed by the plaintiff with the plaint.

"That the defendant before the institution of the present suit asked the plaintiff for an account and a list of fields in dispute in order to decide whether any mistake had really been made, but the plaintiff neither sent the said papers to the defendant nor showed them to his pleader.

"That no excess irrigation dues have been realized from the plaintiff, and the dues referred to in the plaint having been fully examined, have been rightly assessed and recovered.

"That the plaintiff and his ancestor had been always paying the irrigation dues and deriving benefits thereof, and the jamabandis have been always in their hands; they never raised any objection; that the present plaintiff has

no *locus standi*. The allegation that the said dues were paid by mistake and the mistake was discovered on the 13th of May 1891, is wrong.

[141] "That the plaintiff applied to the Collector of Agra for a refund of the amount but it was rejected on the 1st of August 1891; that no excess irrigation fee has been recovered from the plaintiff, and if any has been recovered, he is not entitled to its recovery under circular A. D. of July 1883."

Upon these pleadings the Court of First Instance dismissed the suit as barred by limitation.

The plaintiff appealed, and the Lower Appellate Court (District Judge of Agra) dismissed the appeal, finding the suit barred by limitation under article 14 of the second schedule to the Indian Limitation Act, 1877.

The plaintiff thereupon appealed to the High Court.

Babu Jogindro Nath Chaudhri and Babu Satya Chandra Mukerji, for the Appellant.

Mr. E. Chamier, for the Respondent.

Blair and Burkitt, JJ.—In our opinion the suit does not lie by dint of section 241, second paragraph of cl. (i), of the Land Revenue Act, No. XIX of 1873, and section 45 of Act No. VIII of 1873. This question was not raised in the appeal or in deed elsewhere at all. The Court below dismissed the suit by the application of art. 14, sch. II of the Limitation Act. The appeal is therefore dismissed, but under the circumstances, without costs.

Appeal dismissed.

NOTES.

(This was affirmed by the Privy Council in (1903) 25 All., 527.)

[32 All. 141]

The 16th December, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Kanhia Lal.....Plaintiff

versus

Debi Das and another.....Defendants.*

Hindu law—Joint Hindu family—Suit for partition—Plea by defendants that some of the property in suit was their self-acquired property—Burden of proof.

In a suit for partition of property alleged to be the property of a joint Hindu family, of which the plaintiff was a member, the defendants, while admitting that some of the property scheduled in the plaint was joint property pleaded that the bulk of the property in suit, of which they were in possession, was their own self-acquired property. *Held*, that the burden of proof was on the defendants to show that such property was their self-acquisition. [142] *Gajendar Singh v. Sardar Singh*, Weekly Notes, 1896, p. 23; *Dhurm Das Pandey v. Mussumat Shama Soondri Dibiah*, (1843) 3 Moo. I. A., 229, and *Gobind Chunder Mookerjee v. Doorgapersaud Baboo*, (1874) 22 W. R. C. R., 248, referred to.

* Second Appeal No. 410 of 1897, from a decree of C. Rustemjee, Esquire, District Judge of Moradabad, dated the 24th March 1897, reversing the decree of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 11th December 1893.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri, Babu Ratan Chand and Munshi Gokal Prasad, for the Appellant.

The Hon'ble Mr. Conlan and Mr. D. N. Banerji, for the Respondents.

Burkitt, J. (Blair, J., concurring).—This is a second appeal in a partition suit. The reply of the defendants to that suit was that the great bulk of the property sought to be partitioned was their self-acquisition, and that it did not belong to the joint family. It was admitted that some of the property scheduled in the plaint was joint property.

At the hearing in the first Court the Subordinate Judge very properly placed on the defendants the onus of proving that the property claimed by them was their self-acquired property. The defendants refused to accept the ruling of the Court in that matter. They persisted in their contention that the onus lay on the plaintiff, and declined to call any evidence in support of their case. They contented themselves with putting in certain sale-deeds and such like documents. As to those papers it is sufficient to refer to the case of *Gajendar Singh v. Sardar Singh*, Weekly Notes, 1896, p. 23. Such documents unsupported by any parol evidence, are insufficient to establish the defendants' case. The first Court gave the plaintiff a decree. On appeal the District Judge has reversed that decision. He held that the onus of proof lay on the plaintiff. In so holding we have no doubt he was entirely wrong, and we say so on the authority of *Dhurm Das Pandey v. Mussamat Shama Soondri Dibiah*, (1843) 3 Moo. I. A., 229, and of the High Court of Bengal in the case of *Gobind Chunder Mookerjee*, (1874) 22 W. R., C. R., 248, and the cases cited therein. We hold that as the defendants set up their separate acquisition in a suit for the partition of a joint family, which admittedly was possessed as such of some property, the presumption of law was that the whole of the property of each individual belonged to the common stock. The burden of proving separate self-[143] acquisition lay on the person asserting it. In our opinion therefore the decision of the Judge was absolutely wrong. We set aside his decree dismissing the suit.

It was urged for the respondents that we should now remand the record so as to give them an opportunity of putting in their evidence. We refuse to adopt that course. The defendants had ample opportunity to produce their evidence. They absolutely refused to submit to the ruling of the first Court and declined to produce evidence. They have only themselves to thank for the consequences. We refuse to assist them. The suit then was practically undefended and was properly decreed by the Court of First Instance in the absence of any evidence for the defence. That was a right decree. We restore it, and (setting aside the decree of the Lower Appellate Court) we allow this appeal with costs.

Appeal decreed.

NOTES.

[This was followed in (1902) 4 C.L.J., 56 (*Dayabhaga* family). See also (1902) 16 C. P. L. R., 3.]

[22 All. 143]

The 16th December, 1899.

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Abdur Rahim.....Plaintiff

versus

The Municipal Board of Koil.....Defendant.*

Suit for declaration of right to be entered in list of candidates for appointment as member of a Municipal Board—Jurisdiction—Suit brought against the Municipal Board in its corporate capacity.

Where a plaintiff sued for a declaration of his right to have his name entered in the list of persons entitled to be candidates for election as members of a Municipal Board and brought his suit against the Board in its corporate capacity, it was *held*, that such a suit would not lie against the Board, even if, which was not decided, it might lie against the revising authority, by the irregular action of which, it was alleged, the plaintiff's name had been excluded from the list of candidates.

THE facts of this case sufficiently appear from the judgment of the Lower Appellate Court, which was as follows:—

“ The plaintiff appellant asks for a declaratory decree against the Municipal Board of Aligarh (*sic*), to the effect that he is entitled to be entered in the list of candidates for election as a member of the Board, and for damages amounting to Rs. 1,100.

[144] “ His allegation is that he was elected as a member in March 1894, but his election was set aside by the Magistrate's order passed in May 1894.

“ After this the Municipal Board appointed Mr. H. J. Smith, K. Muhammad Yusuf, L. Sri Lal and Sheikh Amin-ud-din as a revising authority for correcting the list of voters for 1895.

“ Muhammad Nur Khan, his former opponent, raised an objection to entry of name of plaintiff on list of voters, on the ground that he paid a monthly rent of less than Rs. 10. The matter was brought up before the revising authorities on 26th January 1895, and some irregular and illegal proceedings took place, as detailed in the plaint, in consequence of which the name of plaintiff appellant was struck off list of candidates for membership. It is alleged that the order passed by the revising authority was passed *mala fide* at the instigation of Muhammad Nur Khan, to whom the members of the revising tribunal were partial (Mr. Smith alone excepted). In consequence of this illegal action of the revising tribunal plaintiff appellant failed to be elected in 1895, and this suit is the result.

“ The learned Subordinate Judge fixed several issues and decided as below:—

1. The suit is cognizable by a Civil Court.
2. The order of the revising authorities was not wholly regular and the decision was erroneous.
3. The suit is not barred by section 42, S. R. A.
4. The plaintiff is qualified to be a member.

* Second Appeal No. 298 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 4th March 1897, confirming a decree of Babu Bepin Behari Mukerji, Subordinate Judge of Aligarh, dated the 6th December 1895.

5. The plaintiff can maintain a suit for damages, but he cannot get any because he has failed to prove malice on part of the revising authorities.

"The plaintiff has appealed against this decision. No objection has been taken under section 561, Civil Procedure Code, by the defendant Municipal Board, but I hold that the defendant can nevertheless contest the findings of the lower Court where they are against them. 'A respondent who fails to file a petition under this section is not bound by the findings arrived at against him by the lower Court'—*Bhagoji v. Bapuji*, (1888) I. L. R., 13 Bom., 75, and may take any objection to the decree of the lower Court which he [146] might have taken if he had preferred a separate appeal—*Kamat v. Kamat*, (1884) I. L. R., 8 Bom., 368; *In re M. Himmat Bahadur*, (1866) B. L. R., Sup. Vol., 429.

"Under these circumstances the Government Pleader on behalf of the Municipal Board urges:—

- (1) that the suit is not cognizable by a Civil Court;
- (2) that the plaintiff is not entitled to the declaration asked for as against the defendant Board.

"I am referred to the ruling of the Calcutta High Court in *Sabhapati Singh v. Abdul Gaffur*, (1896) I. L. R., 24 Cal., 107, on behalf of the Board.

"The remarks of Mr. Justice TREVELYAN, p. 111 *et seq.*, point to the conclusion that a suit would lie under the circumstances stated by the plaintiff appellant, that is, assuming that the allegation of the plaintiff appellant is correct, that his name was struck off the list of candidates in an irregular way by friends of Muhammad Nur Khan, who were not acting in good faith; it stands to reason that the relief claimed is one which can be considered by the Civil Court acting under section 42, Specific Relief Act.

"This is clearly the meaning of the ruling of the Calcutta High Court referred to above, and as no ruling can be cited to the contrary, I hold that the learned Subordinate Judge was right in finding that he has jurisdiction to try and decide this suit.

"The next point for decision is more difficult—

Can the plaintiff appellant claim the declaration asked for against the Municipal Board?

"The plaintiff appellant, who has conducted his own case, admits that his claim is against the corporate body represented by the President, and not against the President or any individual member personally.

"In the Calcutta case above noted it was decided that no action for damages could lie against the Magistrate who set aside the election, as he only acted *bond fide* in pursuance of what he believed to be the duties of his office; and it was further held that no declaration could be made against him, as the matter was not one in which he really had an interest.

[146] "It was held, however, that an action did lie against those persons who denied the right of the plaintiff and put in force machinery which excluded his exercise of that right.

"In this case the plaintiff appellant bases his suit on the allegation that certain specified members of the Municipal Board, acting under the instigation of his opponent Muhammad Nur Khan, put certain machinery in motion, which resulted in his name being struck out of the list of candidates for the year 1895, and on this ground he says he is entitled to a declaration and damages as against the Municipal Board in its corporate capacity. In this case, according to the rules laid down for the Aligarh Municipality (G. O. No. 716, dated 9th

August 1884), the result of the proceedings of the revising authority was that their order became final, not being corrected by the Magistrate within one month from the last sitting. In other words, the proceedings of the revising authorities were automatically ratified by the Board under the rules, and the order of the revising authorities became for all practical purposes an order of the whole Board.

"But it is not contended that the members of the Board in their corporate capacity were actuated by any malice.

"The order of the revising authorities became the order of the Board under force of circumstances, and it is obvious that the position of the Municipal Board in its corporate capacity is in this case similar to the position of the Magistrate in the Calcutta case. The following remarks apply in this case, *mutatis mutandis*. 'What he (the Magistrate) did was done, or at any rate purported to be done, in pursuance of authority given to him by law. There is a question whether he had any authority to do what he did * * * ; but even if that be so, the Magistrate acted *bodâ fide* in pursuance of what he believed to be the duties of his office, and therefore he would not be liable to an action in respect of it. He would certainly not be liable to any action for damages, and, as far as a declaration against him is concerned, that is not a matter in which he really had any interest. * * * We think it very doubtful whether such a decree could be given, and certainly, as a matter of policy, it would not be right for us to do anything which would compel Magistrates of districts to be [147] brought in in suits of this kind when the contest is really one between the parties who have opposed one another at an election.'

"In this case, applying the principles laid down above, I hold that the real dispute lies between plaintiff appellant and the friends or partisans of Muhammad Nur Khan, and that the Municipal Board in its corporate capacity cannot be dragged into their quarrels.

"The Municipal Board in its corporate capacity acted *bond fide* in pursuance of rules laid down for its guidance by Government, and is not interested in any way with respect to the title of plaintiff appellant to any particular character or right. In this particular instance the right of plaintiff appellant to be elected a member of the Board is not a matter in which the Board in its corporate capacity is interested in the slightest degree.

"For the above reason, I hold that the plaintiff appellant cannot, under s. 42, Specific Relief Act, claim any declaration or ask for any damages against the Municipal Board in its corporate capacity, and the suit must therefore fail.

"It is unnecessary, under these circumstances, to express any opinion on the facts; but I may say that I agree with the learned Subordinate Judge in his finding on the sixth issue, *viz.*, that the plaintiff appellant is qualified under the rules to be a member of the Municipal Board.

"The learned Subordinate Judge for reasons given by him did not award costs to defendant Municipal Board, but in this appeal I am of opinion that the Board is entitled to its costs.

"The plaintiff appellant should have been content with the finding of the learned Subordinate Judge that the proceedings of the revising authorities were irregular and their decision erroneous.

"It is quite clear that as against the Board in its corporate capacity he has no reasonable ground of complaint.

"Appeal dismissed with costs."

The plaintiff thereupon appealed to the High Court.

Babu Satya Chandar Mukerji, for the Appellant.

Mr. E. Chamier, for the Respondent.

Burkitt, J. (Blair, J., concurring).—In this appeal various questions have been argued before us, and amongst others the [148] question as to whether any suit having for its object to obtain a declaration that the plaintiff is entitled to have his name entered in the lists of electors or candidates could lie against the Municipal Board. We do not propose to decide any of those questions. We are of opinion that the appeal must fail on the short ground that the suit has been brought against the wrong party. The plaintiff's allegation is that by reason of certain tortious acts committed by the revising authority his name was wrongfully struck off the list of persons qualified to stand as candidates for election to the Municipal Board at the next election. This the plaintiff alleged as done at the instigation of, and with a view to please and show partiality to, a disappointed candidate. It is admitted for the plaintiff that he had a remedy by application to the District Magistrate (who had power to revise and amend the list prepared by the revising authority), but that he did not avail himself of that remedy.

We are clearly of opinion that if the plaintiff had any right of suit, as to which we express no opinion, his suit should have been instituted against the persons of whose alleged wrongful acts and misconduct he complains, namely, the persons who constituted the revising authority, and that the suit, if maintainable at all, would lie against them personally for the individual acts done by them. The revising authority had the duty imposed on it of preparing the lists of voters and candidates, subject to the final orders of the District Magistrate, and if the members of that body are responsible to any Court for wrongful acts done by them in the performance of that duty they are responsible as individuals. The Municipal Board in its corporate capacity is not answerable for the misconduct and wrongful acts of the revising authority in preparing the lists. It has no control over or power of amending those lists. The Magistrate of the District is the only authority by which those lists can be revised or amended.

For the above reasons we are of opinion that this appeal fails. We therefore dismiss it with costs.

Appeal dismissed.

NOTES.

[See also (1914) 19 C. W. N., 129 a case under the Bengal Medical Act, VI of 1914, in which the name of a person entitled to be included in the voters' list was not registered, and mandamus was sought.]

[149] PRIVY COUNCIL.*The 27th and 28th June, 4th and 5th July and 11th November, 1899.*

PRESENT :

LORDS WATSON, HOBHOUSE AND DAVRY, SIR RICHARD COUCH
AND SIR EDWARD FRY.

Balkishen Das and others.....Defendants

versus

W. F. Legge.....Plaintiff.

On appeal from the High Court for the North-Western Provinces.

Sale of land and agreement for re-purchase—Mortgage by conditional sale—Right to redeem—Intention—Regulations I of 1798 and XVII of 1806—Exclusion of extrinsic evidence to vary written instrument—Act No. I of 1872, (Indian Evidence Act,) section 92.

A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits.

The vendor did not exercise his right of repurchase; but after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale.

Held; (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in section 92 of the Indian Evidence Act, 1872.

This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts.

(2) That there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan.

(3) The equity of redemption was rendered applicable to a mortgage of this class by the effect of the Regulation XVII of 1806. The Transfer of Property Act, 1882, section 58, defines a mortgage of this character, stating the already existing law, and practice regarding it; but owing to its date did not apply in this instance.

(4) Redemption had been rightly decreed in the Courts below.

(5) Whether such a mortgage would be redeemable under the Regulation law independently of intention indicated in the instrument was not a point calling for decision. Indications in this case appearing in the deeds were (a), words in the agreement for repurchase similar to those in Regulation I of 1798, relating to the deposit of mortgage money in the Treasury, giving the like power to deposit; (b), the inclusion in the present security of a sum due on an account, open to be increased, other than the price fixed for the repurchase and other matters. *Bhagwan Sahai v. Bhagwan Din*, (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387, distinguished.

[150] APPEAL from a decree (23rd April 1897) of the High Court, which affirmed, substantially, a decree (8th February 1895) of the Subordinate Judge of Jaunpur.

The suit was brought by the respondent, William Francis Legge, on the 5th November 1894, for the redemption of an alleged mortgage of the 4th

February 1873, on which date he executed to Balkishen Das, the appellant, together with Hari Das, since deceased, a firm of bankers in Benares, a deed of sale to them of his estate, named the Patilah taluk, the price stated being Rs. 1,50,000. The consideration was not paid in cash, but consisted in part of money unpaid upon a previous mortgage to the banking firm effected on the 8th April 1872 by the plaintiff in conjunction with a partner (whom he had since bought out) in carrying on Indigo factories, of which he was the sole owner in February 1873. The rest of the consideration was a balance, retained by the banking firm, of the amount then due on an estimate of expenses for conducting the factories, which they financed for the plaintiff.

A second deed, an ikrarnama, was executed by the banking firm to the plaintiff on the same day, and bore even date with the first deed, the deed of sale. By this ikrarnama the firm agreed that they would sell the taluk back to him if he paid on the 1st March 1876 the sum of Rs. 1,65,000 to them; and it was thereby agreed:—(1) that, if the buyers or their heirs should raise any objections to receiving the money and to relinquishing the property, the seller should be competent to deposit that sum in cash in the Treasury, and thereupon obtain possession;—(2) that if the estimate of the expenditure on the Indigo factories should be varied by consent from year to year, then the seller should be liable to pay along with the sum specified above whatever sum might be found to be due at that time, on the factories account.

On the 6th April 1873 a deed was executed between the parties containing "an estimate of expenditure upon the factories;" and the respondent borrowed money, which was secured to be repaid in December 1873 upon an instrument separately mortgaging the factories; which, after fresh borrowing and another deed of estimate in 1874, were sold on the 25th March 1875, [151] with some other properties, by the plaintiff to the bankers for Rs. 66,000.

The defence of Balkishen Das and of the sons of Hari Das, and his successors in the firm, was that the transaction of the 4th February 1873 was a sale out-and-out of Patilah, and not a mortgage. They denied that any relation of debtor and creditor was subsisting between the parties, and that any agreement to allow the vendor to repurchase for a specified sum, or any relation of mortgagee and mortgagor, continued after the date fixed for payment of the sum for the repurchase, if it was to take place; that date having been the 1st March 1876.

The question to be decided on this appeal was the main one raised by the issues:—whether the instruments of the 4th February 1873 constituted a mortgage by conditional sale or a sale out-and-out. Oral evidence was admitted on each side at the hearing to explain the intention of the parties to the transaction.

The decision of the Subordinate Judge was in the plaintiff's favour. His judgment was that the deeds on their face constituted a conditional mortgage, and he found that by the ancient custom prevailing, the mortgage by conditional sale was generally effected in that way. He referred to the value of the property, which was in excess of the price stated in the sale deed of 1873, as showing, with clauses in the ikrarnama (including those above mentioned), the intention of the parties to mortgage, and not actually to sell. His decree was for redemption, on payment by the plaintiff of the Rs. 1,65,000 stipulated for the repurchase, with Rs. 6,607 for principal and interest due on a sum left unpaid, on the expenditure estimated, after the sale of the factories in 1875.

This decision was maintained on the defendants' appeal by a Division Bench of the High Court (BANERJI, and AIKMAN, JJ.). Their judgment is

reported at length in *Balkishen Das and others v. W. F. Legge*, (1897) I. L. R., 19 All., 430. Upon a consideration of the terms of the ikrarnama, the surrounding circumstances and the oral evidence, they came to the conclusion, in concurrence with the Court below, that the contracting parties intended the transaction to be one of mortgage by conditional sale, and not to be an [152] absolute sale with merely a right to repurchase on a certain date. They did not regard as a precedent for this case that of *Bhagwan Sahai v. Bhagwan Din*, (1890) L. R., 17 I. A., 98 ; I. L. R., 12 All., 387, which they distinguished from the present.

Mr. J. D. Mayne, and Mr. W. Colvin, for the appellants, argued that the judgments of the Courts below were wrong upon the construction of the deeds of 4th February 1873. The true intent and meaning of those deeds were that they ended the relation of debtor and creditor between the parties, and that the bankers became absolute owners of the taluka, after the 1st March 1876. The buyers were until that date under contract to convey that property back to the plaintiff if he should tender to them on that date Rs. 1,65,000, and should also pay any balance that might then be due under the deed of estimate of expenditure dated the 8th April 1872. Those sums were neither tendered nor paid on that date and therefore the sale was from that date indefeasible. The High Court had erred in holding that there were in the surrounding circumstances reason for their putting a construction upon the deeds of the 4th February 1873 different from that which the words literally bore. Also, in the absence of fraud, and for purposes other than to prove it, the Courts below were wrong in admitting oral evidence. This they had admitted to explain what the parties intended by the deeds that had passed between them, and to vary the meaning of the words used ; so that what had been plainly a sale had been construed to have been a mortgage. This was in contravention of sections 92 and 93 of the Indian Evidence Act, 1872, which excluded all evidence taken from outside the written agreement. Besides, the evidence for the plaintiff as to the meaning of the parties, even if admissible, was insufficient to outweigh the express words of the registered document. Again, both the Courts below had relied upon an assumed usage of the people to employ language importing a sale with a view to conveying the effect of a mortgage. This was not borne out by evidence. The appellant had the right to contend that there was upon the true construction of the words used in the deeds, not contradicted by any legal evidence, nor by any evidence rightly understood, a sale for valuable [153] consideration received by the vendor, coupled with a contract under which he was to be allowed to repurchase the property on a fixed day only. When he had failed to repurchase on that day, the right on his part to obtain possession of the property that had passed from him to the defendants ceased to be exerciseable. From and after the 1st March 1876 the relation of debtor and creditor no longer existed. They were then vendor and purchaser. There was no longer any loan, debt or mortgage after that date, the sale having become absolute.

The decision of this Committee in *Bhagwan Sahai v. Bhagwan Din*, (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387, was then referred to—wherein was cited the judgment in *Alderson v. White*, (1858) 2 DeG. and J., 105, to the effect that the rule of law on the subject was the following:—that *prima facie*, an absolute conveyance, containing nothing to show that the relation of debtor and creditor is to exist between the parties, does not cease to be an absolute conveyance and become a mortgage merely because the vendor stipulates that he shall have a right to repurchase. In *Sital Pershad v. Luchmi Pershad Singh*, (1883) L. R., 10 I. A., 139, the plaintiff failed to establish that a sale to him, with a right of

repurchase, was in effect a mortgage; but in that case there were special circumstances, not presented in this, it was true. The sale in that case was declared to be an acquittance of the debt, and the money for repurchase was only to be received under circumstances personal to the debtor, and not shown. Here, there had been a resort to other modes of securing and of clearing the debt on the factories followed by the sale of them, which in 1875 left a comparatively small balance. The principle that continuing indebtedness was to support the view of continuing mortgage was referred to in *The Manchester, Sheffield and Lincolnshire Railway Company v. The North Central Wagon Company*, (1888) L. R., 13 A. C. 554, 560.

Mr. A. Cohen, Q. C., and Mr. L. DeGruyther (Mr. A. J. Ashton with them), for the respondent, contended that the judgments of the Courts below were right as to the effect of the deeds of the 4th February 1873. The terms of those instruments, read together, could not but be construed as supporting [154] the view that they were intended to operate as a mortgage, and not as a sale out-and-out. Their form was one much used in the North-Western Provinces and elsewhere to constitute a mortgage by conditional sale, termed in the vernacular bai-bil-wafa. It was said to have been the practice of the Muhammadans to employ this form of mortgage, as it avoided, in their opinion, any infringement of their law against the creditor's taking interest from the debtor. Reference was made to Baillie, Moohummudan Law. Supplement "Of Sale," 782, 809. But sale and a right of purchasing back were commonly resorted to in transactions intended to have the effect of mortgages. In the present instance the intention of the parties to mortgage was shown in several ways by the provisions made in the deeds themselves; and, first, by the right secured to the vendor, should he conclude to repurchase and should the vendee refuse to accept his tender of the purchase money, to pay it into the District Treasury. That provision was in the words of a clause in Regulation I of 1798 relating to the mortgage by conditional sale, or bai-bil-wafa; secondly, the requirement that advances made, and to be made, for the working of the factories should be repaid at the same time with the payment of the repurchase money; thirdly, the excess of that money, by Rs. 15,000 over the Rs. 1,50,000; the ostensible sale price mentioned in the deed. Next, reference was made to Regulations I of 1798 and XVII of 1806, and the introduction of the right of redemption into the Indian law of mortgage. A statement of that right was not required to be in the deeds themselves, because it was an incident annexed by law without mention in the written contract. Macpherson on Mortgages, 7th ed., pp. 15, 16; Rashbehary Ghose on Mortgages, Tagore Law Lectures for 1877, pp. 136, 139. In 1865 the law of foreclosure in these mortgages was considered in *Forbes v. Amir-un-nissa Begam*, (1865) 10 Moo., I. A., 346, where the effect of a bai-bil-wafa or mortgage by conditional sale, was dealt with as resulting from deeds of sale and defeasance in no way different from those in the present case. On the other hand, in *Pattabhiramier v. Vencaturao Naicken*, (1870) 13 Moo. I. A., 560, which came before this Committee from Madras, to which Presidency the rule of the Bengal Regulations [155] allowing redemption at any time before foreclosure had not been extended, a sale was held to have become absolute after default. That was on the ground that the English law relating to the equity of redemption was no part of the ancient Indian law and usage in these matters.

With reference to what was laid down in *Alderson v. White*, (1858) 2 De G. and J., 98, as belonging to mortgage, that the relation of debtor and creditor must be intended to continue, it was argued that the state of things as shown to be in contemplation by the ikrarnama of the 4th February 1873 completely satisfied that requirement. The transaction involved that the security should

include the debt upon the factory accounts. The principal English cases bearing upon an actual transaction of mortgage receiving effect, though ostensibly a sale, on the first appearance, upon evidence of the intention of the parties to secure repayment according to contract, instead of selling and buying out-and-out, were collected in *Rochevoucauld v. Bousted*, (1897) L. R., 1 Ch., 196. In *Rakken v. Alagappudaya*, (1892) I. L. R., 16 Mad., 80, the intention and agreement were proved by oral evidence and a suit for possession founded on a deed of sale was defeated by proof of a contemporaneous oral agreement for reconveyance on the payment of money borrowed. In that case was cited by the Court *Bakshu Lakshman v. Govinda Kanji*, (1880) I. L. R., 4 Bom., 405, and it was held that, without contravention of sections 92, 93 of the Indian Evidence Act, 1872, if it is apparent that the transaction has been treated as a mortgage by the parties, a mortgage it will be held to constitute. The admission of oral evidence was shown by those cases to turn on the necessity of admitting it to expose fraud involved in the conduct of a pretended buyer knowing himself to be mortgagee.

Also were cited *Bhup Kuar v. Muhammadi Begam*, (1883) I. L. R., 6 All., 37; *Ali Ahmad v. Rahmat-ul-lah*, (1892) I. L. R., 14 All., 195, where the case of *Bhaqwan Sahai v. Bhaqwan Din*, (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387, is observed upon; *Rama Sami Sastrigal v. Samayappa Nayakan*, (1881) I. L. R., 4 Mad., 179; *Ras Muni Dibia v. Prankishen Das*, (1848) 4 Moo. I. A., 392.

[186] Mr. J. D. Mayne replied.

Afterwards on the 11th November 1899 their Lordships' judgment was delivered by Lord DAVEY.

In and prior to the year 1872 Hari Das and the appellant Balkishen Das carried on business as bankers at Benares. Hari Das was the managing partner. He died on the 27th April 1889. The present appellants are Balkishen Das and the two sons and heirs of Hari Das. The respondent was at that time the owner of a taluka called Patilah in the district of Jaunpur and was also half-sharer of certain indigo factories known as Basharatpur, and carried on the business there in partnership with one De Momet, his co-sharer. By a deed dated the 8th April 1872 the taluka was mortgaged to Hari Das and Balkishen Das for Rs. 1,25,000 and by another deed of the same date (called a deed of estimate) the factories were also mortgaged to them as security for Rs. 60,000, which sum was to be applied partly in payment of previous debt and partly in providing for the necessities of the indigo business for the current year. At the end of the year 1872 it was found that the business had been carried on at a loss. The debt due to the bankers was Rs. 1,90,000 and further advances were needed for carrying on the business. The respondent in these circumstances bought out his partner De Momet and became sole owner of the factories and solely interested in the business. A fresh bandobast or settlement was thereupon made between him and the bankers and was carried into effect by three deeds, of which two relating to the taluka were dated the 4th February 1873 and the third relating to the factories was dated the 6th April 1873.

The first deed of 4th February 1873 was, on the face of it, an absolute sale by the respondent to the bankers for the price of Rs. 1,50,000, which was expressed to be paid in the following manner, *viz.*, the bankers retained out of the Rs. 1,50,000 the sum of Rs. 1,37,333-6-0 principal with interest up to date which had by calculation been found due by the respondent to the bankers under the mortgage deed of the taluka dated 8th April 1872 and retained the balance Rs. 12,666-10-0 in part payment of the amount then

due on the deed of estimate of expenses for conducting the factories of the Basharatpur concern.

[157] The other deed of the 4th February 1873 was in the following terms :—

“ We, Babus Hari Das and Balkishen Das, sons of Babu Padam Das, proprietors of the firm of Babu Madhuban Das and Dwarka Das, caste Gujrati, resident of mohalla Gwaldas, in the city of Benares, do declare as follows :—

“ The vendor, Mr. William Francis Legge, having, under the sale-deed dated 4th February 1873, sold absolutely, for Rs. 1,50,000, his zamindari right and property in the entire 16 annas of taluka Patilah, pargana Ungli, in the district of Jaunpur, comprising 25 villages, original and attached, together with all sir, sayer items, high and low lands, water and forest produce, water places and tanks, cultivated, uncultivated, saline, waste and jungle lands; village sites, ponds, katcha and pakka wells, collection houses, tenants' quarters, bamboo clumps, groves and detached fruit and timber trees of all sorts, and stone and wooden mills, inclusive of all the zamindari rights and interest appertaining to the said taluka, without exclusion of any right or property, to us, the executants, has caused mutation of names to be effected. We, the executants, therefore, of our own free will and accord, covenant and declare that if the said vendor pays on 1st March 1876, the amount of Rs. 1,65,000 in a lump sum, we shall sell to the said vendor the whole of the said ilaka sold, as it exists at present, for the said amount of Rs. 1,65,000 and we shall cause everything connected with mutation of names, &c., to be done, neither we nor our heirs shall have any objection thereto. If we or our heirs raise any objection to receive the money and relinquish the property, the vendor shall be competent to deposit the said amount in cash in the treasury, by virtue of this agreement, and obtain possession over the ilaka, we shall have no sort of objection to it. It has further been stipulated by the executants and the vendor that if the amount of the estimate money of the Basharatpur concern should keep varying on account of alterations made by consent of us, executants, from year to year, then the vendor shall be liable to pay along with the sum abovementioned, whatever sum may be found to be due at that time by him to us executants. The sahib shall not be competent to effect a sale until the payment of the estimate money relating to the factories of the Basharatpur concern. We shall recover from the vendor any amount of arrear that may be due to us by the cultivators by making an assignment thereof in favour of the vendor, and after the expiry of 1st March 1876, the said vendor shall not be competent either to pay the money or to make the purchase and the conditions of this deed of agreement shall be deemed to be full and void.”

The question between the parties in this appeal is whether the two deeds together constituted a mortgage of the taluka or an out-and-out sale with a contract of repurchase.

After the execution of these deeds the bankers made further advances to the respondent to a large amount on account of the [158] Basharatpur concern. By the third deed dated the 6th of April 1873 the sum of Rs. 44,223-14-3 was found due from the respondent up to date, and he mortgaged the factories for Rs. 75,000, out of which the balance was paid off and money was provided for working the factories during the current year.

On the 3rd of March 1874 another deed of estimate was executed for that year, and finally by a deed dated the 25th March 1875 the respondent sold and conveyed the factories to the bankers for a price which left him a debtor to them in the sum of Rs. 5,953-4-3. There is no deed of defeasance to this deed and it was admittedly an absolute sale.

It should be noticed that on the execution of the deeds of 4th February 1873 the necessary mutation of names was made and the bankers entered into and have ever since been in possession or receipt of the rents and profits of the taluka.

The respondent did not buy back or redeem the property on the 1st of March 1876. But on the 5th of November 1894 he commenced the present action for redemption of the taluka, alleging that the deeds of 4th February 1873 constituted a mortgage by conditional sale with possession thereof. The defendants and present appellants, on the other hand, contended that the transaction was an absolute sale with a contract of resale, and the time having expired and the condition not having been fulfilled the contract had become null and void.

The Subordinate Judge held that the documents in question were deeds of mortgage by conditional sale and that the respondent was entitled to redemption. His judgment was affirmed by the High Court.

Evidence of the respondent and of a person named Man was admitted by the Subordinate Judge for the purpose of proving the real intention of the parties, and such evidence was to some extent relied on in both Courts. Their Lordships do not think that oral evidence of intention was admissible for the purpose of construing the deeds or ascertaining the intention of the parties. By section 92 of the Indian Evidence Act (Act 1 of 1872) no evidence of any oral agreement or statement can be admitted as between the parties to any such instrument or [159] their representatives in interest for the purpose of contradicting, varying or adding to, or subtracting from, its terms, subject to the exceptions contained in the several provisos. It was conceded that this case could not be brought within any of them. The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not, in the opinion of their Lordships, any application to the law of India as laid down in the Acts of the Indian Legislature. The case must therefore be decided on a consideration of the contents of the documents themselves with such extrinsic evidence of surrounding circumstances as may be required to show in what manner the language of the document is related to existing facts.

Mortgages by conditional sale under various names are a common form of mortgage in India and have come before this Board in several reported cases. It has been stated that this form of mortgage was introduced to enable Muhammadans, contrary to the precepts of their religion, to lend money at interest and obtain security for principal and interest. If so, one would expect to find that the transaction would, as far as possible, be made to assume the appearance of a sale. It is not necessary in a mortgage by conditional sale "kutkubala" or "bai-bil-wafa" that the mortgagor should make himself personally liable for the repayment of the loan (*see Macpherson on Mortgages*, 5th edition, p. 11).

By Bengal Regulation I of 1798, intituled "a regulation to prevent fraud and injustice in conditional sales of land under deeds of bai-bil-wafa or other deeds of the same nature," provisions were made for the case of the lender refusing to receive the money on the day named. The borrower was empowered to deposit the amount due on or before the stipulated date in the Dewany Adawlut of the city or zillah in which the land may be situated. If the lender has obtained possession of the land, the principal sum only need be deposited, leaving the interest to be settled in an adjustment of the lender's receipts and disbursements during the period he has been in possession. By Regulation XVII of 1806 the mortgagor under deeds of this description was empowered to redeem the [160] land at any time within one year after the commencement of proceedings to foreclose the mortgage or render the sale conclusive, provided that payment or tender be proved or deposit be made

within the time above specified in the manner specified in the previous Regulation.

In the case of *Pattabhiramier v. Vencatarow Naicken*, (1870) 13 Moo., I. A., 560, it was decided that according to the ancient law of India a mortgage by conditional sale was enforceable according to the letter or (to use the language of English lawyers) time was of the essence of the contract. The effect of the Regulation of 1806 was therefore to introduce into those parts of India to which the regulation applies the English doctrine of an equity of redemption as applicable to the class of deeds referred to in it.

Mortgages of this character are thus defined in clause (c) of section 58 of the Transfer of Property Act, 1882: "Where the mortgagor ostensibly sells the mortgaged property on condition that on default of payment of the mortgage money on a certain date the sale shall become absolute, or on condition that on such payment being made the sale shall become void or on condition that on such payment being made the buyer shall transfer the property to the seller, the transaction is called a mortgage by conditional sale." The Transfer of Property Act does not apply to this transaction, but it may be assumed that the framers of it in this section intended to state the existing law and practice of India.

The appellants argue that the language, whether of this Act or of the Regulations, shows that in order to attract their provisions there must be underlying ostensible arrangements for sale a real substantial intention to secure money advanced. They rely on the decision of this Board in the case of *Bhagwan Sahai v. Bhagwan Din and others*, (1890) L. R., 17 I. A., 98; I. L. R., 12 All., 387. Their Lordships decided that case on the language of the deeds then in question, which they evidently considered showed that the transaction was not such a transaction as is described in the Regulation of 1806, and there was therefore no right of redemption [161] after the expiry of the date fixed. The appellants contend that such ought to be the conclusion in the present case, seeing that the parties did stand in relation of lender and borrower prior to 1873, and then expressly altered it into that of buyer and seller. The respondents, on the other hand, contend that a conditional sale becomes subject to an equity of redemption by force of the regulations before mentioned independently of any indications in the document that it is intended to be a mortgage. This is a question on which their Lordships are not called on to express an opinion in this case, for the documents in question contain important indications of the intention of the parties. The second deed or *ikrarnama* provides that if the bankers object to receive the money and relinquish the property, the vendor may deposit the amount in the treasury "by virtue of this agreement" and obtain possession over the *ilaka*. This provision at once suggests a reference to Regulation I of 1798 as being in the opinion of the parties applicable to the case. It was not suggested that there was any other statutory provision or practice by which such deposit could be made by virtue of the agreement alone without the intervention of the Court in a suit for the purpose, while, on the other hand, the words exactly describe the procedure under the Regulation. Again, the estate was made redeemable only on payment as well of the amount which should be found due at the time of redemption on account of the *Basharatpur* concern as of the stipulated sum of Rs. 1,65,000. The practical effect of this was to consolidate the debt on the factories account with the principal sum mentioned in the deed and to give the bankers a security on the *taluka* for the debt of the factories. This gives the transaction the character of a mortgage so far as the factory accounts are concerned, and if it is to some extent a mortgage it may well be held to be

so entirely. There was also some evidence, though not very precise, that the property in the year 1873 was worth considerably more than Rs. 1,50,000. This was accepted in the Court below, but their Lordships do not place much reliance upon it.

Their Lordships hold that the transaction was intended to be, and was, a mortgage by conditional sale, and they will therefore [162] humbly advise Her Majesty that the appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the Appellants—Messrs. *Ranken, Ford, Ford and Chester.*

Solicitors for the Respondents—Messrs. *Young, Jackson, Beard and King.*

NOTES.

I. Extrinsic evidence is inadmissible to show that a document of one kind is other than what it purports to be :—(1899) 22 All., 149 P. C. ; (1905) 27 All., 612 (sale-deed or gift) ; (1906) 30 Bom., 119 (unless the case falls within any of the provisos to s. 92) ; (1906) 8 Bom. L. R., 761 (one of the provisos was held to apply) ; (1906) 8 Bom. L. R., 764 (*ibid*) ; (1901) 26 Bom., 252 (mortgage or lease) ; (1909) 34 Bom., 59 (sale-deed or mortgage) ; (1906) 30 Bom., 426 (*ibid*) ; (1903) 8 C. W. N., 101 (principal or surety) ; (1900) 28 Cal., 256 (evidence of acts and conduct of parties admissible) ; (1901) 28 Cal., 289 (*ibid*) ; (1903) 30 Cal., 883 (misrepresentation) ; (1901) 25 Mad., 7 (evidence of subsequent conduct not admitted) ; (1912) 14 I. C., 65 (Mad.) ; (1910) 10 I. C., 1004, Punjab, (admitted) ; (1915) 25 I. C., 93 (Cal.) ; (1916) 26 I. C., 717 (Oudh.).

II. Nor is it admissible to contradict the terms of a deed :—(1906) 8 Bom. L. R., 237 ; (1913) 38 Mad., 226 (whether to vest now or in future) ; (1913) 38 Mad., 514 (amount of the price).

III. But evidence is admissible to contradict recitals etc. :—(1909) 10 C. L. J., 27 (consideration) ; (1909) 11 C. L. J., 39 (means of satisfaction of the debt).

IV. A document may be proved to be other than what apparently it purports to be from the intention that may be gathered from the deed itself or from contemporary deeds etc. :—(1899) 22 All., 149 P. C. ; (1913) 17 C. W. N., 1053 (sale or mortgage deed) ; (1913) 14 M. L. T., 579 ; (1911) 10 I. C., 630 (All.) ; (1915) 26 I. C., 706 (Oudh) ; (1915) 27 I. C., 436 (Mad.). See also (1907) 6 C. L. J., 208 ; (1911) 33 All., 585 (the interval here between the deeds was too long.)]

[22 All. 162]

CIVIL REFERENCE.

The 20th November, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Chand Mal and others.....Applicants

versus

Lachhmi Narain.....Opposite Party.*

Act No. V of 1881 (Probate and Administration Act), section 3—Probate—Will—Document intended to take effect partly in the life-time of the executant and partly after the executant's death.

There is no objection to one part of an instrument operating *in presenti* as a deed and another *in futuro* as a will. *Cross v. Cross*, (1846) 8 Q. B., 714 : S.C., 15 L. J., (N. S.) Common Law, 217, referred to.

THIS was a reference under sections 17 and 18 of the Ajmere Courts' Regulation (No. 1 of 1877). The facts out of which it arose appear from the order of reference, which was as follows :—

* Miscellaneous No. 166 of 1899.

"The plaintiffs in the above case applied, on the 29th March 1898, to the Commissioner, Ajmere-Merwara as District Judge of Ajmere, under section 56 of the Probate and Administration Act (V of 1881) for the grant of probate of a document purporting to be the will, executed on the 10th April 1887, of Musammat Gulab Kunwar, widow of Seth Sobhagmal of Kuchawan. The said Musammat Gulab Kunwar died on the following day, viz., on the 11th April 1887, at Ajmere, leaving, as is alleged, assets to the value of Rs. 7,200 at Beowar and Pushkar within the Ajmere District.

"After the application for probate was made the defendant Lachhmi Narain, minor son of Seth Har Narain, deceased, of Ajmere, by his guardian his mother Musammat Gopi, lodged a caveat, contending *inter alia* that the will was not genuine, that Musammat Gulab Kunwar had only a life interest in the [163] property, which devolved on one Dhanrupmal, cousin of Sobhagmal, the deceased husband of the testatrix Musammat Gulab Kunwar, that the caveator had purchased the property situated at Beowar, and subject to the document of which probate was applied for, at a Court sale in execution of a decree passed against Dhanrupmal the next reversionary heir of Seth Sobhagmal, and lastly, that the document for which probate was asked was not a will, inasmuch as it contained provisions which were to take effect during the life-time of the executrix Musammat Gulab Kunwar.

"The District Court rejected on the 20th May 1898, the application for probate, on the ground that the document was not a will, for the reason given in the caveat.

"An appeal was filed in this Court against the order of the District Judge, and was dismissed by Colonel Yate, Officiating Chief Commissioner, on the same grounds that influenced the Court below, namely, that the document for which the probate was applied did not come within the definition of a will.

"Against the order of this Court, which is dated the 27th of September 1898, the plaintiffs have applied for a reference under section 17 of the Ajmere Courts' Regulation, to their Lordships of the Honourable High Court at Allahabad. The case is accordingly submitted for the High Court's consideration, together with a copy of all the important documents connected with it."

Pandit Sundar Lal and Pandit Madan Mohan Malaviya, for the Applicants.

Babu Jogindro Nath Chaudhri, for the Opposite Party.

Strachey, C.J. (Banerji, J., concurring).—Our answer to this reference is that such portions, if any, of the document propounded, as the Court below, after taking evidence, may hold to be a legal declaration of the intentions of Musammat Gulab Kunwar with respect to her property which she desired to be carried into effect after her death, amount, in our opinion, to a will, within the meaning of section 3 of the Probate and Administration Act of 1881, notwithstanding that the same document may contain other provisions which she desired should be carried into effect during her life-time.

[164] We may refer the Court of the Chief Commissioner to the case of *Doe d. Elizabeth Cross v. Arthur Cross*, (1846) 8 Q. B., 714: S.C., 15 L. J., (N. S.) Common Law, 217, the effect of which is stated in Jarman on Wills (5th ed., vol. 1, p. 25). It was there held that "there was no objection to one part of an instrument operating *in presenti* as a deed and another *in futuro* as a will."

The costs will be disposed of in accordance with section 20 of the Ajmere Courts' Regulation of 1877. Let the case be returned.

NOTES.

[See also (1911) 15 C. W. N., 1014.]

[22 All. 164]

The 22nd December, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Rampal Singh.....Defendant

versus

Murray & Co.....Plaintiffs.*

*Act No. IX of 1872 (Indian Contract Act), Sections 148, 151, 152—Contract—
Bailment—Liability of bailee—Liability of guest at hotel in respect of
furniture used by him.*

The defendant's wife went to stay at a hotel owned by the plaintiffs. While there she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife, and used by her during her illness. The plaintiffs subsequently sued to recover the value of such furniture from the defendant. *Held*, that in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to sections 121 and 152 of the Indian Contract Act, 1872. *Shields v. Wilkinson*, (1887) 1 L. R., 9 All., 398, referred to.

THE facts of the case sufficiently appear from the order of the Chief Justice.

Pandit *Sundar Lal* and Pandit *Madan Mohan Malaviya*, for the Appellant.

The Respondents were not represented.

Strachey, C. J.—This is a reference to the Court by the Local Government under Rule 17 of the Kumaun Rules, 1894, made under section 6 of the Scheduled Districts Act, 1874. The suit out of which it arises was brought in the Court of the Assistant Commissioner of Naini Tal by the proprietors of the Grand Hotel, Naini Tal, against Raja Rampal Singh. The plaintiffs claimed by their plaint to recover Rs. 580 as due by the defendant [165] for board and lodging, and incidental expenses incurred during his and the late Rani's residence at the Grand Hotel, Naini Tal. They filed an account, from which it appeared that they claimed Rs. 164 for board and lodging and the balance of Rs. 416 as incidental expenses for the value of certain hotel furniture. The defendant in his written statement admitted liability for the Rs. 164, but denied liability for the balance. From the written statement and from the issues framed by the Assistant Commissioner the following facts appear to have been undisputed. The defendant's wife while staying at the plaintiff's hotel was seized with cholera and died, the defendant not being then at Naini Tal. There was no evidence to show how she caught the disease or whether the source of infection was within the hotel or outside it. Three days after her death the furniture of the rooms occupied by her during her illness was destroyed by the plaintiffs in order to prevent the risk of infection to the residents of the hotel. The defendant did not in his written statement deny that the destruction of the furniture was necessary for that purpose. The only grounds upon which he denied liability were that his wife had contracted the disease after her admission to the hotel, that it should be inferred that she contracted it in consequence of "something wrong in the culinary process" of the hotel, and that it was not in accordance with the usage of hotels in Naini

* Miscellaneous No. 246 of 1899.

Tal to claim value for destruction of property necessitated by death from any epidemic originating in the hotel itself." No special contract varying the ordinary relation of inn-keeper and guest in respect of the goods was alleged. The only issue framed by the Assistant Commissioner, which need be referred to, was as follows:—"Is the defendant liable for the value of hotel property destroyed owing to defendant's wife having died of cholera in the hotel; and if so to what extent?" There was no issue of fact and no evidence was given by either side. The Assistant Commissioner gave judgment upon the pleadings. He decreed the claim on the grounds that the defendant had adduced "no authorities in support of his somewhat extraordinary contention that he is not liable," and that "plaintiffs have probably suffered in pocket as it is from the scare which a death from cholera in their hotel would doubtless cause; it would be unfair [166] in the extreme to saddle them with the cost of new furniture."

Against this decision the defendant appealed to the Court of the Deputy Commissioner of Naini Tal. The Deputy Commissioner held that inasmuch as the defendant and his wife knew, when the latter was admitted to the hotel, "that an incident of such illness as cholera is that articles used by the patient must be destroyed," there was an implied contract by the defendant "to make good any damage caused by the illness of his wife." He accordingly dismissed the appeal. A further appeal by the defendant to the Court of the Commissioner of the Kumaon Division was rejected summarily. The Local Government has referred the decree of the Commissioner to this Court for our report and opinion. The question upon which our opinion is asked is "as to the liability or otherwise of the Raja to pay the cost of the articles belonging to the hotel which were destroyed to prevent the danger of infection in consequence of the death of Rani Rampal Singh from cholera."

At the hearing of the reference the learned advocate who appeared for the defendant stated that his client did not contest his liability, should the Court hold that the wife, if she had survived, would herself have been liable to such a claim. The question therefore is whether, in the absence of express agreement, a guest at a hotel is liable to compensate the owner for the loss of hotel furniture used by the guest while suffering from an infectious disease and destroyed by the owner in order to prevent infection, there being no evidence of negligence on the part of the guest either in the contracting of the disease or in the use of the furniture during its continuance, and it being admitted that the destruction of the furniture was necessary. There appears to be no reported case in point. To decide the question it is necessary first to see what is the true legal relation between the guest and the hotel-keeper in respect of the furniture used by the former. It is clearly the relation of bailor and bailee as defined by section 148 of the Indian Contract Act, IX of 1872. The bailment is one of hire; the guest hires not only the rooms which he occupies, but the furniture which they contain. The nature and extent of his liability are shown by section 152 of the Act [167] which provides that "the bailee, in the absence of any special contract, is not responsible for the loss, destruction or deterioration of the thing bailed, if he has taken the amount of care of it described in section 151." And section 151 provides that "in all cases of bailment the bailee is bound to take as much care of the goods bailed to him as a man of ordinary prudence would, under similar circumstances, take of his own goods of the same bulk, quality and value as the goods bailed." So that the guest is not responsible for the loss, destruction or deterioration of the furniture hired by him if he has taken as much care of it as a man of ordinary prudence would, under similar circumstances, take of similar furniture of his own. Ordinary prudence is

the test. In the present case the plaintiff has never alleged or suggested that the defendant's wife did not exercise ordinary prudence in taking care of the furniture, nor is there any evidence that she did not. In the absence of evidence either way, does the burden of proving the exercise of ordinary prudence rest on the hirer, or is it for the owner of the goods to show that ordinary prudence was not exercised? The question of burden of proof in cases of injury to goods delivered under a bailment of hiring was considered by this Court in *Shields v. Wilkinson*, (1887) I. L. R., 9 All., 398. If the damage caused were such that in the ordinary course of events it would not happen to goods of the kind in question if used with ordinary prudence, then I think it would be for the hirer to prove that he had exercised such prudence : otherwise I think that the owner must give some evidence of negligence. Such goods as those in question here, that is, bed-room furniture and articles in the patient's personal use, could not have been used by a person suffering from cholera without being so infected as to require destruction ; such damage is a practically irresistible consequence of such use, no matter what degree of prudence is exercised. That being so, it was for the plaintiffs to give some evidence that the defendant's wife did not take as much care of the goods as a person of ordinary prudence would have taken of her own goods under similar circumstances, and no such evidence having been given the defendant is not liable. There is no ground for the Deputy Commissioner's assumption, that because the defendant and his wife may be supposed to have [168] known that in the event of infectious disease the articles used by the patient would have to be destroyed, there was an implied contract by them to make good the loss irrespective of any negligence ; in other words to insure the owner against such loss. The *prima facie* inference would rather be that in forming with the owner the relation of bailor and bailee, they intended the usual legal consequences to follow, including the ordinary restricted liability of a bailee for hire. If the owner denied any further protection than this, if he wished to throw upon the hirer the entire risk of accidental or irresistible destruction of the goods, he could not do so by the special contract which section 152 allows, but in the absence of any special contract and of any want of ordinary prudence making the hirer responsible, he must be taken to have accepted the risk as an incident of his business. If the goods had remained with him he would have had to bear any loss which ordinary prudence could not have prevented, and his having entrusted them to a hirer, who exercises an equal degree of prudence, is no reason for putting him in a better position, or for exacting from the hirer a greater amount of care than the owner himself would probably have taken.

I think that the Commissioner ought to have allowed the defendant's appeal and dismissed the suit so far as the claim to recover the value of the furniture was concerned. This is our answer to the reference.

Banerji, J.—I am of the same opinion.

NOTES.

[Messrs. Pollock and Mulla in their Indian Contract Act, 1872 (III Edn., 1913), pp. 501, 502 approve the view in this decision that the liability of an inn-keeper is that of a bailee under ss. 151, 152.]

[22 All. 168]

The 16th January, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE AND
MR. JUSTICE BANERJI.

Banke Lal and others.....Plaintiffs

versus

Jagat Narain.....Defendant.

Banke Lal and others.....Plaintiffs

versus

Damodar Das and another..... ..Defendants.*

Execution of decree--Sale in execution—Sale set aside—Second sale in execution of a different decree—First sale subsequently confirmed in suit for that purpose—Title of purchasers at first sale—Civil Procedure Code, sections 311, 312.

Certain immovable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under section 311 of the Code of Civil Procedure the sale was set aside. After the sale had been thus set aside [169] the same property was again sold in execution of another decree. Subsequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by STRACHEY, C. J., that the second purchasers having acquired their title at a time when the first sale had been set aside, their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held* further (by STRACHEY, C. J. and BANERJI, J.) on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale.

Dagdu v. Panchamsing Gangaram, (1892) I. L. R., 17 Bom., 375; *Kanāpa v. Jonardan*, (1874) 11 Bom. H. C. Rep., 193; *Adhur Chunder Banerji v. Aghore Nath Aroo*, (1893) 2 Cal. W. N., 589, and *Ram Chunder Saāhu Khan v. Samjir Ghazi*, (1892) I. L. R., 20 Cal., 25, distinguished. *Nawab Zun-ul-abdin Khan v. Muhammad Asghar Ali Khan*, (1887) I. L. R., 15 I. A., 12, referred to by STRACHEY, C. J.

THE facts of this case are fully stated in the judgment of the Chief Justice.

Munshi *Ram Prasad* and Pandit *Sundar Lal*, for the Appellants.

Mr. *D. N. Banerji* and Pandit *Moti Lal*, for the Respondents.

Strachey, C. J.—These two first appeals are connected appeals in connected suits, the same persons being plaintiffs and appellants in both. They are also connected with second appeals Nos. 405 and 633 of 1897, in which the same persons are plaintiffs. Each case raises the question of the rights of the plaintiffs under a purchase at an execution sale of certain zamindari property as against other purchasers who claim to have respectively bought at other sales certain portions of that property. It will be convenient to consider separately the two first appeals, as to which one judgment will suffice, as it did in the Court below.

* First Appeals, Nos. 115 and 116 of 1898, from decrees of Babu Madho Das, Subordinate Judge of Bareilly, dated the 30th March 1898.

The litigation arises out of the failure of the firm of Lachmi Narain of Bareilly. Several suits were brought against the firm by creditors, who obtained decrees. One of the decree-holders was one Kalka Prasad. He put in execution his decree against Ram Sarup and Piare Lal, the representatives of the debtor [170] Lachmi Narain, and on the 20th November 1885, there were sold in execution of the decree the rights and interests of the judgment-debtors in a village called Saidpur, or Saidpur Hawkins, and those rights and interests were purchased by the plaintiffs. One of the questions raised by the appeals is as to the exact extent of the interest acquired by the plaintiffs by that purchase, and whether it included the portions claimed by the defendants. At all events, it included the twenty biswas share of the judgment-debtors in mauza Saidpur. Objections were raised to the sale by the judgment-debtors on the ground of irregularity in publishing or conducting it under section 311 of the Code of Civil Procedure. The Court executing the decree allowed the objections and set aside the sale on the ground that the notification of sale was so vague in its description of the property to be sold as to be misleading to intending purchasers. That order was passed on the 5th May 1886. Under the Code as it then stood no appeal lay from the order of the executing Court, but under the decisions of this and other High Courts a regular suit lay at the instance of the auction purchasers to set aside the order and to have the sale confirmed. Before, however, anything was done to question that order, certain portions of the village Saidpur were, on the 20th September 1886, sold in execution of other decrees passed against the same judgment-debtors. One of these was a decree of Kunwar Harcharan Lal. In execution of that decree two pieces of property were sold. One portion, described as "Hawkins Kothi, with inclosure and land," was purchased by Damodar Das, the respondent in F. A. No. 116. Another, described as "Begam Bagh, with masonry inclosure and kothi therein, and land," with other details not necessary to state, was purchased by Jagat Narain, the respondent in F. A. No. 115. On the 4th December 1886, both sales were confirmed under section 312 of the Code, and in February 1887, the purchasers obtained possession. It is under these sales that the defendants-respondents resist the claim of the plaintiffs-appellants to possession of these plots by virtue of the sale of the 20th November 1885. That sale, it will be remembered, had been set aside on the 5th May 1886. On the 20th September 1886, that is, on the very day of the purchases by the defendants, the plaintiffs brought a suit to set aside the [171] order of the 5th May 1886, and for confirmation of their sale of the 20th November 1885. It has not been contended that by reason of that suit the defendants' purchases are effected by the doctrine of *lis pendens*. That contention could not have been successfully raised; first, because there is no evidence to show that at the time of the sale of the 20th September 1886, the suit instituted on that date had already been filed; and, secondly, because, even assuming the institution of the suit to have come first, it clearly had not become "contentious" within the construction placed by this Court and other High Courts upon section 52 of the Transfer of Property Act, 1882, at the time of the sale on the same day. The only persons whom the plaintiffs made parties defendants to that suit were the judgment-debtors whose property had been sold. They never made the present defendants parties to that suit, although the Court pointed out the advisability of their so doing if they claimed those portions of the property which the defendants had purchased on the 20th September 1886. The defendants to that suit, the judgment-debtors, filed written statements confessing judgment. Nevertheless on the 7th March 1887, the Court of First Instance dismissed the suit on the ground that the plaintiffs persistently refused to specifically answer the

Court's inquiry as to the particulars of the property which they claimed to have purchased on the 20th November 1885, and more especially whether they claimed that that sale included the kothis and gardens subsequently purchased by the defendants. From that decision the plaintiffs appealed to the High Court, which, on the 14th May 1888, reversed the first Court's decree and allowed the claim. The judgment and decree of the High Court in the first place awarded the plaintiffs "possession of the property in suit, to wit, mauza Saidpur together with the groves." Secondly, it "declared that the auction-sale in favour of the appellants dated the 20th November 1885, was a good auction-sale, and that the property as aforesaid sold thereat was purchased by them." In September 1888, the plaintiffs obtained formal possession of mauza Saidpur in execution of the High Court's decree. They were resisted in obtaining possession of the plots which the defendants had purchased; and hence these suits, the first against Jagat Narain for possession of Begam Bagh (F. A. [172] No. 115), the second against Damodar for possession of Hawkins Kothi (F. A. No. 116).

The case of the plaintiffs is that these properties passed to them under their prior purchase of the 20th November 1885, which they say was confirmed by the High Court with the effect that the confirmation related back to the date of the sale, and therefore their purchase of the 20th November 1885, must be given priority over the defendants' purchase of September 1886. The case of the defendants is, first, that Hawkins Kothi and Begam Bagh were not in fact included in the execution sale to the plaintiffs of November 1885, and, secondly, that that sale was never validly confirmed as regards them, and is not entitled to priority over the sale under which they purchased.

The Court of First Instance decided in favour of the defendants and dismissed the suits.

The first question to be considered in these appeals is whether the execution sale of the 20th November 1885, in fact included Hawkins Kothi and Begam Bagh. The sale notification describes the property as "mauza Saidpur Hawkins." It describes the judgment-debtors' interest as "20 biswas with gardens belonging to Ram Sarup and Piare Lal." Hawkins Kothi is a piece of land surrounded by a wall, and including a kothi or house, certain out-houses, and certain lands cultivated by tenants. Begam Bagh is another inclosure consisting mainly of a garden, but also apparently including a kothi. There is no doubt that both Hawkins Kothi and Begam Bagh are included within the area of the village Saidpur. Everything which can be described as gardens is expressly included in the sale notification. I think there can be no doubt that, apart from buildings, all land and especially all land cultivated by tenants, included within the area of the zamindari would *prima facie* pass by a conveyance or execution sale of the zamindari. The only question I think is as to the kothis and the out-houses attached to them. As to these I have no doubt whether that it was fully intended that they should be sold with the rest of Saidpur. They are specifically mentioned in the application for execution and in the warrant of attachment. I do not agree with the view of the Subordinate Judge that the kothis were not actually attached. He bases that view on the [173] amin's report in which the amin stated that he had attached "the zamindari property." But the report itself expressly refers to a list appended to it, which specifically includes in the attached property the kothis and gardens, and I think that shows clearly that those properties were in fact attached, and that in the report the amin used the expression "zamindari property" merely as a compendious description of everything detailed in the appended list. The executing Court when it set aside the sale at the same time stated its opinion to be that the kothis and gardens were included in the

property sold, though it held that that did not appear with sufficient clearness from the description of the property, and that the absence of specific details was misleading. Now in the entire absence of evidence to the contrary, I think that a kothi or other building situate within the zamindari area is included in and passes with the zamindari. No doubt the contrary may be shown by evidence, that is to say, evidence of the circumstances connected with the acquisition, construction, or user of the buildings, from which it may properly be inferred that they are not appurtenances of the zamindari, but have been so severed or held so separately from it as to form a separate and distinct property of the zamindar. In the present case there is no such evidence. The village Saidpur was purchased by Lachmi Narain in 1861. There is in evidence an account book of the firm showing that at the same time there was purchased a kothi or kothis separately valued. It is impossible to say from this document whether the singular word "kothi" or the plural "kothis" is designated. Further, there is nothing to show, if the document referred to one kothi, which, if either, of the kothis concerned in this suit is referred to. There is no evidence showing for what purpose or in what manner either the kothi in Hawkins Kothi or the kothi in Begam Bagh was used at any time up to the sale of the 20th November 1885. Therefore in the absence of any evidence to the contrary I hold that the kothis and the out-houses as well as the gardens and cultivatory holdings, passed with the rest of the zamindari of mauza Saidpur by the sale of the 20th November 1885.

The next question relates to the validity of that sale, and as to this defendants raise two contentions. First, they say that at the [174] date of their purchase of the 20th September 1886, the plaintiffs' purchase having been set aside, they, the defendants, took Hawkins Kothi and Begam Bagh absolutely and not subject to any rights then existing in the plaintiffs. Secondly, they contend that, so far as they are concerned, the sale of the 20th November 1885, must be deemed to be a sale which was never confirmed, inasmuch as the confirming decree of May 1888, was passed in a suit to which they were not parties, and by means of collusion between the plaintiffs and the judgment-debtors who were the sole defendants.

In reference to the first of these contentions the plaintiffs seek to establish an analogy between the decree of 1888 and an ordinary order confirming a sale under section 312 of the Code. It has been held in several cases that an auction purchaser at an execution sale has prior to confirmation under section 312, an inchoate or equitable title which becomes absolute on confirmation, that any subsequent purchaser, even if the subsequent purchase is first confirmed, takes subject to this inchoate title of the first purchaser, and that on confirmation the title to the property, as between different auction purchasers under different sales, relates back to the date of the sale. In support of this contention the plaintiffs rely on *Dagdu v. Panchamsing Gangaram*, (1892) I. L. R., 17 Bom., 375; *Konapa v. Janardan*, (1874) 11 Bom., H. C. Rep., 193, and a case reported in 2 Calcutta Weekly Notes, p. 589. When these cases are looked at there is one obvious matter in which they are distinguishable from the present. In all of them at the time of the second purchase the first had not been set aside but was in force. All of them proceed on the principle that at the time of the second purchase there existed in the first purchaser under a subsisting sale an inchoate title, which only awaited confirmation of the sale to become a complete title. In each of these cases the second purchaser bought subject to that inchoate title which only awaited confirmation. In the present case at the time of the second sale to the defendants the sale to the plaintiffs had been set aside for many months. If that sale

was set aside, and was not subsisting at the date of the defendants' purchase, how can it be said that at that date any inchoate title in the plaintiffs existed? The inchoate title depends on the sale, [175] and can exist only as long as the sale is in force. If on the 20th September 1886, the sale had gone and the inchoate title of the plaintiffs under it had therefore gone, the defendants did not purchase subject to it. Can it be said that the inchoate title still existed, although the sale giving rise to it had been set aside, merely because there was a possibility of a suit being brought by the auction purchasers for reversal of the order setting aside the sale and for confirmation of the sale itself? I am disposed to agree that the confirmation constituted by the decree would relate back to the date of the sale and make the sale valid *ab initio quoad* the judgment-debtors. But can it do so in such a manner as to defeat intermediate purchasers who have purchased *bond fide* at a time when the sale was set aside, and under valid decrees, and in valid auction sales of their own? No case, it is admitted, has carried the doctrine of inchoate title so far as this. The plaintiffs rely on the analogy of the case of *Ram Chunder Sadhu Khan v. Samir Gazi*, (1892) I. L. R., 20 Cal., 25, and in particular on the passage at p. 28, where it is said :—"The effect of the subsequent dismissal of the suit to set aside the sale was the same as if it had been dismissed in the first instance, and as if the first sale had never been set aside." The learned Judges give no reasons for that opinion; but I think it sufficient to say of that case that the circumstances of it were in several particulars different from the present, and that it was decided under the provisions of the Bengal Rent Act VIII of 1869. If we are to go by analogy, I think a more instructive analogy is to be found in the judgment of their Lordships of the Privy Council in the case of *Nawab Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan*, (1887) L. R., 15 I. A., 12, where it was laid down that the title of a *bond fide* purchaser in execution of a decree which at that time was valid and in force is not affected by the circumstance that the decree is afterwards set aside on appeal as erroneous. I have not arrived at this conclusion without some doubt, because unquestionably there are difficulties in any view of the conflicting rights of these two auction purchasers. It is possible, for instance, that questions of some difficulty might arise if the competition were between an auction purchaser buying after the previous sale had been set aside, and the prior auction purchaser, who, after the [176] second sale, obtained on appeal a reversal of the order setting his sale aside. As to which of the two auction purchasers would in that case be entitled to priority, I need express no opinion, though I acknowledge that in favour of the prior auction purchaser it might plausibly be contended that to deny him priority would have the effect of rendering nugatory the right of appeal now given to him by section 588 (16) of the Code. That difficulty I prefer to deal with when it arises. On the other side, however, I think there are still greater difficulties, and in particular the difficulty and objection resulting from the long period of uncertainty and suspense in which it would be impossible practically to say whether property might safely be sold in execution of a decree. The previous sale having been set aside, a suit for confirmation of the sale and for reversal of the order setting aside the sale might be brought at any time up to a year from the date of the order: the suit might conceivably be a protracted one and go through the whole course of appeal possible in India, and ultimately to the Privy Council; and the question would arise whether the titles of auction purchasers and transferees from those purchasers, and even further transferees again in the period between the setting aside of the order and the institution of the suit should for the whole of that protracted period be subject to every sort of uncertainty. But the greatest difficulty to my mind is in holding that there remains an inchoate title when the sale has been set aside

and when all that remains to the plaintiff is the possibility of bringing a suit to have the reversal of the sale itself set aside. These defendants were *bond fide* purchasers of these plots at a time when I cannot hold that the plaintiffs had any title to them whatever, and for that reason I think that the defendants' purchase is entitled to priority and that the suit must fail.

That would be sufficient to dispose of these suits, but that I understand that my brother BANERJI has some doubts on the matters which I have so far discussed; and I do not pretend to be entirely free from doubt myself. Therefore it is necessary now to consider the second ground on which the defendants contend that even if Hawkins Kothi and Begam Bagh were included in the sale of November 1885, the plaintiffs have not validly [177] acquired these properties. That second ground is that by reason of the collusive nature of the proceedings terminating with the High Court's decree of May 1888, the sale of the 20th November 1885, must be deemed never to have been confirmed *quoad* these defendants and the order of the 5th May 1886 setting aside the sale remains standing *quoad* them. There can be no doubt that an auction purchase in execution of decree must be confirmed if it is to pass a complete title. It must be confirmed either by an order under section 312 or by a decree in a regular suit brought for the purpose. The question is whether the High Court's decree of 1888 was prevented from having been a valid confirmation by reason of collusion as alleged. The conclusion at which I have arrived is that the proceedings in that suit were collusive proceedings between the plaintiffs and the then defendants. The High Court's decree was passed solely on the ground of the confession of judgment by the then defendants in the Court of First Instance. In dealing with the question of collusion it must of course be remembered that direct evidence on such a point can seldom be expected. One has to look at all the circumstances and consider what is the most probable and common sense inference to be drawn from the circumstances as a whole. Now what are the circumstances here? There was a sale to the plaintiffs in November 1885 of mauza Saidpur at which only 6,000 rupees were realized. We find the judgment-debtors objecting to that sale and getting it set aside in May 1886. From that moment the plaintiffs did absolutely nothing to impugn the order until the 20th September 1886, which by a curious coincidence happened to be the very day when, in execution of another decree, these properties were sold to and purchased by the defendants. On that day they made an unsuccessful attempt to get the sale postponed, and having failed they purchased secretly, in the name of one Kishen Lal, the village Saidpur, which, on the same day, was sold in execution of a decree of Lalta Prasad and Gobind Prasad. On the same day they also bring their suit for confirmation of the sale of the 20th November 1885, and against whom do they direct it? They carefully confine the suit to the judgment-debtors, who had no remaining interest whatever in the property: and I use the word "carefully" advisedly, because the circumstance of the defendants' purchases [178] was pressed upon the plaintiffs' attention by the Court, which insisted in vain on an answer to the question whether they claimed Hawkins Kothi and Begam Bagh, in which event the Court considered that the present defendants ought to be made parties to the suit. They refused to say whether they sought to affect the interests of these persons or not. These persons had a real interest in opposing the suit. The judgment-debtors, who had succeeded in obtaining the order of the 5th May 1886, filed written statements confessing judgment. Why did they do that, if they did not wish actively to assist the plaintiffs in getting the first sale restored with the minimum of opposition? If

they had no defence to make to the suit, or thought they were not interested in opposing it, and if that is why they made no resistance it would have been sufficient for them to have simply let judgment go by default. One of the plaintiffs was examined as a witness in this case—the plaintiff Banke Lal. He was called by the defendants. He was cross-examined by his own counsel. There was an issue as to the collusive nature of the proceedings in the former suit. If there had been in fact no collusion in that former suit I think it would have been a natural course to have taken such a favourable opportunity of obtaining a specific denial by Banke Lal, that in the former suit there had been collusion in obtaining the confession of judgment. No such question was put, and the plaintiff's counsel confined himself to asking whether it was true that the former defendants had been induced to confess judgment by a bribe of Rs. 3,000. From all these circumstances the conclusion which I draw—of course, like most other conclusions of facts it is only based on a balance of probabilities—is that the parties to that former suit agreed together to set up by a suit which was really a sham suit intended not to be resisted but facilitated, the sale of the 20th November 1885, in order to defeat the present defendants, of whose purchases the plaintiffs and the judgment-debtors were of course fully aware. I agree with the Court below in not being satisfied with the evidence by which it was attempted to show an actual bribing of the then defendants. Apart from that, however, and although the bribe has not been established, I think there is sufficient ground for coming to the conclusion that the confirmation of the plaintiffs' sale was obtained [179] by collusion between the plaintiffs and the judgment-debtors. I would therefore dismiss both appeals and suits on the grounds, first that the defendants' purchases are, under the circumstances, entitled to priority over the plaintiffs' purchase; secondly, that, as regards the defendants, the confirmation of the plaintiffs' sale by a decree to which the defendants were not parties, and which was obtained by collusion between the plaintiffs and the judgment-debtors, cannot operate as a valid confirmation of the sale of the 20th November 1885. For these reasons I am of opinion that both these appeals should be dismissed with costs in both Courts.

Banerji, JJ.— I also am of opinion that the decrees of the Court below should be affirmed, although I am unable to agree with most of the reasons by which the judgment of that Court is supported. In the two suits out of which these appeals arise there are three questions to be considered; (1) whether the property now in suit was comprised in the auction sale of the 20th November 1885; (2) whether the defendants have priority over the plaintiffs by reason of their having purchased the said property after the sale of the 20th November 1885 had been set aside, and of the said sale having been confirmed by proceedings to which the defendants were not parties; (3) whether the decree of this Court of the 14th May 1888, affirming the said sale, was obtained by means of collusion and fraud.

Holding the view which I do on the third question, I do not deem it necessary to decide the other questions. Upon those questions I must confess my mind is not free from doubt. I prefer therefore to rest my judgment on the conclusion at which I have arrived with reference to the third question. If the decree of this Court, which is the real basis of the plaintiffs' title, was fraudulently and collusively obtained, the sale at which the plaintiffs purchased never became absolute, and even if it be assumed that the property in suit was included in that sale, the plaintiffs have acquired no priority over the defendants. I am clearly of opinion that there was collusion between the plaintiffs and their debtors in the previous suit. The decree

passed in that suit was based on a confession of judgment filed by the debtors. In my opinion that confession of judgment was the result of a concert [180] between the parties to that suit, the object of which was to defeat the intermediate purchasers, the defendants. The oral evidence adduced to prove the existence of a concert has been disbelieved by the Court below, and I must say that I see no sufficient reasons for disagreeing with that Court as to its estimate of that evidence. But fraud and collusion are from their very nature not ordinarily capable of being proved by direct evidence. A party imputing fraud to a transaction is no doubt bound to establish it, but he can do so, and is only able to do so in the great majority of cases, by means of circumstantial evidence only.

Now let us see what were the circumstances in this case. The sale of the 20th November 1885, was set aside on the objection of the judgment-debtors on the 5th May 1886. For several months after that date the plaintiffs took no steps to obtain the reversal of the order setting aside the sale. It was only when they had found that other creditors of the judgment-debtors had caused some of the property of the judgment-debtors to be advertised for sale, and when the actual date fixed for the sale, namely, the 20th September 1886, had arrived, that they brought their suit to have the order of the 5th May 1886, set aside, and the sale of the 20th November 1885, confirmed. The very fact of their having made this delay in the institution of their suit raises doubts as to the *bond fides* of the suit, and these doubts are strengthened by the fact that a large portion of the property sold on the 20th November 1885, was subsequently purchased by these plaintiffs themselves on the 20th September 1886, benami in the name of one Kishen Lal. The evidence to which the Court below has referred leaves no room for doubt that the purchase by Kishen Lal was in reality a purchase by the plaintiffs. It appears that the plaintiffs made some attempt on the 20th September 1886, to avert a sale, but they failed in that attempt because the Court refused to grant their prayer for the postponement of the sale. After the sale had taken place and the defendants had purchased the property now in dispute, what did the plaintiffs do? Although the Court repeatedly called upon them to declare in distinct terms whether their suit embraced the property purchased by the defendants, namely, Hawkins Kothi [181] and Begam Bagh, they gave no direct answer to the Court's inquiry, and although they were aware that their judgment-debtors had ceased to have any interest in that property, they preferred to continue their suit against their judgment-debtors alone, and did not accept the suggestion of the Court that the auction-purchasers should be added as parties. The next thing we find is that on the 20th November 1886, that is, two days before the date fixed for the hearing of the case, the defendants appeared in Court and filed a petition, confessing judgment. We know that the defendants to that suit, namely, the judgment-debtors, had strenuously contested the validity of the auction sale of the 20th November 1885, and had actually got that sale set aside on the ground of irregularity and inadequacy of price. We find that at the subsequent sale which took place on the 20th September 1886, the property sold yielded a price which was more than double of that realized at the first sale, and yet we find that the judgment-debtors, who evidently benefited by the second sale, which enabled them to discharge a large portion of their debts, appear in Court and do an act which would facilitate the passing of a decree in favour of the plaintiffs. What could be their motive in confessing judgment on the 20th November 1886? It is difficult to conceive that they had any other motive than that of enabling the plaintiffs to obtain a decree and thereby to defeat the interests of the defendants. As I have said, the judgment-debtors had a substantial interest in opposing the

plaintiffs' suit and in obtaining an affirmance of the order setting aside the sale of the 20th November 1885; but when, in spite of that interest, they admitted the justness of the plaintiff's claim, it is difficult to draw any other inference than what I have stated above. As their property had passed into the hands of purchasers, it was not difficult to induce them to join the plaintiffs in colluding with them and perpetrating a fraud on the defendants, the second purchasers. Having regard to these considerations I think the Court below rightly held that the confession of judgment, which was the only foundation of the decree of this Court of the 14th May 1888, was filed collusively and fraudulently, and that that decree had not the effect of affirming as against the defendants the prior sale of the 20th [182] November 1885. That being so, the plaintiffs have not acquired by virtue of that decree any priority as against the defendants, and the plaintiffs' suit has been rightly dismissed.

Appeal dismissed.

NOTES.

[See now the C. P. C., 1908 sec. 65 by which the purchaser's title commences from the date of sale.

See also (1902) 24 All., 467; 218. In (1900) 23 All., 94, certificate to appeal to the Privy Council was given.]

[22 All. 182]

The 16th January, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Raghubar Dayal.....Defendant

versus

Banke Lal and others.....Plaintiffs.*

Execution of decree—Procedure—Act No. XII of 1881 (N.-W. P. Rent Act), Sections 170, 171, 172—Civil Procedure Code, Sections 41, 285, 295—Civil and Revenue Courts.

Held that the procedure prescribed by section 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court.

Hence where the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, it was *held* that the purchaser at the sale held in execution of the decree of the Court of Revenue took a good title as against the purchaser at the sale held in execution of the decree of the Civil Court. *Onkar Singh v. Bhup Singh*, (1894) I. L. R., 16 All., 496, *Aulia Bibi v. Abu Jafar*, (1899) I. L. R., 21 All., 405, and *Madho Prakash Singh v. Murli Manohar*, (1883) I. L. R., 5 All., 406, referred to.

THE facts of this case are fully stated in the judgment of the Chief Justice.

The Hon'ble Mr. Conlan, Mr. E. Chamber and Munshi Gobind Prasad, for the Appellant.

Messrs. D. N. Banerji and A. E. Ryves, and Pandit Sundar Lal, for the Respondents.

Strachey, C. J.— This appeal is connected with first appeals Nos. 115 and 116 of 1898, and second appeal No. 405 of 1897, in which we have just

* Second Appeal No. 633 of 1897, from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 27th March 1897, reversing the decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 27th November 1896.

given judgment. The plaintiffs-respondents here are the persons who were plaintiffs in those cases. They claim by virtue of the same execution sale of the 20th November 1885, of mauza Saidpur that we have discussed in our previous judgments. The defendant-appellant purchased certain property included in Saidpur in execution of a Revenue Court's decree obtained by himself against the same judgment-[183] debtors for a share of the profits village Saidpur, under section 93 (h) of the N.-W. P. Rent Act, 1881. His purchase took place on the 3rd November 1885. It has been suggested during the hearing of this appeal that that purchase was set aside and remained set aside at the date of the plaintiff's subsequent purchase of the 20th November 1885. No such suggestion appears to have been made in either of the Courts below, where the whole case proceeded on the assumption that the purchase of the defendant was in force on the 20th November 1885, when the plaintiffs purchased. We must proceed upon that view here. The defendant obtained possession in July 1886. The plaintiffs' purchase of the 20th November 1885 was set aside on the 5th May 1886, but was ultimately confirmed in a suit brought by them for the purpose against their judgment-debtors only, by an appellate decree of this Court in May 1888, under circumstances which are fully stated in our judgments in the first appeals. In the present suit the plaintiffs' claim is for possession of three properties, known respectively as the Sagbari garden, Nauda Bagh, and Safri Bagh. The suit was decreed on appeal by the Lower Appellate Court, and from that decision the defendant now appeals.

The first question discussed in this appeal was as to the effect of a judgment of the District Judge of Bareilly passed on the 24th January 1890. That was a suit brought by the plaintiffs for mesne profits of the village Saidpur. The present defendant-appellant was made a defendant to that suit under section 32 of the Code of Civil Procedure, inasmuch as he alleged that part of the mesne profits claimed were profits of the property which he had purchased on the 3rd of November 1885, and he contended that inasmuch as he had purchased that property the plaintiffs had no right to any profits arising from it from the date of that sale. It is conceded that the decree of the District Judge decided between the present plaintiffs and the present defendant that the land did not pass to the present defendant under the sale of the 3rd November 1885. If anything passed it was the trees and such rights over the land as were necessary for the defendant's enjoyment of the trees. I think therefore that the Lower Appellate Court was right in decreeing the present claim so far as the [184] land is concerned. That was finally decided between the parties by the decree of the 24th January 1890. There remains the right of the defendant in respect of the trees. As to this the matter was not, in my opinion, determined by the decree of the 24th January 1890, and remains open. That was a suit for mesne profits arising out of the land, and there was no real issue as to the ownership of the trees. Now, confining the case to the trees, the defendant's purchase was prior in date to that of the plaintiffs'. The Lower Appellate Court has nevertheless held that the plaintiffs' purchase was entitled to priority on two grounds. The first ground is that, having regard to section 285 of the Code of Civil Procedure, the Revenue Court had no jurisdiction to sell the property on the 3rd November 1885, as it was already under attachment by a Civil Court in execution of Kalka Prasad's decree, under which the plaintiffs ultimately purchased. The second ground is that the defendant's purchase was invalid by reason of section 171 of the Rent Act, as it was not shown that the judgment-creditor, before applying for execution against the immovable property, had failed to

obtain satisfaction of the decree by execution against the person or moveable property of the debtor.

I propose to consider first the second of these grounds. I think that the decision of the Lower Appellate Court is wrong. The immoveable property against which execution was applied for was not a mahal or a share of a mahal. Section 172 of the Rent Act therefore governed the execution. That section makes applicable, amongst other provisions, the provisions of section 170 relating to moveable property, and section 170 provides that "no irregularity in publishing or conducting a sale of any movable property under an execution shall vitiate such sale." By reason of section 172 it follows that the irregularity under section 171 would not vitiate the sale of this immovable property. The non-compliance with the provisions of section 171 was not, I think, more than an irregularity. Apart from the objection under section 285 of the Code, the Revenue Court had undoubted jurisdiction in the matter. As the sale of the 3rd November 1885, was not vitiated by the irregularity, the first ground upon which the Lower Appellate Court has given priority to the plaintiffs' subsequent purchase in my opinion fails.

[185] The second point is the point relating to section 285 of the Code. That section provides that "where property not in the custody of any Court has been attached in execution of decrees of more Courts than one, the Court which shall receive or realize such property and shall determine any claim there-to and any objection to the attachment thereof shall be the Court of highest grade, or, where there is no difference in grade between such Courts, the Court under whose decree the property was first attached." There has been much discussion on the question whether the word "decrees" in this section would include a decree of a Revenue Court. It was contended on behalf of the defendant that the expression, having regard to the definition of "decree" in section 2, must be read as limited to a decree of a Civil Court, and reliance was placed on the decision of this Court in *Onkar Singh v. Bhup Singh*, (1894) I. L. R., 16 All., 496, and *Aulia Bibi v. Abu Jafar*, (1899) I. L. R., 21 All., 405. Those decisions must be read with the decision of the Full Bench of this Court in *Madho Prakash Singh v. Murli Manohar*, (1883) I. L. R., 5 All., 406. The two later cases relate, one of them to injunctions under section 492 of the Code against the sale of property under a Revenue Court decree, the other to the attachment and sale of a Revenue Court decree under section 273. They had nothing to do with any question of the procedure by which Revenue Courts are governed. The Full Bench decision dealt with that question, and established that the Revenue Courts are bound in their procedure by the provisions of the Code of Civil Procedure in matters as to which the Rent Act is silent. Section 285 is a section prescribing certain procedure in the execution of decrees; and having regard to the observations of the majority in the Full Bench case, I think that section 285 would govern the procedure of Revenue Courts, at all events to this extent, that if property is attached in execution of decrees of more Revenue Courts than one, the provisions of the section would have to be complied with by those Courts, just as the Civil Courts would be bound if the property were attached in execution of decrees of more Civil Courts than one. But here the property was attached in execution of a decree of a Revenue [186] Court, and also of a decree of a Civil Court, and the question is whether the procedure of the section can be applied as between those two Courts as if they were Courts of the same character. When the procedure of section 285 is followed, and assets realized by sale in execution, then the different decree-holders obtain a rateable distribution of the assets under section 295, and section 295 makes it necessary that prior to the realization they should have applied for

execution to the Court by which such assets are held. For the purpose of obtaining the benefit of the section, and to enable an application for execution to be made to the Court holding the assets, it is necessary for holders of decrees passed by other Courts to obtain the transfer of those decrees for execution from those Courts to the Court which is to realize the property. Such applications for transfer for that purpose are made under section 223. Now so far as I know there is no case in which these sections have been applied indiscriminately as between Civil Courts and Revenue Courts, that is to say, no case has been pointed out to us in which section 285 has been applied when property has been attached in execution of a Civil Court decree and also of a Revenue Court decree. Similarly, no case has been pointed out to us in which, for the purposes of section 285 and section 295 or otherwise, a Revenue Court decree has been transferred for execution to a Civil Court or *vice versa*. The principle that, in matters as to which the Rent Act is silent, the Revenue Courts are to be governed by the Code of Civil Procedure must, I think, be applied subject to the broad line of demarcation between the functions of the Civil and Revenue Courts which the Legislature has drawn, and we must not so apply it as to confound the functions of these widely different kinds of Courts, or to make one class of Court encroach upon the province of the other. Now when the provisions of the Code and those of the Rent Act relating to execution of decrees are compared, very great differences are noticeable. It is only necessary to mention a few. Under section 170 of the Rent Act no irregularity in publishing or conducting a sale under an execution is to vitiate the sale and by section 172 that applies to immovable as well as to movable property. Then there is section 171, to which I have already referred, and which makes [187] it necessary for a judgment-creditor to attempt to obtain satisfaction against the person or movable property of the judgment-debtor before he can apply for execution against any immovable property. There are also provisions (see the sections beginning with section 178) greatly differing from those of the Code as to claims made by third parties to property which has been attached and whose sale is contemplated. Many other differences might be mentioned. Now if section 285 of the Code is to be applied to cases where property is attached in execution of both Civil and Revenue Court decrees, how are we to deal with differences of this kind? Suppose, first, that it is the Civil Court which has to undertake the execution. It must presumably deal with any objections made to the attachment under the Revenue Court's decree, for that attachment is not affected by the fact that another Court conducts the sale. If, for instance, the judgment-debtor, under the Rent Court's decree, objects to the attachment on the ground that it is in violation of section 171 of the Rent Act, is the Civil Court to give effect to that objection? If yes, it becomes *pro tanto* a Revenue Court, it has to apply a procedure which the Rent Act shows the Legislature intended should be applicable to Revenue Courts alone. If no, the judgment-debtor loses the right which the Rent Act gives him, and the execution is validated so far as the Revenue Court's decree is concerned, merely because a Civil Court decree also happens to have been passed. On the other hand, suppose that the Court conducting the execution is a Revenue Court. In dealing with objections or claims, is it to ignore the procedure prescribed by Chapter VII of the Rent Act, and to adopt in its place the different procedure of the Code? Considerations of this kind lead me to the conclusion that it was not intended to apply sections like section 285 of the Code as between a Revenue Court on the one hand and Civil Court on the other. If so, then there was nothing that on the 3rd November 1885, prevented the Revenue Court from selling the property, that is to say, the trees, to the defendant-appellant. In that view the title passed to the defendant under that sale,

and, so far as regards the trees, the plaintiffs took nothing by their subsequent purchase of the 20th November 1885, even assuming that sale to have been [188] validly confirmed by the High Court's decree of May 1888. The suit therefore should have been dismissed as regards the trees, and decreed as regards the land of the three properties which I have mentioned. I think that the proper decree to pass now is that the appeal should be dismissed as regards the land, and that it should be allowed as regards the trees, and that the parties should pay and receive costs in proportion to their failure and success.

Banerji, J.—I concur in the order proposed by the learned Chief Justice. The plaintiffs' suit embraced two claims, first, a claim in regard to the land covered by the trees in the three groves in question; and, secondly, a claim in regard to the trees. As for the land, it is conceded by the learned counsel for the appellant that the decree of the 24th January 1890 operates as *res judicata*. As regards the trees, I am unable to accept the contention of Mr. Conlan, that the judgment in the suit in which the said decree was passed has the effect of *res judicata* in respect of the trees also. That judgment was passed in a suit for mesne profits arising out of the land only. The question of the ownership of the trees was not a question directly and substantially in issue in that suit. Therefore any opinion which the Court may have expressed in that suit in regard to the title to the trees cannot operate as *res judicata* and the question as to the ownership of the trees was a question which the Courts below were bound to determine in this case. The purchase by the defendant being in point of time prior to the purchase by the plaintiffs, the defendant would have priority of title, unless that title could be defeated on any ground. The Lower Appellate Court holds that the Court of Revenue was not competent to sell the groves, because there existed on the groves a prior attachment by a Civil Court, and it relies for its conclusion on section 285 of the Code of Civil Procedure. I agree with the learned Chief Justice in thinking that the Court below has erroneously held that section 285 precluded the Revenue Court from selling the property in question. Having regard to the ruling of the Full Bench in *Madho Prakash Singh v. Murli Manohar*, (1883) I, L. R., 5 All., 406, and the provisions of section 4A of the Code of Civil Procedure, it is beyond doubt that in regard to matters of procedure as to which the Rent Act [189] does not contain specific provisions the Courts of Revenue are to apply the procedure of the Code of Civil Procedure. This means that as regards cases pending in Courts of Revenue the procedure should, where the Code of Civil Procedure applies, be that prescribed by that Code. But it does not follow that where the procedure of the Code of Civil Procedure applies to Courts of Revenue, those Courts should, for all purposes, be deemed to be on the same footing as ordinary Civil Courts. The Courts of Revenue are Courts of exclusive jurisdiction competent to try suits of a specific class. As regards such suits the jurisdiction of Civil Courts is excluded by the provisions of sections 93 and 95 of the Rent Act. The Legislature could not certainly have contemplated that while Civil Court should have no jurisdiction to try suits and applications of the descriptions specified in those sections, they should be competent to determine questions relating to execution arising out of such suits and applications. Where, according to the Full Bench ruling of this Court, a Court of Revenue is to apply the provisions of the Code of Civil Procedure, that procedure is applicable to proceedings pending in the Court of Revenue. In this view section 285 of the Code of Civil Procedure would so far govern proceedings in Courts of Revenue that where the same property is attached by more Courts of Revenue than one, the property is to be realized by the Court indicated by that section, namely, where a difference of grade exists

between the different Courts of Revenue, by the Court of the highest grade, and where no difference exists between such Courts, by the Court which first attached the property. But I am unable to hold that where the same property has been attached both by a Civil Court and by a Court of Revenue the procedure of section 285 would apply. That section was enacted to put an end to the difficulties which used to arise under section 271 of Act VIII of 1859, and the object of the section is, that where several Civil Courts attach the same property, it shall be realized by one Court only, the remedy of the different judgment-creditors who obtained the several attachments being that provided by section 295. Now in order to enable a decree-holder to obtain a rateable distribution under that section he would have to apply to the Court which is to realize the assets for execution of [190] his decree. Certainly the holder of a decree of a Revenue Court cannot apply to a Civil Court for the execution of his decree, and I am unable to hold that by virtue of section 223 of the Code a decree of a Court of Revenue can be transferred to a Civil Court for execution. Having regard to the policy of the Rent Act it cannot be conceived that it was ever intended that a decree of a Court of Revenue should be executed by a Civil Court. In my long experience I have never seen any instance of a decree of a Revenue Court having been transferred to a Civil Court for execution, or a decree of a Civil Court transferred to a Court of Revenue. Of course the fact of such transfers never having taken place does not necessarily lead to the conclusion that the power to make the transfer does not exist; but, as I have said above, I am of opinion that it was never contemplated by the Legislature that a Civil Court should execute a decree of a Court of Revenue. This affords a sufficient answer to the contention that section 285 applies to a Court of Revenue in the sense that where property has been attached by a Civil Court and by a Court of Revenue, the Court in pursuance of whose order the attachment was first made, should realize the property, whether that Court was a Civil Court or a Court of Revenue. I agree with the learned Chief Justice in holding that the Court below was wrong in its conclusion that by reason of section 285 the Court of Revenue was not competent to sell the property in question on the 3rd November 1885. The mere fact of a previous attachment existing over the property did not preclude the sale of it in pursuance of another attachment by a Court of a different class. The only other ground on which the learned Judge of the Lower Appellate Court has held the defendant's purchase to be void is that, under section 171 of the Rent Act, the defendant was bound to show that he could not get satisfaction of the decree obtained by him by execution against the movable property of his debtors before he could sell their immovable property. On this point I am in full accord with the opinion expressed by the learned Chief Justice. In this view the question of collusion and fraud in respect of the decree of this Court, dated the 14th May 1888, does not arise.

Decree modified.

[191] PRIVY COUNCIL.

The 8th and 28th November, 1899.

PRESENT :

THE LORD CHANCELLOR, LORDS HOBHOUSE, MORRIS, DAVEY AND
ROBERTSON, AND SIR RICHARD COUCH.

Roshan Singh.....Plaintiff

versus

Balwant Singh.....Defendant.

[On appeal from the High Court for the North-Western Provinces.]

Hindu law—Right of illegitimate son to maintenance only.

In the regenerate classes of Hindus a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of his father's estate :—a right personal to him and not inherited by his offspring. *Chuoturya Run Murdun Syn v. Sahub Purhulad Synd*, (1885) 7 Moo. I.A., 18, referred to and followed.

An allowance for maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent.

The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the above-mentioned head of the family. His ground of claim was that he had inherited the right to maintenance and had thus an interest or charge within the meaning of section 91 of the Transfer of Property Act, 1884, to entitle him to redeem.

The decision was that the High Court had rightly concluded that he had not inherited that right. The authority of the *Mitakshara* in Chap. 1, sections 11 and 12, was more consistent with a personal right of the illegitimate son.

APPEAL from a decree, I. L. R., 18 All., 253, (18th February 1896) of the High Court, reversing a decree (31st March 1894) of the Subordinate Judge of Aligarh.

The plaintiff-appellant, suing in 1893 as a pauper, claimed to be declared entitled to redeem a mortgage of forty-three villages, part of the Husain talukh in the Aligarh district, and comprised within the zemindari formerly possessed by Narain Singh, who made the mortgage on the 30th August 1838, and died in October 1844. The plaintiff's deceased father, Bhoj Singh, was the illegitimate son of Indarjit Singh, who was grandson of Mittar Singh. Narain Singh, who had inherited the ancestral estate, was another grandson of the same.

The mortgagee was Pitambar Singh, who died in November 1845, leaving a minor son. The present successor in title to them was Balwant Singh, now the defendant-respondent.

The mortgagor left no son; his two widows, Mohar Kunwar and Sengar Kunwar, succeeded to the estate. They sued, but failed [192] to get possession of the mortgaged property. In 1868 Bhoj Singh sued a predecessor of the present respondent for the same, but he was found by two Courts in concurrence to be an illegitimate son, and his suit was dismissed. As to this in the present suit the High Court, on the judgment now appealed from, referring to this dismissal, and the reason for it, observed that the question whether this question of his legitimacy or illegitimacy was a cause already adjudged had been held so to be by the Subordinate Judge, and had not been challenged before them.

The plaint alleged that Sanwant Singh, father of Indarjit, and grandfather of Bhoj Singh, had received a malikana allowance of Rs. 457 paid by the head of the family, and that the plaintiff, son of Bhoj Singh, was the sole surviving heir of Narain Singh; but that if it were found that the plaintiff's father, Bhoj, was of illegitimate birth, still the Husain estate had been liable for his maintenance, and that for this reason "they had acquired a right to redeem the property mortgaged."

The defendant in his written statment pleaded that it had been established in the suit of 1868 that the plaintiff's father was not of legitimate birth, and that the ancestors of the plaintiff had never been allowed to have any villages, or malikana, out of the family estate. Among other issues the following were fixed: whether the plaintiff's predecessors had received, and the plaintiff was entitled to, maintenance from the family estate, and whether the latter was entitled to redeem the mortgage of 1838. These were also the questions which the appellant sought to raise on this appeal. The Subordinate Judge decreed the claim to redeem, and redemption upon payment of Rs. 51,000. His view was that the plaintiff had a right to redeem, notwithstanding the fact that his father was of illegitimate birth. He found that Bhoj Singh, and his father and grandfather before him, had received maintenance out of the family property in the shape of a malikana allowance of Rs. 457 per annum, to which the plaintiff as the legitimate son of his illegitimate father was clearly entitled in lieu of his "charge for maintenance" upon the Husain estate; and that he was in consequence a person who had an interest in the right to redeem mortgaged property, and hence was entitled to redeem the mortgage in suit under [193] section 91 of the Transfer of Property Act (Act No. IV of 1882).

On an appeal heard by a Division Bench (BANERJI and AIKMAN, JJ.) the Judges reversed the above decision. They said in their judgment:—"Assuming that the plaintiff is entitled to maintenance from the Husain estate, that right to obtain maintenance cannot, in the absence of a contract or of a decree of Court making the maintenance a lien on the estate, be regarded as a charge on the estate within the meaning of sections 91 and 100 of Act No. IV of 1882, as was held in *Kunwar Sham Singh v. Raja Balwant Singh and others*, F. A. No. 295 of 1893, decided by this Court on the 11th June 1895. It is urged before us that although the plaintiff may not have a charge on the property in question, he has an interest in it, inasmuch as his father, Bhoj Singh, was entitled to a malikana allowance in lieu of his maintenance. There is nothing before us to show that if Bhoj Singh was entitled to maintenance or to a malikana allowance in lieu of maintenance, that allowance was one which was not limited to the term of his life, but was heritable by his son. According to Hindu law, an illegitimate son of a person belonging to one of the three regenerate classes is entitled, if docile, to obtain maintenance from his father. No authority has been shown to us for holding that this is anything but a personal right. Therefore, even if it be assumed that Bhoj Singh was granted a malikana allowance in lieu of his maintenance, it would not follow that that allowance would pass to his son. The Subordinate Judge was clearly in error in holding that the plaintiff was entitled to the malikana allowance which Bhoj Singh is said to have enjoyed. Consequently the plaintiff has no right to redeem the mortgage in question. This is sufficient to dispose of this suit. The plaintiff having no right of redemption, his suit should have been dismissed. We allow the appeal and dismiss the plaintiff's suit, with costs here and in the Court below."

* Reported in full, I. L. R., 18 All., 253.

Sir *W. H. Rattigan*, Q.C., and Mr. *C. W. Arathoon*, for the appellant, argued that the result at which the Subordinate Judge's judgment had arrived was correct, and that the reasons given by [194] the High Court for reversing it were insufficient. The appellant was a descendant in a family in which there were two branches; the succession in the senior line of Raja Narain Singh the head of the family, who in 1838 mortgaged part of the ancestral estate, and the other branch to which the plaintiff belonged. The father of the latter was of illegitimate birth. There was evidence that the members of the family in the plaintiff's branch had for three generations received malikana allowance; and the Court of First Instance had found this as a fact. It was a just inference, and it was now submitted, that a substantial portion of the ancestral estate had been applied by way of maintenance for the collateral members of the family. The appellant relying on his being entitled to maintenance in succession to his father, claimed to have an interest in, or charge upon, the mortgaged property within the meaning of section 91 of the Transfer of Property Act, 1882, and in virtue of such interest to be entitled to redeem the mortgage of 1838. There was not, it was contended, any break in consequence of the illegitimate birth of the plaintiff's father Bhoj Singh; and against the continuance of the right to maintenance that illegitimacy was no bar.

As averred in the plaint, and found by the first Court, Indarjit Singh, father of Bhoj, and grandfather of the plaintiff, in succession to Sanwant, had received the malikana allowance. Referring to the effect of the illegitimacy of Bhoj, according to the Hindu Law, an illegitimate son was not in any sense "quasi nullius filius," although he did not share, and had no coparcenary right, in joint family estate. Such a son had a recognized, though lower, status in the family of his father, and he had a right to maintenance out of the family estate. The general principle might be thus stated,—that disqualification to share in the family estate on account of illegitimacy did not involve a disqualification to be maintained out of that estate. There was, it was submitted, no reason why the illegitimacy of Bhoj should involve his incapacity to transmit the right to malikana not withheld in this family from the younger branch. The Hindu law was liberal in the matter of assigning maintenance to those who were regarded as members of the family, and the right might attach to a junior line within certain limits. As an authority to show that offspring [195] not of legitimate birth might be regarded as belonging to a family, *Pandara Telaver v. Puli Telaver*, (1863) 1 Mad., H. C. Rep., 478, 482, was cited: there the judgment gave effect to such propositions. In regard to the consequences of illegitimacy as to disqualifying to inherit reference was made to the Mitakshara, Chapter I, section XI, paragraphs 30, 31, 33; R. C. Mitra, *Tagore Law Lectures*, 1895, 1896, lecture 11, where the texts were given as to maintenance, and to the judgment at page 369 of I. L. R., 6 Allahabad Series.

Mr. *J. D. Mayne* and Mr. *G. E. A. Ross*, for the respondent, argued that the judgment of the High Court was right. By the Hindu Law the right of Bhoj Singh to maintenance was a personal right only attaching to him as the illegitimate son of Indarjit; and no right over the family inheritance could have been claimed by him. This applied to the claim attempted to be made for his son that the latter had an interest in the family estate. That interest had not been founded upon a malikana agreed to be paid, or made the subject of a decree. Resting only on the right of Bhoj Singh to maintenance, the present claim could not be supported, because an illegitimate son could only claim maintenance from his father's estate and could neither claim it from his collateral relations, nor from the estate of the family to which his father belonged. The right of the illegitimate son attaching to him personally was not transmis-

sible from him to his son by inheritance. Reference was made to the *Mitakshara*, Chapter I, section XI, paragraphs 30 and 59; *Chuoturiya Run Murdun Syn v. Sahub Purhulad Syn*, (1857) 7 Moo., I. A., 18. *Har Gobind Kuari v. Dharam Singh*, (1884) I. L. R., 6 All., 329, was also referred to show the personal nature of the right to maintenance.

Sir W. H. Rattigan, Q.C., replied.

* The judgment of the Board was as follows :—

The defendant in the original suit, now respondent, is in possession of the Husain Taluk by virtue of a mortgage effected in the year 1838 by the Talukdar Narain Singh. The plaintiff seeks to redeem the property. The Subordinate Judge decreed redemption on payment of Rs. 51,000 and interest to date of [196] payment. The High Court reversed that decree and dismissed the suit.

The plaintiff is the son of Bhoj Singh who was son of Indarjit and first cousin once removed of Narain, the common ancestor of the two being Mittar Singh the grandfather of Narain and the great-grandfather of Bhoj. The plaintiff first claimed title as a co-sharer in the estate; but he failed in that claim because his father Bhoj was not the legitimate son of Indarjit. The plaintiff still claims to redeem on the ground that he is entitled to maintenance out of the estate; which, as he contends, is a charge or interest carrying with it the right to redeem within the terms of the Transfer of Property Act, 1882. This position he seeks to establish in two ways. First, he alleges a title by contract with the widows and heirs of Narain. Secondly, he contends that Bhoj, though excluded from inheritance, was entitled to maintenance from the estate, and that Bhoj's title has descended to himself.

The contract with the widows is contained in a declaration by them dated 20th August 1850. It appears that Bhoj had sued to recover the whole estate from them, that his suit had been dismissed by the Sudder Ameen, and that he had appealed to the Sudder Dewani Adawlut. The operative part of the declaration is as follows :—

“ Now through fear of ruining the ancestral estate he came on the right-path, and of his own free will and accord came to us and so we are also pleased with him. We therefore declare in writing that we shall continue to pay Rs. 457 from the malikana dues to the said Kuar without objection after taking possession of the said villages under the settlement proceeding, as the same was paid for maintenance to the forefathers of the said Kuar by the Raja, masnad-nashin of this family.”

Four days later Bhoj executed a deed of relinquishment in which he withdrew his appeal and stated :—“ In fact the appellant has no right except to the malikana dues of village Allahdinpur which was formerly granted to his grandfather Sanwant Singh by Raja Narain Singh.”

From these documents the Subordinate Judge deduces the conclusion that the widows of Narain, in whom a widow's estate [197] was then vested, granted, or agreed to continue, a malikana allowance, which was charged on the estate in favour of Bhoj and on his death descended to the plaintiff. But there is no such agreement. What virtue there might be in the word ‘malikana,’ or in the thing signified, we need not discuss; for the widows do not profess to vest or to recognise any malikana right in Bhoj. There is nothing in the record to show any malikana right in anybody but the widows except the indirect assertion of Bhoj himself that malikana dues over one of the 43 villages for which he was suing had been granted to his grandfather. The malikana dues of the estate belonged to the widows subject to the mortgage by Narain. They were not in possession. All they undertake is that when they get

possession they will out of the malikana dues so recovered pay Rs. 457 a year to Bhoj, as the same was paid to his forefathers. In point of fact the agreement has been wholly ineffectual, because the widows, who have now been dead for many years, never got possession at all. But if they had, they only agreed to make a money payment to Bhoj personally, and they did nothing to create a heritable interest in him or any charge on the inheritance.

The more general question of law raised by the plaintiff relates to the position of the offspring of an illegitimate son. The family belongs to one of the twice-born classes. Among them an illegitimate son takes no part of the inheritance; but he is entitled to maintenance from the estate of his father. This law is found in sections 11 and 12 of Chap. I of the Mitakshara. In par. 3 of section 12 it is thus stated:—"It follows that the son begotten by a man of a regenerate tribe on a female slave does not obtain a share . . . but if he be docile he receives a simple maintenance." There is no reason to think that this effect of illegitimacy differed according to the particular mode of it; and the more general statement applying to illegitimacy generally which their Lordships have just made is embodied in the judgment of this Board in *Chuoturya Run Mundun Syn v. Sahub Purhulad Syn*, (1857) 7 Moo., I. A., at pp. 50 and 53.

The Subordinate Judge, whose opinion has been supported at this Bar in an able argument by Sir Wm. Rattigan reasons thus. [198] He states the rule that illegitimate sons of a Hindu are entitled to maintenance out of their father's estate. He then continues:—"Bhoj Singh was entitled to maintenance out of the estate held by Narain Singh, not because of his relationship with Narain Singh, but because he was a son of Indarjit Singh, who in his turn had a share in the estate. I have therefore no doubt that as the estate was joint family property of the descendants of Mittar Singh, among whom Bhoj Singh was one, the latter as such member, though of illegitimate descent, was entitled to be maintained out of the estate."

It seems to their Lordships that this reasoning leaves the difficulty of the plaintiff's case wholly untouched. Conceding that Bhoj could, claim maintenance as against Narain, the question is whether he could transmit that claim to his son. Indarjit, we are told, had a share in the family estate. Bhoj then had a right to maintenance out of Indarjit's estate including that share. But Bhoj had no share in the family estate out of which the plaintiff could be maintained; therefore the plaintiff's right to be maintained out of his father's estate does not place him in the same relation to the family estate as Bhoj derived from his right in respect of Indarjit's estate.

On this point the High Court, speaking of Bhoj's right, say:—"No authority has been shown to us for holding that this is anything but a personal right." Neither has any been shown to their Lordships. Sir Wm. Rattigan cited a case from Madras High Court Reports Vol. I., p. 478, *Pandaiya Telaver and another v. Puli Telaver and others*, which, he contended, was a direct authority in his favour. But the question there was whether an illegitimate daughter entitled to maintenance out of her father's estate was so far a member of his family as to make a marriage with her a lawful marriage; and the Court held that she was. Whether right or wrong, that decision has no bearing on the question whether a right to be maintained, vested in one who cannot inherit, is itself a heritable right. The plaintiff's proposition does not appear to follow from the expression in the Mitakshara which says that the illegitimate son "if he be docile," receives a "simple maintenance." On the contrary that passage is more consistent with a purely personal right; and [199] there is no authority either of texts or of decisions to contravene the obvious meaning.

The plaintiff would also, before he could succeed, have to show that a claim for maintenance, not founded on contract or decree, is an interest in or charge upon the property within the meaning of the Transfer of Property Act. The High Court think it is not. The point has been much discussed at the Bar, but no authority has been produced either way. As the principle on which their Lordships have expressed their concurrence with the High Court goes, to the root of the plaintiff's title to maintain this suit, it is not necessary for them to decide the second point. They will humbly advise Her Majesty to dismiss the appeal. The appellant must pay the costs.

Solicitors for the Appellant:—Messrs. *T. L. Wilson & Co.*

Solicitors for the Respondent:—Messrs. *Pyke and Parrot.*

NOTES.

[As regards the rights of the illegitimate son, in the general case, see also 18 M. L. T., 542; 24 M. L. J., 273; 29 M L.J., 793.]

[22 All. 199] FULL BENCH.

The 19th December, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE BLAIR,
AND MR. JUSTICE BURKITT.

Zamir Hasan and another.....Decree-holders

versus

Sundar and another.....Judgment-debtors.*

Execution of decree—Limitation,—Act No. XV of 1877 (Indian Limitation Act)
Sections 7 and 8—Minority.

Section 8 of the Indian Limitation Act, 1877, applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. *Seshan v. Rajagopala*, (1889) I. L. R., 13 Mad., 236, and *Govindram v. Tatia*, (1895) I. L. R., 20 Bom., 383, followed. *Har Gobind v. Srikishen*, Weekly Notes, 1884, p. 58, overruled.

A decree was passed in 1881 in favour of two decree-holders. Subsequently one of the decree-holders died, and the names of his widow and his two minor sons and one minor daughter were entered as his representatives. In 1888 an application was made for execution by the widow on behalf of the minor sons, which was dismissed. In February 1894 the two sons of the deceased decree-holder being still minors made another application for execution through one Aijaz Husain. Held that section 7 of the Limitation Act applied, and that this application was not time-barred. *Lolit Mohan Misser v. Janoky Nath Ray*, (1893) I. L. R., 20 Cal., 714, and *Pahari v. Bhupendra Narain Roy*, (1895) I. L. R., 23 Cal., 374, followed.

[200] THIS was an appeal from an order passed in execution of a decree. The original decree was passed on the 12th December 1881. There were two decree-holders, Musammat Khatun Daulat and Amir Hasan. The latter died, and his widow Musammat Rukkaya and his two sons and one daughter, all three minors, had their names entered in lieu of Amir Hasan's. An application for execution was filed by Musammat Rukkaya on behalf of the minors on the 31st August 1889, but that application was dismissed on the 25th September

* Second Appeal No. 312 of 1897, from an order of C. Rustomjee, Esq., District Judge of Moradabad, dated the 30th January 1897, reversing the order of Pandit Rajnath Sahib, Subordinate Judge of Moradabad, dated the 28th July 1894.

1888. The next application for execution was filed on the 19th of February 1894, by one Aijaz Hussain on behalf of the two sons of Amir Hasan who at that time were still minors. The judgment-debtors objected, but the Court of First Instance (Subordinate Judge of Moradabad) disallowed their objections. On appeal to the District Judge that Court allowed the judgment-debtor's objections, holding that execution of the decree was barred by limitation. The applicants appealed to the High Court. The appeal was laid before a Full Bench in pursuance of a recommendation made by BLAIR and BURKITT, JJ., in view of the existence of various conflicting rulings on the point in issue, by their order of the 14th November 1899.

Pandit Baldeo Ram Dave (with Pandit Sundar Lal) for the Appellant.

The decree is a joint one in favor of both the decree-holders. An application, if made by one of them or his representatives, will take effect in favor of both the decree-holders, [Article 179 of Act No. XV of 1879, Explanation I]. Applications for execution of the decree were, from time to time, made within the period of limitation prescribed by law by one of the decree-holders or by the legal representatives of the other decree-holder, who were of age at the time. The last of such applications was made by them on the 9th November 1888. This application kept the decree alive up to that date in favor of all the decree-holders. For this proposition, I rely upon *Shib Chunder Das v. Ram Chunder Poddar*, (1871) 16 W. R., 29; *Daya Moyee Dabee v. Nilmoney Chuckerbutty*, (1876) 25 W. R., 70; *Pounampilath v. Pounampilath*, (1880) I. L. R., 3 Mad., 79; *Nanda Rai v. Raghunandan Singh*, (1885) I. L. R., 7 All., 282, and *Wasi Imam v. Poonit Singh*, (1893) I. L. R., 20 Cal., 696.

[201] Although the present application for execution of the decree was made over five years after the 9th November 1888, but as the appellants were minors at the time from which the period of limitation was to be reckoned, that is on the 9th November 1888, and are still minors, they can avail themselves of the provisions of section 7 of the Indian Limitation Act, 1877. There can be no doubt, that the appellants are persons "entitled to make an application" for execution of this decree within the meaning of that section [see section 231 of the Code of Civil Procedure, 1882]. Article 179 of the second schedule to the Indian Limitation Act provides several points of time from which the period of three years shall begin to run. I contend that for purposes of the Limitation Act, 1877, the period which begins from each point is a separate period, and if a person entitled is under a disability at the time when any one of such periods commences, the operation of the Act is suspended during the continuance of the disability by virtue of section 7 of the Act. In support of my contention I rely upon *Har Gobind v. Srikishen*, Weekly Notes, 1883, p. 63; 1884, p. 58; *Lachman Prasad v. Bhagwan Singh*, Weekly Notes, 1886, p. 49; *Lolit Mohun Misser v. Janoky Nath Roy*, (1893) I. L. R., 20 Cal., 714; and *Norindra Nath Pahari v. Bhupendro Narain Roy*, (1895) I. L. R., 23 Cal., 374.

The judgment of this Court in *Har Gobind v. Srikishen*, Weekly Notes, 1883, p. 63; 1884, p. 58, was reconsidered upon review, and relying upon section 8 of the Indian Limitation Act, 1877, it was set aside by this Court. But section 8 of the Limitation Act applies to cases prior to the institution of a suit. The words in the section are "joint creditors or claimants." It does not apply to "decree-holders." Further, that section is applicable to cases where payment to one of the joint creditors or claimants *per se* discharges the debtor. In case of payment to one of the joint decree-holders it is not the act of the joint decree-holder, but the act of the Court executing the decree, that is intended to operate as a valid discharge. Though a joint decree-holder may accept payment out of Court and grant a

receipt in acknowledgment of such payment, yet in the absence of a certificate of satisfaction, the creditor's acknowledgment does not of itself operate as a discharge [202] [see sections 231, 257 and 258 of the Code of Civil Procedure, 1882]. This was the view of the law taken by the Bombay High Court in *Govindram v. Tatia*, (1895) I. L. R., 20 Bom., 383, and by the Madras High Court in *Seshan v. Rajagopala*, (1889) I. L. R., 13 Mad., 236.

*Munshi Gokul Prasad (with whom Pandit Tej Bahadur Sapru) for the Respondents.

If the other decree-holders could take out execution and give a valid discharge, then the decree is certainly barred against the present appellants, *vide* section 8 of Act XV of 1897, which provides only for cases where *all* the decree-holders rest under disability, which is not the case here. The decree in this case having been passed jointly in favour of more persons than one, any one could take out execution and give a valid discharge. The decree was based apparently upon a contract, and a contract can be discharged by any one of the joint promisees without the consent of the others. *Hargobind v. Srikishen*, Weekly Notes, 1884, p. 58; *Ramautar v. Ajudhia Singh*, (1876) I. L. R., 1 All., 231; *The Collector of Shahjahanpur v. Surjan Singh*, (1881) I. L. R., 4 All., 72; *Surju Prasad Singh v. Khwahish Ali*, (1882) I. L. R., 4 All., 512; *Banarsi Das v. Maharani Kuar*, (1882) I. L. R., 5 All., 27, and Act No. XV of 1877, Sch. II, Art. 179, Expl. (1). But the Madras case goes still further. It lays down that to a case like the present neither section 7 nor section 8 would apply. Section 8 of Act XV of 1877 would not apply, inasmuch as it does not contemplate the case of execution-creditors at all, and secondly because in view of section 258, Act XIV of 1882, it is the act of the Court that is intended to operate as a valid discharge. Section 7 does not apply, inasmuch as what is necessary under that section is that either there ought to be one single decree-holder who is a minor, or there ought to be more who are all of them minors, for, otherwise a decree may be barred against the major decree-holders and yet under section 231, Civil Procedure Code, a minor decree-holder may seek execution of the entire decree, thus indirectly benefiting the other decree-holders against whom the decree may have become barred. *Seshan v. Rajagopala*, (1889) I. L. R., 13 Mad., 236. See also *Mitra on Limitation and Vigneswara [203] v. Bapayya*, (1892) I. L. R., 16 Mad., 436. So in this case section 8 does not apply any more than section 7. The case of *Govindram v. Tatia*, (1895) I. L. R., 20 Bom., 383, decides that section 8 of Act XV of 1877 does not apply to execution-creditors, but it differs from the Madras case in so far as it holds that section 7 does apply where one of several decree-holders is a minor. As to *Norendra Nath Pahari v. Bhupendra Narain Roy*, (1895) I. L. R., 23 Cal., 374; *Lolit Mohun Misser v. Janoky Nath Roy*, (1893) I. L. R., 20 Cal., 714, and *Mon Mohun Buksee v. Gunga Soondery Dabee*, (1882) I. L. R., 9 Cal., 181, it is submitted that these were cases in which there was only one decree-holder and he was a minor, so that these cases are quite distinguishable from the present.

Strachey, C. J.—The Lower Appellate Court has reversed the decision of the Court of First Instance and held the application of these minors barred by limitation on the authority of *Hargobind v. Srikishen*, Weekly Notes, 1884, p. 58. That decision applied the provisions of section 8 of the Limitation Act to a case of joint decree-holders. The application of section 8 to such a case has since been more fully considered by the Madras High Court in *Seshan v. Rajagopala*, (1889) I. L. R., 13 Mad., 236, and by the Bombay High Court in *Govindram v. Tatia*, (1895) I. L. R., 20 Bom., 383. These Courts have held that section 8 of the Limitation Act applies only to those cases in which the

act of the adult joint creditor is *per se* a valid discharge. The Madras High Court in the earlier case pointed out that the question whether one of several decree-holders can enter satisfaction on behalf of all is one of procedure, and a rule of decision must be looked for in the Code of Civil Procedure. They added :—" Having regard to sections 258 and 231, we are of opinion that it is not the act of the joint decree-holders, but the act of the Court executing the decree, that is intended to operate as a valid discharge." I agree with the views expressed in the Madras and Bombay cases, and I think that the decision in *Har Gobind v. Srikishen* is based on a wrong view of section 8 and ought to be overruled.

The other questions which have been discussed in this appeal relate to the construction to be placed on section 7 of the Limitation Act. The applicants for execution in this case are still [204] minors. In 1888 an application was made for execution by their mother, the widow of one of the decree-holders. That application was within time under art. 179 of sch. ii of the Act. By reason of the first explanation to art. 179, that application being made by a representative of one of the joint decree-holders, took effect in favour of all. Under the fourth head of the third column of art. 179, that application became a fresh point for reckoning the period of limitation. At the time when that application was made these present applicants were minors. Their application now in question was not made till February 1894. The question is, whether they are entitled to the benefit of section 7. There are still other persons jointly interested with them in the decree who are adults and who could not apply on their own behalf by reason of limitation. It has been contended on the authority of *Seshan v. Rajagopala* that section 7 would not apply where some only, and not all, of the judgment-creditors are affected by a legal disability. On this point I agree with the Bombay High Court in *Govindram v. Tatia* that no such restriction can properly be placed on section 7. Apart from that I think that the present application is protected by the terms of the section. Two cases decided by the Calcutta High Court and precisely in point have been cited to us. The first of these is *Lolit Mohun Misser v. Janoky Nath Roy*, (1893) I. L. R., 20 Cal., 714 ; and the second is *Norendro Nath Pahari v. Bhupendra Narain Roy*, (1895) I. L. R., 23 Cal., 374. I see no reason to dissent from those decisions. The result is that this appeal must be allowed and the decision of the first Court be restored, and the execution will proceed. The appellant will have his costs, including fees on the higher scale.

Blair, J.—I entirely concur in the order proposed and for the reasons given by the learned Chief Justice.

Burkitt, J.—I am of the same opinion, and for the same reasons.

Appeal decreed.

NOTES.

[See now ss. 6 & 7, Limitation Act, 1908. Previously there was a conflict of rulings between the Madras High Court in (1902) 25 Mad., 26 ; 431 ; (1905) 28 Mad., 479 ; (see also 31 All., 156), and the other High Courts in (1900) 22 All., 199 ; (1901) 28 Cal., 465 ; (1905) 27 All., 67 ; (1907) 29 All., 279 ; (1896) 20 Bom., 383 ; (1906) 9 O.C., 269 ; (1908) 7 C. L. J., 308. In (1910) 34 Bom., 672, it was pointed out that this decision would be correct even under the Act of 1908.]

[206] *The 20th December, 1899.*

PRESENT :

MR. JUSTICE KNOX, MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Murlidhar and others.....Defendants

versus

Pem Raj and others.....Plaintiffs.*

Act No. XII of 1881 (N.-W. P. Rent Act), Section 7—Expropriatory tenant—Expropriatory rights arising on sale of part only of vendor's proprietary rights.

Held, that in order that the provisions of section 7 of the North-Western Provinces Rent Act, 1881, may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121, approved.

Held also, that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory possession of the sir land, and agrees to relinquish his expropriatory rights in respect of the sir land the vendee, in the event of such possession not being delivered or expropriatory rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. *Bhikham Singh v. Har Parsad*, (1896) I. L. R., 19 All., 35, approved.

THE facts of this case are as follows:—Murlidhar and others, being owners of a ten biswa share in the zamindari of a village called Gumanpur, sold to Pem Raj and others, on the 22nd September 1893, four biswas out of the said share. By the same transaction the vendors also purported to convey to the vendees 58 bighas 13 biswas of sir land. The sir land thus dealt with by the conveyance was a portion of 226 bighas 14 biswas of sir land appertaining to the whole village, and was slightly in excess of what would have been the sir of the vendors proportionate to the four biswa share sold by them. The sale-deed provided that the purchasers should be put into actual possession of the sir land, and that the vendors should relinquish such expropriatory rights as they might acquire therein. It was also stated in the sale-deed that out of Rs. 4,000, the amount of consideration for the sale, Rs. 1,500 should be deemed to be the consideration for the transfer of the sir land and for the agreement to relinquish the expropriatory rights. The sale-deed further provided that in the event of the vendees failing to deliver possession of the sir land to the purchasers, or of their not relinquishing their expropriatory rights, the vendees would be entitled to a refund of [206] the aforesaid sum of Rs. 1,500. Possession not having been delivered over the sir land, the presentsuit was brought for recovery of possession, and in the alternative for a refund of Rs. 1,500 with interest. The Court of First Instance (Subordinate Judge of Mainpuri) made a decree in favour of the plaintiffs for the refund of the amount stated above. On appeal the Lower Appellate Court (Officiating District Judge of Mainpuri) affirmed the decree of the first Court. The defendants appealed to the High Court.

Pandit Sundar Lal, for the Appellants.

The object of that part of the contract between the parties which related to the sir land was to compel the defendants not to exercise the right conferred on them by section 7 of Act No. XII of 1881, and thus to defeat the object

* Second Appeal No. 885 of 1896, from a decree of Rai Pyare Lal, District Judge of Mainpuri, dated the 5th August 1896, confirming a decree of Maulvi Muhammad Mazhar Hussain, Subordinate Judge of Mainpuri, dated the 15th June 1895.

with which the provisions of that section were enacted. The contract is therefore void under section 23 of Act No. IX of 1872, and is not enforceable at law—*Leake on contracts*, page 677, *Kashi Prasad v. Kedar Nath Sahu*, (1897) I. L. R., 20 All., 219, *Bhikham Singh v. Har Prasad*, (1896) I. L. R., 19 All., 35, and the judgment of this Court in an unreported case (Second Appeal No. 890 of 1896, decided on the 5th May 1899).

The losing or parting with the proprietary rights of a person in a mahal so as to create exproprietary rights need not be a loss of or parting with his entire rights in the mahal. If it were not so, a man might sell all his rights in a mahal save and except one square inch of land therein. This would then prevent the acquisition of the rights of an exproprietary tenancy, which section 7 of Act No. XII of 1881 intended to confer, and the retention of which in the hands of the expropriator is so carefully provided for in section 9 of the Act—*Gulab Rai v. Indar Singh*, (1883) I. L. R., 6 All., 54. The object of these sections is to make some provision for improvident proprietors who are compelled by circumstances to sell or part with their lands. A proprietor may sell any part of his rights in a mahal or in the sir lands in the mahal—*Sital Prasad v. Amtul Bibi*, (1885) I. L. R., 7 All., 633; *Payag Singh v. Nurul Hasan Khan*, (1889) Weekly Notes, 1890, p. 5; [207] *Ghansham Das v. Sheomangal Singh*, Weekly Notes, 1891, p. 150. In such a case exproprietary rights accrue to the vendor—*Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121. The Board of Revenue in these Provinces was at first inclined to take this view—*Shaikh Seraj-ud-din v. Mohsin Ali*, (1879) I. L. R., R. and R., 111,—It has, however now expressed a different view—*Khushali v. Bhika*, (1888) Sel. Dec., B. of R., p. 8. The adoption of this interpretation would altogether defeat the object with which section 7 of Act No. XII of 1881 was enacted, and would be inconsistent with the policy which underlies the enactment of section 174A of this Act or sections 50, 125, and 190 of Act No. XIX of 1873. A construction which defeats the object of the law should not be adopted. In the present case the contract being void, the suit is not maintainable.

Munshi Kalindi Prasad (with Munshi Gokul Prasad), for the Respondents.

The interpretation put upon section 7 of the Rent Act No. XII of 1881, in *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121, deserves reconsideration. A person must part with all his proprietary rights in a mahal before he can acquire exproprietary rights in the land held by him as sir. I rely upon the wording of the section itself. The word 'his' in the first paragraph of the section is very expressive. In the absence of any limitation the words 'his proprietary rights' ought to be construed in their largest sense—*Jarao Bai v. Kifayat Ali Khan*, Weekly Notes, 1893, p. 177. In that case it was observed that "section 7 of Act No. XII of 1881 must refer to a case where the zamindar loses or parts with *all* his proprietary rights." Further on in the same case it was observed that "the words 'his proprietary rights' as used in section 7 must refer to the losing or parting with all his proprietary rights." Section 7 of the Rent Act is intended to provide a protection against absolute ruin for a zamindar who has lost all that he had and has nothing left to subsist on. But if the view taken in *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121, be correct, it might happen that a person while retaining the greatest part of his property for himself might part with the [208] minutest fraction of it with this result, that he would acquire exproprietary rights in the proportionate share of his sir land. Is he indigent enough to entitle him to the grace allowed by law? What would be the value of such grace? I submit that the interpretation put upon section 7 by the Board of Revenue in

Khushali v. Bhika, (1888) Sel. Dec., B. of R., p. 8, is correct and based upon sound reasoning.

Banerji, J.—The appellants, who were defendants in the Court of First Instance, held a ten-biswas share in the zamindari of the village Gumanpur. They sold four biswas out of the said 10 biswas to the plaintiffs on the 22nd September 1893. By that sale-deed the defendants purported to convey to the plaintiffs not only a 4-biswas share of the zamindari, but also 58 bighas 13 biswas of sir land. This quantity of sir land is a portion of 226 bighas 14 biswas of sir land appertaining to the whole village, and is slightly in excess of what would be the sir of the defendants proportionately to the 4-biswas share sold by them. The sale-deed provided that the purchasers should be put into actual possession of the sir land, and the vendors should relinquish such exproprietary rights as they might acquire therein. It was also stated in the sale-deed that out of Rs. 4,000, the amount of consideration for the sale, Rs. 1,500 should be deemed to be the consideration for the transfer of the sir land and the agreement to relinquish exproprietary rights. The sale-deed further provided that in the event of the vendors failing to deliver possession of the sir land to the purchasers, or of their not relinquishing their exproprietary rights, the vendees would be entitled to a refund of the aforesaid sum of Rs. 1,500. Possession not having been delivered over the sir land, the present suit was brought for recovery of possession, and, in the alternative, for a refund of Rs. 1,500 with interest. The Court of First Instance made a decree in favour of the plaintiffs for the refund of the amount stated above. That decision has been affirmed by the Lower Appellate Court. The defendants have preferred this appeal on the ground that the agreement upon which the plaintiffs have based their claim is contrary to law and is therefore void. It was held in *Bhikham Singh v. Har Prasad*, (1895) I. L. R., 19 All., 35, that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory [209] possession of the sir land and agrees to relinquish his exproprietary rights in respect of the sir land, the vendee, in the event of such possession not being delivered or exproprietary rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. To this view I still adhere. The only other question which has to be considered in this case, therefore, is whether, by selling a part of their proprietary rights in the village in question, the defendants could acquire exproprietary rights in respect of their sir land under section 7 of Act No. XII of 1881. The decision of that question depends upon the construction to be placed on the provisions of section 7. Does that section contemplate that exproprietary rights would accrue in favour of a person losing or parting with his proprietary rights only when he loses or parts with all his proprietary rights or that he would acquire such rights even when he parts with or loses a portion of his proprietary rights? This question was answered by a Division Bench of this Court in the case of *Bhawari Prasad v. Ghulam Muhammad*, (1896) I. L. R., 18 All., 121. In that case it was held that in order that the provisions of section 7 may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. With that decision I am fully in accord. The language of section 7 is no doubt not so clear as it should have been; but having regard to the policy of that section any construction other than that placed on it in the ruling referred to above would evidently defeat the object of the section and enable a proprietor to divest himself of his sir lands by excluding from sale an infinitesimal portion of his proprietary rights. The reasons for holding that the section does not contemplate the transfer or loss of all proprietary rights are fully stated in that judgment, and

I have nothing to add to those reasons. There is, it is true, a ruling of the Board of Revenue, reported in the Selected Decisions of the Board of Revenue for 1888-1891, at page 8, in which a contrary view was held, but I am unable to follow the conclusions arrived at in that ruling. According to well-known rules of construction it is our duty to place on the section such a construction as would effectuate the intention of the Legislature, [210] provided that the language of the section can admit of the construction. I hold that the language of section 7 is sufficiently wide to justify us in construing it in the manner in which it was construed in *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121. If the words "proprietary rights" in section 7 may, as I hold they do, include a part of the proprietary rights, the subsequent words "land held by him as sir" can be equally held to include a proportionate part of the sir land. In this view as the agreement upon which the plaintiffs have based their claim would have the effect of defeating the law as I understand it, it is a void agreement and cannot be given effect to. The plaintiffs' suit should therefore have been dismissed. I would allow the appeal, set aside the decrees of the Courts below and dismiss the suit; but having regard to the conduct of the defendants and to the fact that the plea which has been taken in this Court was never raised in the Court below, I would make no order as to the costs of the litigation.

Knox, J.—I follow my learned brother, but with extreme hesitation. If the question was *res integra* and if the precedent, *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121, did not stand as a reported decision of this Court, I should have been very much inclined to hold otherwise. The interpretation now placed seems to me to put such a strain upon the words of the section as they stand that I doubt whether they can bear it. We have had abundant evidence that the language of this particular Act is in many cases, to say the least of it, very inartistic, and it may be that the interpretation which we now put is one within the spirit and policy aimed at by the Legislature when they enacted this section.

Aikman, J.—The decision of this appeal turns upon the construction of the opening words of section 7 of Act No. XII of 1881. These words are as follows:—"Every person who may hereafter lose or part with his proprietary rights in any mahal shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting" at a rate of rent such as is specified in the section. The Board of Revenue for these provinces held that the right thus created did not arise until the person claiming it lost or parted with the whole of his proprietary rights [211] in the mahal. In the case of *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121, a Division Bench of this Court pointed out that if this was the meaning to be attributed to the words of the section, the object of the Legislature would be easily defeated. This is undoubtedly true. I think it is possible to construe the words "his proprietary rights" as meaning the whole or part of his proprietary rights; but there remains the passage in the section "shall have a right of occupancy in the land held by him as sir in such mahal at the date of such loss or parting." The learned Judges who decided the case just referred to do not consider what meaning would have to be put on those words if an exproprietary right arises when a zamindar parts with a portion only of his proprietary rights. I scarcely think that the learned Judges would have held that if a zamindar parted with a mere portion of his proprietary rights he would thereby at once become an exproprietary tenant of the whole of the sir land which he had held in the mahal, and yet that is the apparent meaning of the words used by the Legislature. To carry out the view of the Division Bench to its logical conclusion,

we should have to read the section as if it ran "shall have a right of occupancy in such portion of the land held by him as sir in such mahal as is proportionate to the proprietary interests he has lost or parted with." This seems to me to trench dangerously on legislation. But in view of the consideration that the construction put upon the section by the Board of Revenue would result—to use the words of the learned Judges who decided the case of *Bhawani Prasad v. Ghulam Muhammad*, (1895) I. L. R., 18 All., 121,—in opening a door through which it would be possible for evasions of the law to become general in these provinces, I do not wish to depart from the principle *stare decisis*, and I concur in the order proposed.

BY THE COURT.—The order of the Court is that the appeal is allowed, the judgment and decree of the Lower Appellate Court are set aside, and the suit of the plaintiffs is dismissed, but without costs. *Appeal decreed.*

NOTES.

[This was followed in (1910) 32 All., 383; (1912) 16 I. C., 42 (All.). See also (1912) 17 I. C., 522 (All.); (1907) 10 O. C., 243.]

[212] APPELLATE CIVIL.

The 4th January, 1900.

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

MehrbanoDefendant

versus

Nadir Ali and another.....Plaintiffs.*

Act No. IV of 1882 (Transfer of Property Act), section 85—Mortgage—Prior, and subsequent mortgagees—Effect of non-compliance with section 85.

A prior mortgagee, without making a puisne mortgagee a party to his suit, sued on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. *Held* that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Janki Prasad v. Kishen Dat*, (1894) I. L. R., 16 All., 478, followed.

THE facts of this case are as follows:—

Dilawar Ali owned 6½ biswas of the village in suit. This share he hypothecated to Banwari Das by means of four deeds executed on different dates in the years 1874, 1875 and 1876. After the execution of at least two of these deeds Dilawar Ali mortgaged the same property to Narain Das. Banwari Das sued on his deeds before Act No. IV of 1882 came into force, and obtained a decree. He did not make Narain Das, the subsequent incumbrancer, a party to that suit. Narain Das sued in 1886, and obtained a decree. He did not make Banwari Das a party to his suit. Banwari Das, in execution of his decree, brought the mortgaged property to sale and purchased it himself. Narain Das sold his decree, but when the purchaser attempted to execute it by sale of the property, objection was taken by the representatives of Banwari Das, the first mortgagee.

* Second Appeal No. 605 of 1897, from a decree of H. W. Lyle, Esq., Additional District Judge of Moradabad, dated the 25th May 1897, reversing a decree of Pandit Raj Nath, Subordinate Judge of Moradabad, dated the 2nd September 1896.

The suit, out of which the present appeal arose, was brought by the representatives of Banwari Das for a declaration that the decree held by the defendant as purchaser from Narain Das could not be executed as against them. The Court of First Instance (Subordinate Judge of Moradabad) dismissed the suit. On appeal the Lower Appellate Court (Additional Judge of Moradabad) reversed the decree of the Subordinate Judge and gave the [213] plaintiffs the declaration which they sought. The defendant thereupon appealed to the High Court.

Mr. S. *Amiruddin* for the Appellant.

The Hon'ble Mr. *Conlan* and Maulvi *Ghulam Muftaba* for the Respondents.

Blair and Burkitt, JJ.—In this case the contending parties are practically the first and second mortgagees or their representatives. The first mortgagee, who is represented by the plaintiffs-respondents, sued upon his mortgage, obtained decrees for sale, and in execution purchased the mortgaged property. To his suit he did not make the puisne mortgagee a party, as he was bound to do under the provisions of section 85 of the Transfer of Property Act. The puisne mortgagee, who is represented by the defendant-appellant, in his turn instituted a suit upon his mortgage: he did not make the latter a party to his suit. The puisne mortgagee obtained a decree for sale, and has now put up and advertised the mortgaged property for sale. Thereupon the plaintiffs, the representatives of the prior incumbrancer, have instituted this suit, in which they ask for a declaration that that property is not liable to be sold in execution of the decree held by the defendant puisne mortgagee. A decree has been given by the Lower Appellate Court in terms of the prayer for relief. The meaning of the decree under appeal we take to be that the defendant the puisne mortgagee cannot bring to sale the mortgaged property in execution of a decree in a suit to which the prior mortgagee was no party. If that is the meaning of the decree it is, in our opinion, a perfectly right decree. For our authority we refer to the case of *Janki Prasad v. Kishen Dat*, (1894) I. L. R., 16 All., 478; at pp. 482, 483. Broadly stated, the effect of the ruling in that case is that a mortgagee, who has obtained a decree for sale in a suit to which he did not make other mortgagees parties, cannot bring the mortgaged property to sale in execution of that decree. It is immaterial that in the case we have just cited the parties who were prevented from bringing the mortgaged property to sale were the first mortgagees, and that in this case the party sought to be prevented from bringing the mortgaged property to sale is the representative of the second mortgagee. Indeed, the case would [214] be, if anything, stronger against the second mortgagee than against the first mortgagee. In our opinion the defendant-appellant here is not entitled to bring this property to sale in execution of the decree for sale which she holds. It may be that in a properly constituted suit with a proper array of parties and in a suit in which she offers to redeem the prior mortgages the appellant may be entitled to bring the property to sale after such redemption. As to that matter, however, it is unnecessary for us to express any opinion. We think that the decree of the Court below as interpreted above is a correct decree. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[See the notes to (1894) 16 All., 478.]

[22 All. 215]

The 10th January, 1900.

PRESENT :

MR. JUSTICE KNOX AND MR. JUSTICE BLAIR.

Barkat-un-nissa.....Applicant

versus

Abdul Aziz.....Opposite Party.*

*Civil Procedure Code, section 505—Criminal Procedure Code, section 145—
Order of Magistrate for maintenance of possession no bar to the
appointment of a receiver by a Civil Court.*

The fact that there exists in respect of any immoveable property an order of a Magistrate passed under section 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by section 505 of the Code of Civil Procedure of appointing a receiver in respect of the same property.

THE facts of this case sufficiently appear from the order of the Court.

The Hon'ble Mr. Conlan, Mr. W. K. Porter and Maulvi Ghulam Muftaba, for the Appellant.

Mr. S. Amir-ud-din, for the Respondent.

Knox and Blair, JJ.—This is an appeal from an order passed by the Subordinate Judge of Moradabad on the 29th July 1899, refusing to appoint a receiver to certain property, the subject of a suit before him. The ground on which the learned Subordinate Judge bases his refusal is that in suits like this one before him, there is no rule for the appointment of a receiver, and injunctions only are deemed sufficient. He adds that there is no reasonable cause for the appointment of a receiver. Now as to the circumstances of the case. The respondent Maulvi Abdul Aziz is a [215] person who in a prior suit had claimed a declaration from this Court that one Nurul Haq, munsarim of certain waqf property—the property now in suit—had been dismissed from his office of munsarim, that he, Maulvi Abdul Aziz, had been appointed as manager in Nurul Haq's place, and that being so, the mutawalli, Musammât Barkat-un-nissa, had no right to remove him, the said Abdul Aziz, from the managership. The suit brought by Maulvi Abdul Aziz against Musammât Barkat-un-nissa and others was fought up to this Court with the result that the declaration that Maulvi Abdul Aziz asked for was refused and his suit dismissed. This order was passed on the 10th May 1899. Upon this the appellant before us instituted a suit for the ejectment of Maulvi Abdul Aziz, and after institution applied to the Subordinate Judge for the appointment of a receiver under section 503 of the Code of Civil Procedure. The order refusing the appointment practically gives no reasons for the refusal, and it is not therefore easy to say with authority what it is that weighed upon the Subordinate Judge's mind. The matter has, in another form, been already before this Court, as the appellant asked for an appointment of an *ad interim* receiver pending the hearing of the present appeal. It was then held that the powers of a Civil Court trying an action for ejectment were not in any degree controlled by reason of a Magistrate making an order maintaining possession on behalf of one of the litigants under section 145 of the Code of Criminal Procedure. The reference here made is to an order passed by a Magistrate in 1896, whereby the Magistrate, acting under the pro-

* First Appeal No. 77 of 1899, from an order of Lala Mata Prasad, Subordinate Judge of Moradabad, dated the 29th July 1899.

visions of section 145 of the Code of Criminal Procedure, decided that Maulvi Abdul Aziz was in possession and issued an order declaring him to be entitled to possession until "evicted therefrom in due course of law." If this was the fact which weighed with the Subordinate Judge we can only repeat in clear terms what was said on the 18th November 1899, namely, that the Code of Civil Procedure and the powers of Civil Courts under that Code are in no way fettered by any order that may be passed by a Magistrate under section 145 of the Code of Criminal Procedure. The Magistrate's order under section 145 is only intended to control any period up to the time when the Civil Court takes seisin of the matter and passes such orders as may be [216] necessary for the protection of the property. In the present case we consider it absolutely necessary for the preservation and better custody and management of the property that neither of the contending parties should be in possession of it until the dispute between them has been fully determined, and that the property should remain in the custody of a person independent of both parties,—a person moreover whose position will be that of an officer of the Court appointed by and answerable to the Court for all acts done by him during the period of his receivership. We accordingly allow the appeal, set aside the order of the learned Subordinate Judge, and send this case back to him to be dealt with in the light of our instructions and in accordance with the provisions of section 505 of the Code of Civil Procedure. The appellant will get her costs. We think it expedient to add that our order is not to be interpreted as an order setting aside the order of the Magistrate. The appointment of a receiver should be made with the least possible delay, and in order that the Magistrate may be aware of the purview of the order of this Court we direct that a copy be sent to him for his information.

Appeal decreed.

NOTES.

[In (1913) 40 Cal., 862, it was held that unless there was good reason to the contrary, the Court should, as a matter of judicial discretion, appoint as its receiver the person already appointed by the Magistrate, and in any case, the Magistrate should be informed so as to give him an opportunity to withdraw his attachment.]

[22 All. 216]

REVISIONAL CRIMINAL.

The 16th January, 1900.

PRESENT :

MR. JUSTICE BLAIR.

Abdullah.....Applicant

versus

Jitu.....Opposite Party.*

*Criminal Procedure Code, sections 87, 88, 89—Absconding offender—
Proclamation and attachment—Sale of attached property—Title of purchaser.*

Where property was attached and sold as property of a proclaimed offender under sections 87 and 88 of the Code of Criminal Procedure, it was *held* that although the proclamation was irregular, yet, the property having vested in third parties strangers to the proceedings in which the proclamation was made, the sale could not be set aside.

THIS was a reference under section 438 of the Code of Criminal Procedure, made by the Sessions Judge of Allahabad. The facts out of which the reference arose are as follows.

* Criminal Revision No. 813 of 1899.

A charge was brought in May 1898 against the applicant Abdullah and two other persons. The applicant did not then [217] appear, and the case was tried out against the two others, who were fined Re. 1 each under section 426 of the Indian Penal Code. As regards the applicant, the Magistrate who tried the case recorded his opinion that further proceedings need not be taken against him, as the matter was a trivial one. Notwithstanding this the complainant subsequently applied for process against the applicant, which was granted. As the applicant failed to appear, proceedings to enforce his attendance were adopted, and finally his property was attached, and some houses belonging to him were sold. The applicant then appeared, and asked that the proceedings against him might be stopped, and, in another application, that the proceedings for attachment and sale of his property might be set aside. In both applications applicant contended that he was protected by law. In the first application he contended that the Magistrate's remarks in his judgment, dated the 14th June 1898, virtually amounted to an acquittal, and that he could not be tried. On this point the Sessions Judge was of opinion that the order of the Magistrate was not an order of acquittal, and that there was no bar to the applicant's being tried. The Sessions Judge did not in respect of the proclamation proceedings find that any irregularities occurred in the attachment proceedings, except that at the time of attachment the Government did not take possession of the houses, as it should have done under section 88 of the Code of Criminal Procedure, but it left them in applicant's possession, and that even after sale they were apparently still in his possession. He was, however, of opinion that the case was one in which it would be appropriate to stop all proceedings and to cancel the attachments and sales, and to return the sale money to the purchasers. "The charge against him" said the Judge "is a very trivial one and resulted in the case of his two fellow-accused in a fine of one rupee each only. For such an offence it appears to me unnecessary to resort to extreme processes of law which entail attachment and sale of houses, &c., &c., and also to revive the charge after so long." The Government Pleader after taking instructions from the District Magistrate agreed that the matter was not one which ought to be pursued any further. The complainant, however, opposed this course, urging that the applicant was a man of extremely bad antecedents, having several previous convictions against him, and [218] that in respect of the very matter in question he was at the time bound over to keep the peace and had purposely avoided the process of the Court until such time as his bond should have expired. Under these circumstances the Sessions Judge referred the case to the High Court for orders.

Mr. R. K. Sorabji, for the Applicant.

Maulvi Muhammad, Ishaq for the Opposite Party.

Blair, J.—Three persons were sent before a Magistrate to answer a charge under section 426 of the Indian Penal Code. Two of them presented themselves, the third was absent. The case was heard against the two who were present. Upon their being convicted, the Court showed its appreciation of the magnitude of their offence by inflicting on each of them a fine of Re. 1. That amount was ordered to be given to the prosecutor, and the Magistrate says that it would more than recoup him for any damage suffered. The Magistrate also says that in his opinion the matter was so trivial that it was not desirable to waste time in pursuing the charge against the absent man. A few days after that determination of the case against the two, a fresh complaint was lodged against the third man by the prosecutor, and the Magistrate rightly held that such a complaint was not.

barred by any rule of law. The Magistrate entertained the complaint and issued his warrant for the arrest of the person charged. After some search had been made the Magistrate found that the person for whom the warrant had been issued was absconding or concealing himself to evade process, and thereupon on the 12th September drew up a proclamation calling upon the person charged to appear at the Court House at Allahabad within thirty days of the date of proclamation. It is not clear whether there ever was complete publication as required by law of that proclamation. The provisions of sub-sections (b) and (c) appear to have been complied with upon the 17th September. There is nothing to show whether the provisions of sub-section (a) were ever complied with at all. There was no endorsement or statement in writing made by the Court validating the proclamation. It is therefore obviously not a proclamation according to law. It did not specify a place and a time for the appearance of the absent man within thirty days or more from the date of the publication.

[219] Apparently some form intended to amount to an attachment was gone through, but apparently the property, whatever it was, was allowed to remain in the possession of its original owner. A sale took place of what are described as houses. Purchasers were found and, I suppose, the purchase money was paid. Whether the possession of the property ever passed into other hands than that of the original owner is not clear. Now these matters were brought to the attention of the District Judge in an application for revision made by the absent man, and the Judge refers to this Court a statement of the facts coupled with a recommendation that further proceedings before the Magistrate should be put a stop to, and the attachment and sale be cancelled, and the sale money returned to the purchasers. It has been objected to the Judge's recommendation that the applicant in revision before him had and has his remedy under section 89 of the Code of Criminal Procedure, which enables the subject of such a proclamation as this to prove within two years that he had not absconded to avoid the warrant, and that he had not sufficient notice of the proclamation to enable him to attend within the time specified therein. It seems to me that section 89 prescribes a remedy where there is a good and legal publication, but offers no facility for the contesting of the legality of the proclamation. The fact, however, remains that a sale has taken place; that the purchasers have acquired some sort of title, and I am not aware that this Court in exercising its revisional power has ever passed an order affecting the title of persons (outsiders) to the legal proceedings in which the order is made. I therefore direct that the proceedings before the Magistrate go no further, and must decline to make the order desired in respect of the order of attachment and sale of the property. It will be for the parties to seek elsewhere their legal remedies.

NOTES.

[In 27 All., 572, Abdullah brought a successful civil suit to recover the property from the purchaser, the proclamation and sale being illegal.]

[220] APPELLATE CIVIL.

The 30th January, 1900.

PRESENT:

MR. JUSTICE BLAIR AND MR. JUSTICE BURKITT.

Shiam Lal.....Plaintiff

versus

Chhaki Lal and others.....Defendants.*

Act No. IX of 1872 (Indian Contract Act), section 23—Agreement opposed to public policy—Contract relating to purchase of land within his circle by a patwari—Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 257.

Held, that a contract entered into by a patwari for the purchase for his benefit of land situated within his circle is a contract which is opposed to public policy, even though it may not be rendered void by the rules framed by the Board of Revenue for the guidance of patwaris.

THIS was a suit for declaration of proprietary rights in and for possession of certain zamindari property brought under the following circumstances. The plaintiff was at one time patwari of a village called Birari, and, whilst occupying that position, had purchased, in the years 1878 and 1882, certain property within his circle; but, inasmuch as such a transaction was forbidden by the Rules of the Board of Revenue, he had made the purchase in the name of Udai Ram, his uncle. The plaintiff alleged that during Udai Ram's lifetime the profits of the property were regularly paid to him; but that after Udai Ram's death the defendants, who were his representatives, denied the plaintiff's title and refused to hand over the profits. Hence this suit. The Court of First Instance (Subordinate Judge of Agra) gave the plaintiff a decree. The defendants appealed. The Lower Appellate Court (District Judge of Agra) decreed the appeal and dismissed the suit on the findings, first, that the transaction in question was absolutely forbidden by the Rules of the Board of Revenue, which had the force of law, and, secondly, that the transaction was opposed to public policy. The plaintiff appealed to the High Court.

Munshi Ram Prasad and Pandit Sundar Lal, for the Appellant.

Pandit Moti Lal Nehru, for the Respondent.

Blair and Burkitt, JJ.—It is unnecessary for us to set forth the facts of this case, which will be found in the judgment of the [221] Court below. The Lower Appellate Court is wrong in saying that the patwaris' rules in force in 1878 and 1882, issued by the Board of Revenue with the sanction of the Government, had the force of law. In that matter the learned District Judge is clearly mistaken. Under section 257 of Act XIX of 1873, the only rules which, after publication in the *N.-W. P. Gazette*, acquire the force of law, are the rules mentioned in cls. (a) and (b) of that section, and they are rules to be made by the Local Government itself. If the rules as to patwaris be assumed to have been made under cl. (c) of that section, they clearly have not the force of law, and practically would be no more than departmental rules made by the Board of Revenue with the sanction of the Local Government. In this matter, therefore, the Court below was wrong.

* Second Appeal No. 572 of 1897, from a decree of F. W. Wells, Esq., District Judge of Agra, dated the 26th June 1897, reversing a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 31st March 1897.

But though, in our opinion, the Court below was wrong in that matter, it does not follow that its decision must be set aside. The learned Judge has held practically that the contract relating to purchase of land within his circle, made by the patwari for his benefit, is opposed to public policy. In our opinion that finding is correct. The learned Judge very properly puts it that "it is the duty of a patwari to keep impartially the accounts of zamindars and tenants or between zamindars with conflicting interests;" and further that "no patwari can do his duty properly if he has a direct interest in property in his circle." We think that these remarks are well founded. They show how the interest of a patwari, who has acquired a proprietary title to land within his circle, conflicts with his duty as a patwari bound impartially to record matters of most vital importance to both zamindars and tenants. In the present case the plaintiff admits that having contrary to the rules purchased land in his circle, he, with the object of concealing that purchase from his superiors, took the conveyance in the name of another person. The representatives of that other person are the defendants to this suit. Their predecessor in title was, according to the plaintiff, an active party to this transaction, which transaction we regard as being entered into for purposes opposed to public policy. For the above reasons we concur in the decrees of the Lower Appellate Court dismissing the plaintiff's suit, and we dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1904) 27 All., 73 (contravention of departmental rules prohibiting purchase of property by a police officer); (1912) 15 I. C., 933 (Nag.) (patwari duty inconsistent with lending money). In (1902) P. R., 96, a contravention of Army Regulations which had not the force of law was held not to render the transaction void.]

[222] *The 5th February, 1900.*

PRESENT :

MR. JUSTICE BURKITT.

Kamlapat and another.....Defendants

versus

Baldeo and others.....Plaintiffs.*

Execution of decree—Suit under section 231 of the Civil Procedure Code—

*Suit decreed—Appeal by decree-holders—Death of one of two joint
decree-holders—Abatement of appeal.*

A suit was instituted against two joint decree-holders under section 283 of the Code of Civil Procedure for a declaration that certain property which had been attached by them belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of First Instance, but decreed by the Lower Appellate Court. The decree-holders appealed, but during the pendency of the appeal one of them died and no steps were taken to bring his representatives on the record within the prescribed period. *Held*, that the appeal abated. *Ghamandi Lal v. Amir Begam*, Weekly Notes, 1894, p. 22, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Gulzari Lal*, for the Appellants.

Maulvi *Ghulam Muftaba*, for the Respondents.

* Second Appeal No. 70 of 1899, from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 18th October 1898, reversing a decree of Babu Chajju Mal, Munsif of Mainpuri, dated the 19th May 1897.

Burkitt, J.—In this case the plaintiffs, now respondents, instituted a suit against the defendants, now appellants, to have it declared that certain property attached by the defendants in execution of a money decree against the father of the plaintiffs belonged to the plaintiffs, and was not liable to be taken in execution of the decree against their father. The suit was dismissed by the Court of First Instance, but was decreed on appeal by the Subordinate Judge. From that decree the unsuccessful defendants (the decree-holders Kamlapat and Musammat Anandi) preferred a second appeal to this Court.

That appeal came on for hearing before me sitting alone, and having heard the parties I referred an issue to the Lower Appellate Court under section 566 of the Code of Civil Procedure. The Subordinate Judge in reply returned the issue without any finding. He reported that Kamlapat, one of the appellants, had died, and that therefore he was unable to proceed to the trial of the issue remitted to him. The fact of Kamlapat's death was not known when the appeal originally came on before me for hearing.

[223] Under the above circumstances it is contended for the respondents that the appeal has now abated, and I have to decide whether that contention is well founded or not.

It is not denied that more than six months have elapsed since the death of Kamlapat, and admittedly no application either by the co-appellant, Musammat Anandi, or by anyone on behalf of the representatives of the deceased appellant, to have his representative brought on the record, has been made. So *prima facie* it would appear that the appeal must be held to have abated. It is contended, however, that the right to proceed with the appeal has survived to the co-appellant, Musammat Anandi, and that I should act as provided in section 362 of the Code of Civil Procedure. The argument is that as the money decree passed in favour of Kamlapat and Musammat Anandi was a joint decree, Musammat Anandi is, under section 231 of the Code of Civil Procedure, entitled to sue out execution of the entire decree for the benefit of all the joint decree-holders and of the representatives in interest of any deceased joint decree-holder, and that the right to proceed with the appeal in the absence of any representative of her co-appellant has therefore survived to her. The reply to this argument is that the proceedings now before me are not proceedings in execution of a decree, but are appellate proceedings in a suit to which section 231 has no application. What I have to decide is not whether Musammat Anandi alone could prosecute execution proceedings under section 231, but whether the right to appeal from the Subordinate Judge's decree in a suit in which she and her deceased co-appellant, Kamlapat, were unsuccessful defendants, survives to her within the meaning of section 362 of the Code. In my opinion that question must be answered in the negative. In the case of *Ghamandi Lal v. Amir Begam*, Weekly Notes, 1894, p. 22, it was distinctly laid down that a Court hearing an appeal should have before it all persons whose interests might be affected by the decree in appeal. Now here there were two persons, Kamlapat and Musammat Anandi, both equally interested to procure a reversal of the decree of the Subordinate Judge by which their suit was dismissed. One of those persons died more than six months ago after they had appealed to this Court against the [224] decree of the Subordinate Judge. No application has been made to bring his representative on the record. It has not been shown or even alleged that the deceased Kamlapat left no legal representative, or that the surviving appellant, Musammat Anandi, is such representative. It is most unlikely that she could be Kamlapat's legal representative. On this state of facts there are no materials on which I can find that the right to prosecute the appeal survived to

Musammat Anandi alone. I must therefore hold that the appeal has abated. I accordingly dismiss it with costs.

Appeal dismissed.

NOTES.

[This was overruled in (1902) 25 All., 27; but see (1909) 4 I. C., 385; (1906) 5 C. L. J., 393; 11 C. W. N., 504; (1900) 23 All., 22; (1913) 21 I. C., 951 (Punjab).]

[22 All. 224]

The 8th February, 1900.

PRESENT:

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Gobardhan Das.....Defendant

versus

Jai Kishen Das.....Plaintiff.*

*Act No. IX of 1872 (Indian Contract Act), sections 15, 16, 19—Contract—
Undue influence—Coercion—Civil Procedure Code, sections 522, 526—
Award—Validity of award—Award purporting to be a considered
award of the arbitrators, but really an agreement between
the parties to the submission.*

Under section 16 of the Indian Contract Act, 1872, as it stood before it was amended by Act No. VI of 1899, it is not sufficient, in order to render a contract voidable on account of undue influence, that the party claiming to avoid the contract should have been at the time he entered into it in a state of fear amounting to mental distress which enfeebled the mind; but there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the contract. *Jones v. Merionethshire Building Society*, L. R., 1892, 1 Ch., 173, referred to.

Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was held that this would not prevent the award being a valid and binding award between the parties.

THE facts of this case are fully stated in the judgment of STRACHEY, C. J.

Babu Jogindro Nath Chaudhri, and Munshi Jwala Prasad, for the Appellant.

Pandit Sundar Lal, for the Respondent.

[225] Strachey, C. J.—This is an appeal from a decree passed in accordance with an award which was ordered to be filed under section 526 of the Code of Civil Procedure. Having regard to the construction which has been placed upon the last paragraph of section 522, with which section 526 must be read, the only ground upon which such an appeal will lie is that there has been no award in law or in fact on which a decree could legally be passed. The only grounds upon which the award was contested in the Court below and in this Court are—(1) that by reason of coercion or undue influence exercised on the mind of the appellant there was no valid submission to arbitration; and (2) that there was no award in the sense of a judicial determina-

* First Appeal No. 76 of 1898, from a decree of Babu Nil Madhab Roy, Subordinate Judge of Benares, dated the 25th November 1897.

tion by the arbitrators of the matters submitted, but the arbitrators merely accepted a settlement of those matters by other persons, and mechanically signed an award which was put before them for their signature.

Now as regards the first point, no question of coercion properly so-called arises in this case. Coercion is defined in section 15 of the Indian Contract Act. It is clear that coercion as thus defined implies a committing or threatening to commit some act which is contrary to law. No such act is alleged to have been committed or threatened in the present case. Therefore coercion may be put out of the question altogether. The question of undue influence requires further consideration. We must apply the definition of undue influence contained in section 16 of the Contract Act, as it stood before its amendment by section 2 of Act No. VI of 1899. The only part of section 16 which has been suggested as applicable here is the second clause, which provides that undue influence is said to be employed "when a person whose mind is enfeebled by old age, illness, or mental or bodily distress, is so treated as to make him consent to that to which, but for such treatment, he would not have consented, although such treatment may not amount to coercion." If the appellant's consent to the submission was caused by undue influence as thus defined, the contract was voidable at his option under section 19. Now the circumstances under which the submission was entered into were these. There had been certain dealings between the appellant Gobardhan Das and one Gopal Das, the son of the plaintiff-respondent Jai Kishen Das. Gopal Das was a young man of [226] twenty-two. The appellant was his cousin. It appears that the appellant got Gopal Das to execute a deed of sale of Gopal Das's share in certain ancestral property. There were two deeds, one was taken in the name of Gobind Das, a relative of the appellant, and after that there was a further deed executed by Govind Das in the appellant's favour. On the 26th November 1896, a complaint was filed before a Magistrate by Gopal Das against Gobardhan Das, in which he charged the appellants with offences of criminal breach of trust and cheating under the Indian Penal Code in connection with the execution of the deeds, and on the following day, the 27th, the Court directed that the case should be sent to the police for investigation. While it was still under investigation the submission now in question was executed on the 4th December 1896. The submission is signed by Jai Kishen Das and the appellant Gobardhan Das. It recites a dispute between the executants; it states that "the parties are ready to have recourse to the Civil and Criminal Courts," and that therefore, at the request of some of the relatives of the parties, in order to settle the matter, they appoint certain persons as arbitrators, and declare that they will accept whatever award the arbitrators may honestly make with respect to the dispute relating to the sale deeds. On the next day, that is, the 5th December, the complainant Gopal Das presented an application to the Magistrate, in which, referring to his complaint, he stated that he could not adduce evidence in the case, and, as the police had not as yet taken any proceedings, he prayed that the case might be struck off and his original application returned without any further inquiry. The only order then made was that the application should be sent to the police. Matters remained in that position at the time when the award was made on the 24th December 1896, and ultimately, on the 7th January 1897, the Magistrate made an order to the effect that the complainant did not desire to proceed further with the case, and virtually shelving the complaint altogether. The award and the decree thereon were in the respondent's favour.

Now dealing first with the submission of the 4th December, we have to see whether there is sufficient evidence to justify the conclusion that the ap-

pellant's consent to it was obtained by undue [227] influence employed for the purpose. Returning to section 16, the question is—Does the evidence show that the appellant, while his mind was enfeebled by mental distress, was so treated as to make him consent to that to which but for such treatment he would not have consented? The appellant has given evidence himself as to the circumstances in which his consent was given. All he says on that point is this:—"I executed the arbitration agreement, having been influenced by the criminal case. If I had not affixed my signature, those persons would have got me punished. It was through this fear that I executed the deed of agreement." That is all he says. I have no doubt that the reason why he executed the submission was his fear of the criminal proceedings. A complaint was pending which had been made only a few days before. The submission itself refers to criminal proceedings. Having regard to these facts and to the further circumstances of Gopal Das' application practically abandoning the complaint on the very day after the execution of the submission, there can be no doubt that there was an implied agreement between the parties that if the appellant agreed to the submission the prosecution should be dropped, and that this, so far as the appellant was concerned, was the main object of the submission. As I have said, I have no doubt that at the time when he executed the submission he was to some extent, at all events, in fear of the criminal proceedings, but he does not say a word to suggest the conclusion that the plaintiff or anyone else took advantage of his state of mind to apply any pressure or exercise any influence to procure his consent. It cannot be held that a state of fear by itself constitutes undue influence. Assuming a state of fear amounting to mental distress which enfeebles the mind, there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the agreement. In the case of *Jones v. Merionethshire Building Society*, L. R., 1892, 1 Ch., 173, BOWEN, L. J., appeared inclined to the view that, given an agreement in consideration of a promise not to prosecute, it was a necessary or at least a reasonable inference of fact that undue influence or pressure must have been exercised and must have operated towards obtaining the agreement. See page 186 of the report. But the other [228] Lords Justices concurred with Mr. Justice VAUGHAN WILLIAMS in the Court below in holding that there was practically no evidence of pressure or undue influence, although undoubtedly there was fear and undoubtedly an agreement not to prosecute. In India we must apply the definition of undue influence contained in the Contract Act, section 16, and taking the statements of the appellant as they stand, it appears to me that there is no sufficient evidence of the facts required by the second clause of that section. That disposes of the objection to the award so far as the submission is concerned.

Now with regard to the award itself, both the arbitrators have given their evidence and they describe what they did. Their procedure was certainly singular in one respect. One Gulab Das, the father-in-law of the appellant, appears to have interested himself in the matter and he told Ballabh Das, one of the arbitrators, that the arbitrators need not trouble themselves as he would bring the award and have it signed. He and other relatives of the parties seem to have come to a settlement of the matters in dispute. They drafted an award, and Gulab Das and others, including the appellant, took a fair copy of the award to the arbitrators for signature. The arbitrators signed the award, and at the end both parties signed it also, and stated that they accepted the award. The arbitrators further state that at the same time the award was read out and that the appellant heard it read. They say that they held no meetings and gave no consideration to the matter because they thought

that the dispute had been amicably settled with the consent of the parties in accordance with the draft award, and that in substance they adopted the draft, and gave their award in accordance with the settlement agreed to by both parties. If the award really represented a settlement agreed to by the parties, I see no objection to the draft being adopted and the award being made by the arbitrators in accordance with the settlement, any more than I see any objection to a Court passing a decree in accordance with an agreement arrived at by the litigants. The only peculiarity here is that the award on the face of it professes to be, not the adoption of a settlement arrived at by the parties, but the result of a judicial consideration by the arbitrators themselves of the issues which they formulate, on the [229] statements of the parties and on the depositions of certain witnesses; whereas it is clear that they took no evidence and did not hold any sittings at all. But they signed the award, and the conclusion which they thus signed was accepted by the parties, who of course knew perfectly well how the settlement had been arrived at, and the award drawn up.

But it is said that in that agreement for the settlement again undue influence was exercised, so that even if there was no objection to the submission, still there was no valid agreement upon which the arbitrators could make their award, and that the arbitrators therefore could not make their award in accordance with the so-called settlement, but ought to have decided the dispute irrespective of it altogether. Having read the evidence the conclusion at which I have arrived is that there is no satisfactory proof of the exercise of undue influence in obtaining the signature of the appellant to the award. It is clear that the appellant told the arbitrators at the time that he accepted the award. He himself asked the arbitrators to sign the award after hearing it read. His statement that he signed a blank paper is clearly untrue. No doubt he states in his evidence:—"People said to me that they would get the criminal case struck off if I affixed my signature to the arbitration award. It was for this reason that I affixed my signature to it. By the word 'people' I mean the following persons:—Har Kishen Das and Barjiwan Das." That is all the evidence by which he seeks to establish his plea of undue influence in the obtaining of his signature to the award. Harkishen Das is a relative of his own, related to him quite as closely as to the respondent, Jai Kishen. There is nothing to show that Barjiwan Das had any special connection with Jai Kishen rather than with the appellant. I think that there is nothing to show the exercise of undue influence in the settlement upon which the award was made or in the signing of the award, and, that being so, the arbitrators were competent to give the award in the way they did give it with the knowledge and consent of the parties. The award was valid, and consequently no appeal from the decree founded on it can be maintained.

I think it desirable to state that I might have taken a very different view of the submission and the award if the objection [230] had been taken in either the Court below or in this Court that the submission was void as being in part for an unlawful consideration, or for an object opposed to public policy within the meaning of section 23 of the Contract Act. It might very well have been contended that the submission had for its object the stifling of a prosecution for offences not compoundable under the provisions of the Code of Criminal Procedure, and if any such objection had been made, the judgments of the Court of Appeal in *Jones v. Merionethshire Building Society*, L.R., 1892, 1 Ch., 173, of Mr. Justice STIRLING in *Lound v. Grimwade*, L.R., 39 Ch. D., 605, and of the Madras High Court in *Srirangachariar v. Ramasami Ayyangar*, (1894) I. L. R., 18 Mad., 189, would have required serious consideration. No

such defence or issue has, however, been raised, and I do not think we should go out of our way to raise it for the appellant, when neither this Court nor the Court below has been asked to do so.

I think this appeal should be dismissed with costs.

Banerji, J.—I also would dismiss the appeal. It was not the appellants' case in the Court below, nor is it his case in this Court, that the agreement of submission to arbitration is void on the ground that the object or the consideration of the agreement is unlawful, that object or consideration being the stifling of a criminal prosecution. No issue was joined on that point in the Court below, and no plea has been urged in the memorandum of appeal to this Court to that effect. It is not necessary, therefore, to consider that question in this appeal.

The only ground, upon which the validity of the submission was questioned was that of coercion, or undue influence. It is clear that there was no coercion, and on the evidence it cannot be held that there was undue influence within the meaning of section 16 of the Contract Act. On this point I agree with the observations of the learned Chief Justice and have nothing to add.

As regards the award itself, the evidence shows that it embodies the result of a settlement come to by the parties to which both of them consented. They signed the award as indicating their acceptance of it, and it has not been proved that the appellant's consent to the settlement was procured by undue influence.

Appeal dismissed.

NOTES.

[There was an amendment in 1899 by which a new section was substituted for sec. 16 of the Indian Contract Act, 1872. The decision would be the same under it (Pollock and Mulla, 1913, III Edn. p. 81).

See also (1907) 1 S. L. R., 47; (1904) P. R., 82; (1909) 11 C. L. J., 131.

As regards the binding character of awards, see also (1913) 20 I. C., 355; (1914) 22 I. C., 412.]

[231] *The 14th November, 1899.*

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND

MR. JUSTICE BANERJI.

In the matter of the petition of Durga Prasad.^{*}

Civil Procedure Code, sections 372, 582—Appeal—Devolution of interest pending appeal—Array of parties in appeal.

By virtue of the first portion of section 582 of the Code of Civil Procedure, section 372 of the Code applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. *In the matter of the petition of Sarat Chandra Singh*, (1896) I. L. R., 18 All., 285, followed. *Rajaram Bhagwat v. Jibai*, (1884) I. L. R., 9 Bom., 151, and *Ramji Morarji v. J. E. Ellis*, (1895) I. L. R., 20 Bom., 167, referred to. *The Collector of Muzaffar Nagar v. Husaini Begam*, (1895) I. L. R., 18 All., 86, distinguished.

THIS was an application in a second appeal to substitute as respondent a person who alleged that he had during the pendency of the appeal purchased the decree in dispute from the successful plaintiff respondent. The facts of the case sufficiently appear from the order of Chief Justice.

Pandit *Sundar Lal*, for the Applicant.

Babu *Satish Chandar Banerji*, for the Defendant-Appellant.

^{*} Application in Second Appeal No. 712 of 1898, dated November 14th, 1899.

Strachey, C. J.—In this case an application is made that the name of the applicant may be placed on the record of an appeal pending in this Court in place of the original respondent.

The original respondent was the successful plaintiff in the suit. The applicant claims to be placed on the record as the assignee of the decree from the original respondent. It is not denied that he is such an assignee, and that the assignment was effected shortly after the institution of the appeal.

The application is opposed by the appellant on the ground that this Court has not the power at the stage of appeal to substitute for the original respondent the person who claims as assignee of the decree. That objection is based on certain observations made in a judgment of this Court in the *Collector of Muzaffarnagar v. Husaini Begam*, (1895) I. L. R., 18 All., 86.

Now that judgment appears to me to be clearly distinguishable. In the first place, it appears from the last paragraph of the judgment that the observations which have been relied upon were *obiter*, as the application was dismissed solely on the ground that [232] the assignee, who was the only person apparently interested in maintaining or entitled to support the decree obtained by the original respondent, objected to being made a party. In the second place, the observations relied on were expressly limited to an expression of a doubt. In the third place (and this is the most important ground of distinction), the devolution of interest there did not take place pending an appeal, but between the passing of the decree in the Court below and the presentation of the appeal to this Court. It is not necessary for us to express any opinion one way or another as to whether, in a case of such devolution, we should follow the observations of the learned Judges in that case; but it is clear that their reasoning, especially in regard to the words "pending the suit" in section 372 of the Code, had reference to the particular circumstances of that case, and especially to the fact that the devolution of the interest took place before any appeal was instituted, and not while any suit or appeal was actually pending. On the other hand the decision of Mr. Justice BANERJI in *In the matter of the petition of Sarat Chandra Singh*, (1896) I. L. R., 18 All., 285, is precisely in point. I entirely agree with the view expressed in that case.

It may be, as was pointed out in the earlier of the two cases I have mentioned, that by reason of the concluding words of section 582 the word "suit" in Chapter XXI could be held to include an appeal in proceedings arising out of the death, marriage or insolvency of parties, and therefore would not include an appeal in such proceedings as section 372 contemplates, which do not arise out of death, marriage or insolvency. But that does not make inapplicable to section 372 as well as to other parts of the procedure of Courts of First Instance the earlier part of section 582; so that although in section 372 the word "suit" may not include an appeal, the appellate Court nevertheless has in appeals as nearly as may be the same power as a Court of First Instance has under section 372 in a suit. Any other view would, I think, lead to obvious anomalies. To take the present case,—the assignee is given by section 232 a power, subject to the discretion of the Court, to have the decree executed in the same manner and subject to the same conditions as the original respondent, and it [233] seems improbable that the assignee should have an express power of executing the decree and absolutely no power at all to defend that decree when attacked in appeal. I think it was to avoid that anomaly, among others, that the Legislature enacted the earlier part of section 582. Other anomalies are pointed out by Mr. Justice BANERJI in his judgment. If there is no way to enable this applicant to be brought upon the record as respondent to the appeal, the result is that the appeal will go on against the original respondent who no

longer holds the decree attacked and has no longer any interest in defending it. Presumably the appeal would be dealt with *ex parte*, the only person interested in maintaining the decree having no opportunity to support it, and yet, the assignment having taken place during the pendency of the appeal, the applicant, though unable to support the decree, might nevertheless be held bound by its reversal. A similar anomaly would be the result if the assignor instead of having succeeded in the Court below had lost, had appealed against the decree, and afterwards had assigned his rights. The view that the Court has the power in appeal to bring on the record the assignee of the original respondent is supported by decisions of the Bombay High Court in *Rajaram Bhagwat v. Jibai*, (1884) I. L. R., 9 Bom., 151, and *Ramji Morarji v. J. E. Ellis*, (1895) I. L. R., 20 Bom., 167. For these reasons I am of opinion that this application should be granted by adding the name of the applicant as respondent to the appeal along with the original respondent. The applicant will get costs of this application.

Banerji, J.—I adhere to the view I expressed in *In the matter of the petition of Sarat Chandra Singh*, (1896) I. L. R., 18 All., 285, and hold that, by virtue of the first portion of section 582, section 372 applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. That view is supported by the rulings of the Bombay High Court to which the learned Chief Justice has referred. In the case of *The Collector of Muzaffarnagar v. Husaini Begam*, (1895) I. L. R., 18 All., 86, the question with which we have to deal in this case was not decided.

I agree in the order proposed by the learned Chief Justice.

[234] REVISIONAL CRIMINAL.

The 8th February, 1900.

PRESENT:

MR. JUSTICE AIKMAN.

Isuri Prasad Singh and others.....Applicants

versus

Umrao Singh.....Opposite Parties.*

Act No. XLV of 1860 (Indian Penal Code), section 499—Defamation—Statement made by an accused person in an application to a Court—Statement made in good faith for protection of the interests of the person making it.

In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one Umrao Singh in order to prejudice them in their defence in a civil suit which Umrao Singh had caused to be brought against them. *Held* that this statement did not amount to defamation—not because of the application of any principles of English law, for such principles did not apply to prosecutions for defamation under the Indian Penal Code—but because the statement fell within the ninth exception to section 499 of the Indian

* Criminal Revisional No. 789 of 1899.

Penal Code. *Queen-Empress v. Balkrishna Vithal*, (1893) I. L. R., 17 Bom., 573; *In re Nagarji Trikamji*, (1894) I. L. R., 19 Bom., 340; *Queen v. Pursoram Doss*, (1865) 3 W. R., Cr. R., 45; *Greene v. Delannoy*, (1870) 14 W. R., Cr. R., 27; and *Abdul Hakim v. Tej Chandar Mukerji*, (1881) I. L. R., 3 All., 815, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

. Mr. *E. A. Howard*, for the Applicants.

Babu *Satya Chandar Mukerji*, for the Opposite Parties.

Aikman, J.—Proceedings had been instituted at the instance of one Balwant Singh against Isuri Prasad Singh and six other persons to have them bound over to keep the peace. Whilst the case was pending in the Court of a Magistrate of the first class, a petition was presented to the District Magistrate by Isuri Prasad Singh and the others, asking that the case might be transferred to some other Court, and that a local inquiry might be made. In this petition it was alleged by the petitioners that one Umrao Singh had got Balwant Singh falsely to institute the proceedings against them in order to prejudice them in their defence to a civil suit which Umrao Singh had caused to be brought against them. Umrao Singh coming to know of this, [235] prosecuted the petitioners for defamation. They have been convicted under section 500, Indian Penal Code, and sentenced, Isuri Prasad Singh to a fine of Rs. 10, and the others to a fine of Rs. 2 each. Both parties applied to the Sessions Judge—Umrao Singh asking that the case should be reported to this Court with the view of having the sentences enhanced, and the accused asking that the case should be reported with the view of having the convictions quashed.

The learned Judge has forwarded the case for the orders of this Court. He stated that, in his opinion, the convictions were right, and that it appears to him that they should either be set aside as bad in law, or that the sentence imposed on Isuri Prasad should be enhanced.

There is no doubt that the expressions used by the accused in their petition to the District Magistrate are in themselves defamatory. But the expressions complained of are undoubtedly pertinent to the case which was pending against the accused in the Criminal Court. According to English case-law the accused could not therefore be proceeded against, either civilly or criminally, for using those expressions.

There are decisions of the Bombay and Madras High Courts which, applying the principles of English law, hold that witnesses and counsel cannot be prosecuted for defamatory statements made by them as such. In one case, however, in the Bombay High Court, *Queen-Empress v. Balkrishna Vithal*, (1893) I. L. R., 17 Bom., 573, TELANG, J., expressed an opinion that according to correct principles of construction the meaning of the words of the section of the Indian Penal Code, defining defamation, should not be limited so as to exclude therefrom any evidence given by a witness before a Court of Justice. And in a subsequent case *In re Nagarji Trikamji*, (1894) I. L. R., 19 Bom., 340, in which a pleader had been convicted of defamation for having, in defending his client, described the witnesses for the prosecution as "loafers," JARDINE and FARRAN, JJ., said they were inclined to share the doubts expressed in the previous case by TELANG, J., and acquitted the pleader, not on the ground of English law, but because they held that his case was covered by exception 9 to section 499 of the Indian Penal Code. The case [236] of *Queen v. Pursoram Doss*, (1865) 3 W. R., Cr. R., 45, was somewhat similar to the present. In that case it was contended that a defendant in a criminal case was not tongue-tied, but might make use of any remarks,

however defamatory *per se*, with perfect equanimity and protection from indictment or action. As to this plea KEMP, J., remarked :—"This may or may not be so, but the present case is governed by the provisions of the Indian Penal Code," and in this opinion GLOVER, J., concurred. In a criminal revision case, (1870) 14 W. R., Cr. R., 27, PHEAR, J., observed :—"If the facts which are the subject of the complaint fall within the limits of the definition in section 499, construed, as the section ought to be, according to the plain meaning of the words therein used, and if they are not covered by any of the exceptions to be found in the Code, then in my judgment they amount to defamation quite irrespective of what may be the English law on the subject;" and in this observation JACKSON, J., concurred.

It may be true that the principles of public policy which, according to English law and some Indian decisions, ought to guard the statements of counsel and witnesses apply with equal force to the statements made by accused persons for their own protection. But, as was remarked in the case *Abdul Hakim v. Tej Chandar Mukarji*, (1881) I. L. R., 3 All., 815, when there is substantive law which can be appealed to for information and guidance, the safer course is to look there to ascertain some intelligible rule or rules by which the determination of cases like the present should be regulated. The Indian Legislature might, had it chosen, have so framed section 499 of the Indian Penal Code as to afford to parties, counsel, and witnesses in this country the same protection against indictment for defamation which they have in England. The fact remains that it has not seen fit to do so. This case therefore must, I hold, be decided according to the Indian Penal Code.

The words used in the petition being in themselves defamatory, the conviction under section 500 of the Penal Code was right, unless it can be shown that the accused are protected by one or other of the exceptions to section 499. The only [237] exception at all applicable to this case is the ninth, which enacts that it is not defamation to make an imputation on the character of another, provided that the imputation be made in good faith for the protection of the interest of the person making it.

In this case it is clear that the imputation was made, for the protection of the interest of the accused. The question remains—Was it made in good faith? In the case *In re Nagarji Trikamji*, (1894) I. L. R., 19 Bom., 340, the Judges remark at p. 349 of the judgment :—"In considering whether there was good faith, *i.e.*, under section 52, due care and attention of the person making the imputation must be taken into consideration." This I understand to mean that in considering the amount of care and attention required to establish good faith, regard must be had to the position in which the person making the imputation stands at the time he makes it. In the present case the Magistrate says in his judgment "the accused ought to have ascertained whether the facts mentioned by them in the aforesaid petition were true: and it was necessary for them to prove in this case that those facts were true, but they have failed to do so." This I hold to be an incorrect view of the law, inasmuch as, considering the position in which the accused stood, it is requiring from them an undue amount of care and attention to call upon them to substantiate all that they deemed it necessary to say for the protection of their interests. The accused may have been quite mistaken in thinking that Umrao Singh had caused Balwant Singh to institute the proceedings against them. But I think the evidence adduced by them as to the enmity borne against them by Umrao Singh, the connection between him and Balwant Singh, and other circumstances, is sufficient to show that it was not unreasonable for them to entertain the belief that Umrao Singh was the real instigator of the proceedings. I am of

opinion that the accused are protected by the ninth exception. I quash the convictions and direct that the fines, if paid, be refunded.

NOTES.

[This decision was followed in 29 All., 685 ; (1911) 13 I. C., 217 (Sindh).]

The Madras view is that the privilege of judicial proceedings is absolute, on grounds of public policy without reference to the Penal Code.—37 Mad., 110.]

[238] APPELLATE CIVIL.

The 10th February, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE BANERJI.

Bimal Jati.....Plaintiff

versus

Biranja Kuar and others.....Defendants.*

Mortgage—Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act No. IV of 1882 (Transfer of Property Act), s. 60.

A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced ; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness, or unreasonableness.

Held, that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was, *prima facie*, a good covenant and enforceable by the mortgagee. *Biggs v. Hoddinott*, (1898) 2 Ch. 307, *Santley v. Wilde*, (1899) 2 Ch., 474, and *Orby v. Trigg*, (1722) 9 Mod., 2, referred to.

THE facts of this case are as follows. Madho Saran Singh and Bishan Saran Singh mortgaged to the plaintiff, Goshain Bimal Jati, a 9 anna 3 pie share of mauza Rampur. In the mortgage deed it was recited that the mortgagors had previously sold to the mortgagee a 4 anna share in the same village at a certain specified price ; and the mortgagors, after setting forth the terms of the mortgage, proceeded to covenant that “ if we, the executants, stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale consideration at which we have sold the 4 anna share, and if we transfer it to any other person such transfer made by us shall be deemed invalid and wrong as against the conditions set forth in this instrument.” Notwithstanding the above covenant, the mortgagors sold the share in question by a deed of sale dated the 17th July 1897 to Ram Nandan Pande and others. The mortgagee accordingly sued upon the said covenant, alleging that it gave him a right of pre-emption over the mortgaged property. [239] The Court (Subordinate Judge of Azamgarh) found (1) that the covenant relied on did not give to the mortgagee any right of pre-emption, (2) that the covenant was void for uncertainty within the meaning of section 29 of the Indian Contract Act, 1872, and (3) that the covenant was also void for want of

* First Appeal No. 105 of 1898, from a decree of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 9th February 1898.

consideration under section 25* of the same Act. The Court accordingly dismissed the suit. The plaintiff thereupon appealed to the High Court.

Munshi Gobind Prasad, for the Appellant.

Mr. A. H. C. Hamilton, *Pandit Sundar Lal*, and *Munshi Haribans Sahai*, for the Respondents.

Strachey, C. J.—This is a suit by the mortgagee under a mortgage for fifteen years, executed on the 12th November 1889, to enforce against the mortgagor and his vendee of the mortgaged property, a covenant for pre-emption, alleged to be contained in the mortgage-deed. Certain lessees from the mortgagor were also made defendants. The Court below has dismissed the suit upon two grounds—first, that the covenant in question does not give any right of pre-emption to the mortgagee and is unenforceable at law, because, in the opinion of the Court, it is void for uncertainty; secondly, that the covenant was without consideration. Against this decision the plaintiff has appealed to this Court.

Now the deed of mortgage recites that the mortgagors have already sold to the mortgagee a 4-anna share in the village of Rampur. The mortgage is a mortgage of another 9 annas 3 pie share in the same village. The covenant in question is as follows:—"If we the executants stand in need of making an absolute transfer of the mortgaged share, we shall transfer it absolutely to the said Goshain at the same rate of sale-consideration at which we have sold the 4 annas share; and if we transfer it to any other person, such transfer made by us shall be deemed invalid and wrong, as against the conditions set forth in this instrument." Although the word "pre-emption" is not used, and although it is not expressly stated that before transferring to any other person the property must be offered to the mortgagee at the price specified, I think there cannot be any doubt that that is the substantial meaning of the covenant. It cannot possibly [240] mean that if the property were offered to the plaintiff at that price and were refused by him, the mortgagor could not transfer it to any other person. If that view is correct, then the covenant means that the plaintiff is to have an option of purchase at the price specified, and that any transfer to a third person, without first offering it to the plaintiff, is to be deemed invalid as against him. That is pre-emption and nothing else, and the Court was wrong in holding that the covenant was not one for pre-

Agreement without consideration void.—

unless it is in writing and registered,

or is a promise to compensate for something done.

(3) it is a promise, made or is a promise to pay a debt barred by Limitation law.

* [Sec. 25:—An agreement made without consideration is void unless,

(1) it is expressed in writing and registered under the law for the time being in force for the registration of assurances and is made on account of natural love and affection between parties standing in a near relation to each other; or unless

(2) it is a promise to compensate wholly or in part a person who has already voluntarily done something for the promisor or something which the promisor was legally compellable to do; or unless

(3) it is a promise, made or by his agent generally or specially authorized in that behalf, to pay wholly or in part a debt of which the creditor might have enforced payment but for the law for the limitation of suits.

In any of these cases, such an agreement is a contract.

Explanation 1.—Nothing in this section shall affect the validity, as between the donor and donee, of any gift actually made.

Explanation 2.—An agreement to which the consent of the promisor is freely given is not void merely because the consideration is inadequate; but the inadequacy of the consideration may be taken into account by the Court in determining the question whether the consent of the promisor was freely given.]

emption. I think also that the Court is wrong in holding that the agreement was void for uncertainty. It has, I think, a perfectly definite meaning, and that is the meaning which I have just stated. I think also that the Court was wrong in holding that the agreement was without consideration. There is one single and entire consideration for the mortgage-deed. The consideration for the mortgage, and for all the mortgagor's covenants, is the loan, — the advance made by the mortgagee. It follows that both the preliminary grounds upon which the Court below dismissed the suit, are wrong.

The defendant, however, seeks to uphold the decision upon two other grounds. The first is, that the stipulation of the covenant was for a collateral advantage to the mortgagee, and was therefore void according to the English authorities relating to the principle that a mortgagee is not entitled to the benefit of any stipulation contained in the instrument of mortgage for any collateral advantage, or to anything more than the security for payment of his principal, interest and costs. The answer to that contention is first, that no such doctrine is to be found in the Transfer of Property Act, 1882, which in this country governs the relations of mortgagor and mortgagee; and, secondly, that the latest English authorities show that the rule about collateral advantage is no longer recognized in England in the sense and to the extent supposed in some of the earlier cases, and that provided two conditions are secured, a mortgagee may at the time of the advance and as a term of it stipulate for a collateral advantage. The two conditions are, first, that the bargain is not an unconscionable bargain, and not the result of improper pressure, unfair dealing, or undue influence; secondly, that the right of redemption is not taken away or fettered. That is in substance [241] the effect of the two latest cases on the subject decided by the Court of Appeal, *Biggs v. Hoddinott*, (1899) 2 Ch., 307, and *Santley v. Wilde*, (1899) 2 Ch., 474.

Now as to the first of these two conditions, the Court below has not considered whether the bargain here was unconscionable or oppressive. It has simply dismissed the suit upon the two other grounds which I have mentioned. Whether a bargain is open to objection in reference to the first condition cannot be decided upon any general rule, but depends upon the evidence as to the particular circumstances of the bargain itself. But it is said that the stipulation here is void with reference to the second condition, that is to say, as a fetter or clog on the right of redemption. Now the condition about fettering the right of redemption only means that no bargain made at the time of a mortgage is valid, which prevents a mortgagor from redeeming upon payment of principal, interest and costs. As pointed out by Mr. Justice SHEPARD, that is the effect of section 60 of the Transfer of Property Act, which provides for the right of redemption, but which is not prefaced with any such words as "in the absence of a contract to the contrary." But so long as the bargain places no obstacle in the way of the mortgagor getting back his property upon payment of the mortgage money, it is not open to objection as a fetter on the right of redemption. Then is this covenant for pre-emption open to objection on this ground? It does not, it appears to me, in the least stand in the way of the mortgagor getting back the property, if and when he pays the mortgage-money. There is no provision whatever requiring the mortgagor to transfer the property to the mortgagee if he does not wish to do so. There is nothing which, assuming the mortgage-money to be paid, gives the mortgagee any further right or interest in the property. In *Fisher on Mortgages*, 4th edition, section 1150, it is expressly stated that "the Court will not object to a covenant in a mortgage for a right of pre-emption in the mortgagee in case the estate be sold; though he is liable to be deprived of its benefit by oppressive or fraudulent conduct"—*Orby v. Trigg*, (1722) 9 Mod., 2. The only special

feature here is, that the covenant for pre-emption [242] includes a stipulation for the price which the mortgagee is to pay in the event of the sale being made to him. The price is to be calculated with reference to the price for which the 4 annas share was previously sold. Does that particular feature in the covenant bring it within the condition invalidating bargains as fettering a right of redemption? I do not think it does. If that particular provision could be shown to be fraudulent or oppressive in the sense already stated, the matter would be different; but so far that has not been shown. I think therefore that as the suit has been wrongly dismissed upon a preliminary point, the appeal must be allowed, the decree of the Court below set aside, and the case remanded to that Court under section 562 of the Code of Civil Procedure for disposal on the merits, with reference to the other issues in the case. The appellant will get his costs of this appeal. Other costs will abide the result.

Banerji, J.—I agree that the grounds upon which the Court below has dismissed the suit cannot be sustained. The covenant upon which the plaintiff relies is not a covenant which imposes an absolute bar upon the mortgagor's right to transfer the mortgaged property to any person other than the mortgagee, but simply gives the mortgagee a preferential right to purchase the property at the price specified in the covenant, in the event of the mortgagor electing to sell the property. This, as pointed out by the learned Chief Justice, is nothing more than a covenant conferring on the mortgagee a right of pre-emption. It is not a covenant which is void for vagueness or uncertainty, nor is it a covenant without consideration. The amount advanced under the mortgage-deed is the consideration for all the covenants contained in that deed. The learned advocate for the respondent seeks to support the decree of the Court below on the ground that the covenant in question is not legally enforceable, inasmuch as it fetters the right of redemption of the mortgagor. I am unable to accept this contention. The recent authorities in England, to which the learned Chief Justice has referred, lay down this, that a provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced, but that a covenant [243] conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. The covenant in the mortgage-deed which is in question in this case does not affect the right of the mortgagor to redeem the mortgaged property upon payment of the amount due upon the mortgage. It no doubt confers a collateral advantage upon the mortgagee, but the mortgagee cannot be deprived of that advantage unless, as has been stated above, the covenant can be repudiated on the ground of its being oppressive or unfair. The question whether the covenant in this case is objectionable on the ground last mentioned, was not considered in the Court below, and it is a question which that Court may have to consider when the case goes back to it, but I agree in holding that the said covenant does not fetter the mortgagor's right of redemption, and is not open to objection on that ground. I agree in the order proposed by the learned Chief Justice.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1909) 3 S. L. R., 130; (1903) 2 L. B. R., 108; see also (1905) 7 Bom. L. R., 772; (1909) 10 C. L. J., 626.

The nature and effect of a pre-emptive clause of the sort were exhaustively dealt with in two Judgments of the Madras High Court, (1901) 24 Mad., 449 by Bhashyam Ayyangar, J. and (1912) 24 M. L. J., 84 by SUNDARA IYER, J.]

[22 All. 243]

The 12th February, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND
MR. JUSTICE BANERJI.

Sheo Narain.....Plaintiff

versus

Chunni Lal and others.....Defendants.*

Civil Procedure Code, section 244—Execution of decree—Representative of party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.

Held, that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of section 244 of the Code of Civil Procedure. *Madho Das v. Ramji Patak*, (1894) I. L. R., 16 All., 286, referred to.

THE suit out of which this appeal arose was a suit for sale on a mortgage of the 5th June 1885. The mortgage sued upon was executed pending a suit by the respondents on an earlier mortgage over the same property taken by the respondents in 1882. The respondents in that suit obtained a decree for sale on the 30th September 1885. In his plaint in the present suit the plaintiff stated that the respondents "are impleaded as defendants on account of their decree of the 30th September 1885, [244] and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 20,000 odd was still due to them under their decree, and that the claim was barred by section 244 of the Code of Civil Procedure. On this question the Court of First Instance framed two issues. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs. 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by section 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiffs raised as to such payment and as to the incorrectness of the defendants' accounts was barred by section 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree. The plaintiff thereupon appealed to the High Court.

Munshi Ram Prasad and Pandit Moti Lal, for the Appellant.

Babu Jogindro Nath Chaudhri and Pandit Sundar Lal, for the Respondents.

Strachey, C. J.—The only question in this appeal is whether the Court below has rightly made the plaintiff's decree conditional on the payment by him to the respondents of the amount due under their decree of the 30th September 1885. The plaintiff sued on a mortgage of the 5th June 1885. The respondents were prior mortgagees under a mortgage of 1882. At the time when the mortgage to the plaintiff was executed a suit on the respondents'

* First Appeal No. 160 of 1898, from a decree of Maulvi Syed Siraj-ud-din, Subordinate Judge of Agra, dated the 29th March 1898.

mortgage was pending. The respondents obtained a decree on their prior mortgage on the 30th September 1885. In paragraph 8 of the plaint in the present suit for sale the plaintiff states that the respondents "are impleaded as defendants on account of their decree of the 30th September 1885, and that the entire amount of the said decree was satisfied without anything remaining due, but nevertheless they say their debt is still due; the plaintiff therefore is willing to pay the portion of their [245] demand found in the Court's opinion to be still remaining due." The respondents in their written statement denied that the amount due to them had been fully satisfied, and contended that according to a correct account Rs. 29,000 odd was still due to them under their decree, and that the claim was barred by section 244 of the Code of Civil Procedure. The issues framed by the Court below as between the plaintiff and the respondents were issues 10 and 13. Issue 10 was "whether the whole money due to the defendants 2 and 7 has been satisfied, or a sum of Rs. 29,534 is still due?" Issue 13 was "whether the suit as against these defendants is barred by section 244 of the Code?" On these points the Court below held that in fact the whole amount due under the decree had been paid, but that the plea which the plaintiff raised as to such payment and as to the incorrectness of the defendants' accounts was barred by section 244. The Court accordingly made the plaintiff's decree subject to his paying to these two defendants the amount of their decree.

Now whether this view is correct depends on, first, whether the plaintiff was a representative of a party to the decree of the 30th September 1885, within the meaning of section 244; and, secondly, whether he is attempting to raise in this suit any question which under section 244 can only be determined by order of the Court executing that decree and must not be raised by separate suit.

As to the first of these questions, the plaintiff took his mortgage of the 5th June 1885, during the pendency of the suit in which the decree of the 30th September was passed. He therefore took it subject to the decree, and the decree was binding on him so far as the property comprised in his mortgage was concerned. In the case of *Madho Das v. Ramji Patak*, (1894) I. L. R., 16 All., 286, an opinion was expressed that a purchaser *pendente lite* from a defendant mortgagor should be treated as a representative of the defendant in execution of decree within the meaning of section 244, the reason being that such a purchaser is bound by the decree and should therefore be allowed to make any objection in the execution department which the parties to the decree or any one else bound by it would be competent to make. And it does [246] seem reasonable that no distinction should be made so far as the competency to make objections in execution is concerned between one person who is bound by the decree and another. A purchaser from the defendant mortgagor *pendente lite* is just as much bound by the decree as a purchaser from the judgment-debtor after the decree, and I can see no reason why he should be in an inferior position so far as section 244 is concerned. If that is a correct view as regards a purchaser *pendente lite* in a suit on a mortgage, I think that it must be equally true of a mortgagee who takes a mortgage during the pendency of such a suit. The remarks in the case of *Madho Das v. Ramji Patak*, to which I have referred, were no doubt made *obiter*. The decree against the judgment-debtor was a simple money decree, creating no charge on specific property, to which of course different considerations apply. I think, however, that the observations are sound and reasonable, and that a mortgagee taking *pendente lite*, like the present plaintiff, ought to be regarded as a representative of the mortgagor defendant in the sense that, being bound

by the decree afterwards passed, he is competent, under section 244 of the Code, to raise in the execution of that decree any of the questions mentioned in that section.

The only remaining question is whether such a point is raised in the present suit and ought to have been raised before the Court executing the decree of the 30th September 1885. The question raised—and the only question raised in the present suit—is whether that decree has been fully satisfied or not. If it has been fully satisfied, then admittedly the present respondents cannot stand in the plaintiff's way. If it has not been fully satisfied, then the plaintiff could only get a decree in the present suit conditional on his payment of whatever is due under that decree. Under cl. (c) of section 244, that question being one of the discharge or satisfaction of the decree, could only have been determined by order of the Court executing the decree, and therefore could not be determined by a separate suit. Proceedings in execution of that decree were taken from time to time, and the present plaintiff could then have raised precisely the contentions which he raises now as to the manner in which under the decrees the proceeds of the property sold should have been [247] appropriated. I do not say that the plaintiff cannot even now raise these contentions before the Court executing the decree. We do not now decide any question as to whether that decree has or has not been satisfied. All that we decide is that the plaintiff cannot, in the present suit, raise the contention of its being satisfied, and of the incorrectness of the defendants' account which he has sought to raise. The result is that the decision of the Court below was right as regards these respondents, and that the appeal of the plaintiff as regards them must be dismissed with costs. We extend the time for payment of the sum of Rs. 29,534 until the 9th August of this year.

Banerji, J.—I also would dismiss the appeal. The question raised between the parties to this appeal was whether or not the amount of the decree obtained by the respondents on the 30th September 1885, on their prior mortgage of the 26th April 1882, has been discharged. A further question arises whether the above question can be determined in this suit by reason of the provisions of section 244 of the Code of Civil Procedure. The application of that section depends on, first, whether the appellant is a representative of a party to the suit within the meaning of that section; and, secondly, whether the question now raised is one of the questions which can be determined by a Court executing the decree under section 244. That the question raised in this suit is a question on which the application for execution of the respondents can be opposed admits of no doubt. The appellant alleges that if a proper account be taken of payments made in respect of the decree of the 30th September 1885, in accordance with the terms of that decree nothing is due upon the decree. That is clearly a question relating to the discharge or satisfaction of the decree, and can be determined under section 244 of the Code, provided that the appellant fulfils the condition of being a representative of a party within the meaning of that section. I agree in holding that being a transferee *pendente lite*, and being thus a person who is bound by the decree, he must be deemed to be the representative of the judgment-debtor to the decree, namely, the mortgagor. This was the view held in the case of *Madho Das v. Ramji Patak*, (1894) I. L. R., 16 All., 286, and to that view I still adhere. The [248] question, therefore, of the discharge or otherwise of the respondent's mortgage is not a question which could be determined in this suit. This is sufficient for the disposal of the appeal, and it is not necessary to decide whether or not, as a matter of fact, the amount of the respondent's

mortgage has been fully satisfied. I concur in the order proposed by the learned Chief Justice.

Appeal dismissed.

[22 All. 248]
FULL BENCH.

The 1st and 2nd March, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE BANERJI
AND MR. JUSTICE AIKMAN.

Mathura Singh.....Plaintiff

versus

Bhawani Singh and others.....Defendants.*

Act No. XV of 1877 (Indian Limitation Act), section 14—Limitation—"other cause of a like nature" to defect of jurisdiction—Error in procedure.

In cases in which section 14† of the Indian Limitation Act, 1877, is pleaded as protecting the plaintiff from the bar of limitation, if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of section 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff.

* First Appeal No. 166 of 1898, from a decree of Maulvi Syed Zain-ul-abdin, Subordinate Judge of Ghazipur, dated the 30th March 1898.

† [Sec. 14 :—In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First Instance or in a Court of appeal, against the defendant shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which, from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.]

Like exclusion in case of order under Civil Procedure Code, Section 20. In computing the period of limitation prescribed for a suit, proceedings in which have been stayed by order under the Code of Civil Procedure, Section 20, the interval between the institution of the suit and the date of so staying proceedings, and the time requisite for going from the Court in which proceedings are stayed to the Court in which the suit is re-instituted, shall be excluded.

In computing the period of limitation prescribed for any application, the time during which the applicant has been making another application for the same relief, shall be excluded, where the last-mentioned application is made in good faith to a Court which from defect of jurisdiction, or other cause of a like nature, is unable to grant it.

Explanation 1.—In excluding the time during which a former suit or application was pending or being made, the day on which that suit or application was instituted or made, and the day on which the proceedings therein ended, shall both be counted.

Explanation 2.—A plaintiff resisting an appeal presented on the ground of want of jurisdiction shall be deemed to be prosecuting a suit within the meaning of this section.]

Hence where the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action, and there was on the plaintiff's part in the former suit no want of good faith or due diligence, the plaintiff was held entitled to the benefit of the time during which he was prosecuting the former suit, that is, from the time when the plaint in that suit was filed until the time when it was returned to the plaintiffs for amendment.—*Chunder Madhub Chuckerbutty v. Ram Koomar Chowdry*, (1866) B. L. R., Sup. Vol., 553 ; 6 W. R., C. R., 184 ; *Brij Mohan Das v. Mannu Bibi*, (1897) I. L. R., 19 All., 348 ; *Deo Prosad Sing v. Pertab Kairee*, (1883) I. L. R., 10 Cal., 86 ; *Bishambhur Haldar v. Bonomali Haldar*, (1899) I. L. R., 26 Cal., 414 ; *Ram Subhag Das v. Gobind Prasad*, (1880) I. L. R., 2 All., 622 ; *Jema v. Ahmad Ali Khan*, (1890) I. L. R., 12 All., 207 ; *Mullick Kefait Hossein v. Sheo Pershad Singh*, (1896) I. L. R., 23 Cal., 821, *Bai Jamna v. Bai Ichha*, (1886) I. L. R., 10 Bom., 604 ; *Narasimma v. Muttayan*, (1890) I. L. R., 13 Mad., 451 ; *Tirtha [249] Sami v. Seshagiri Pai*, (1893) I. L. R., 17 Mad., 299 ; *Subbarau Nayudu v. Yagana Pantulu*, (1895) I. L. R., 19 Mad., 90 ; *Venkiti Nayak v. Murugappa Chetty*, (1896) I. L. R., 20 Mad., 48 ; and *Assan v. Pathumma*, (1897) I. L. R., 22 Mad., 494, referred to.

THE suit out of which this appeal has arisen was originally brought by three plaintiffs, Tilakdhari, Mathura Singh and Chotu Singh, for contribution on the basis of a registered agreement, dated the 19th March 1887. The suit was filed on the 14th March 1893. On the 21st December 1893, the suit was dismissed for misjoinder of parties and causes of action ; but on appeal to the High Court the case was remanded to the lower Court with directions to return the plaint for amendment. The lower Court returned the plaint for amendment on the 19th of September 1896. The suit was then continued by Tilakdhari, the names of the other plaintiffs being struck out. On the 23rd September 1896, the other two plaintiffs, Mathura Singh and Chotu Singh, filed separate suits. Mathura Singh's suit was dismissed as barred by limitation, and he appealed to the High Court, urging that the whole period from the 14th March 1893, to the 23rd, or, at least the 19th September 1896, ought to be excluded in his favour from the computation of the period of limitation.

Munshi Gobind Prasad, for the Appellant, drew attention to the alteration of the wording of the sections bearing upon this point in the various Limitation Acts* which had been passed by the Indian Legislature. In Act No. XIV of 1859, section 14, the words were "from defect of jurisdiction or other cause shall have been unable to decide upon it." Section 15 of Act No. IX of 1871, read "from defect of jurisdiction or other cause of a like nature is unable to try it," while section 14 of the present Limitation Act (XV of 1877), reads "is unable to entertain it." From these changes it is to be inferred that the Legislature intended to give a plaintiff relief where some cause, such as defect of jurisdiction, prevented the Court *in limine* from considering the case on its merits.

Where there was no want of good faith on the part of a plaintiff and it was not shown that he had not been prosecuting his suit with due diligence, the authorities showed that the cause of a like nature to defect of jurisdiction need not necessarily be a cause [250] wholly independent of the plaintiff. The following authorities were cited :—*Chunder Madhub Chuckerbutty v. Ram Koomar Chowdry*, (1866) B. L. R., Sup. Vol., 553 ; 6 W. R., C. R., 184 ; *Ram Subhag Das v. Gobind Prasad*, (1880) I. L. R., 2 All., 622 ; *Deo Prosad Sing v. Pertab Kairee*, (1883) I. L. R., 10 Cal., 86 ; *Jema v. Ahmad Ali Khan*, (1890) I. L. R., 12 All., 207 ; *Narasimma v. Muttayan*, (1890) I. L. R., 13 Mad., 451 ; *Tirtha Sami v. Seshagiri Pai*, (1893) I. L. R., 17 Mad., 299 ; *Putali Mehiti v. Tulja*, (1879) I. L. R., 3 Bom., 223 ; *Bai Jamna v. Bai Ichha*, (1886) I. L. R., 10 Bom., 604 ; *Subbarau Nayudu v. Yagana Pantulu*, (1895) I. L. R., 19 Mad., 90 ; *Venkiti Nayak v. Murugappa Chetty*, (1896) I. L. R., 20 Mad., 48 ; *Assan v. Pathumma*, (1897) I. L. R., 22 Mad., 494 ; *Mullick Kefait Hossein v. Sheo*

Pershad Singh, (1896) I. L. R., 23 Cal., 821 ; *Bishambhur Haldar v. Bonomali Haldar*, (1899) I. L. R., 26 Cal., 414 ; *Brij Mohan Das v. Mannu Bibi*, (1897) I. L. R., 19 All., 348 ; and *Salima Bibi v. Sheikh Muhammad*, (1895) I. L. R., 18 All., 131.

Mr. S. Sinha, for the Respondents, argued that the plaintiff in the present case had not been acting with due diligence or in good faith. As showing the absence of good faith he referred to the fact that the plaintiff, at a very early stage in the proceedings, had notice that the plea of misjoinder had been raised ; and also that he need not have waited until the plaint was returned. The suit was not prosecuted with due diligence. In addition to the rulings which had been referred to on behalf of the appellants, counsel for the respondents also referred to *Luchmun Pershad v. Nunhoo Pershad*, (1872) 17 W. R., C. R., 266 ; *Rajendro Kishore Singh v. Bulaky Mahton*, (1881) I. L. R., 7 Cal., 367 ; and *Krishnaji Lakshman v. Vithal Ravji Renge*, (1887) I. L. R., 12 Bom., 625.

Strachey, C. J.—The only question in this case which has been referred to the Full Bench is whether the suit is barred by limitation, or whether it is protected from being barred by the provisions of section 14 of the Indian Limitation Act, 1877. The suit was a suit for contribution based on a registered agreement executed on the 19th March 1887. The plaintiff sues, alleging that he and the defendants were liable under a decree held by the Maharaja of Dumraon, that certain zamindari property [251] of his was sold in excess of his liability under the decree, and that under the agreement he is entitled to recover that excess from the other executants, that is, the defendants. The suit was instituted on the 23rd September 1896. It is admittedly barred by limitation unless the plaintiff is entitled to exclude the time during which he was prosecuting a former suit. The Court below has held that he is not entitled to exclude that time, and has therefore dismissed the suit. From that decision the plaintiff has appealed to this Court, and he relies on the first paragraph of section 14, which is as follows :—“In computing the period of limitation prescribed for any suit, the time during which the plaintiff has been prosecuting with due diligence another civil proceeding, whether in a Court of First Instance or in a Court of appeal, against the defendant, shall be excluded, where the proceeding is founded upon the same cause of action, and is prosecuted in good faith in a Court which from defect of jurisdiction, or other cause of a like nature, is unable to entertain it.” The plaintiff seeks to exclude from the period of limitation the time occupied by a suit which he brought together with two other plaintiffs. That suit was brought on the 14th March 1893. It was a suit founded on the same agreement, for the same relief, and against the same defendants, as the present suit. Each of the plaintiffs claimed contribution as here, alleging that his property had been sold to an extent in excess of his liability under the Maharaja's decree. That suit was dismissed by the Court of First Instance on the ground of misjoinder of plaintiffs and causes of action. On appeal by the plaintiffs this Court, on the 2nd June 1896, held that the first Court was right as regards misjoinder, as the plaintiffs were in all respects separate : their respective properties which had been sold in execution were separately held, and had been separately sold ; and under the agreement the sales gave to each a separate cause of action. But this Court held that the first Court, instead of dismissing the suit, ought, under section 53 of the Code of Civil Procedure, to have returned the plaint for amendment by striking out the names of all the plaintiffs except one, who should be allowed to continue the suit alone. Accordingly this Court remanded the case under section 562 with a direction to the first Court to return the plaint for amendment in [252] the manner stated. The case was therefore returned to the first Court, and on the

14th September 1896, the plaintiffs applied to that Court to make certain amendments in the plaint, or in the alternative to return the plaint, as directed by the High Court, for amendment in the manner which the High Court had suggested. On the 19th September 1896, the Court ordered that the plaint should be returned for amendment within five days, and thereupon the names of the present plaintiff and one of his co-plaintiffs were struck out from the plaint, and that suit was continued by the plaintiff Tilakdhari, alone. On the 23rd September 1896, the present suit was filed. If section 14 of the Limitation Act is applicable, I think that the plaintiff must be held to have been prosecuting the former suit within the meaning of that section from the date of its institution, the 14th March 1893, until the 19th September 1896, when the Court returned the plaint for amendment, and enabled him to be struck out of that suit, and so to file the present. In that view, if the section is applicable, this suit would be within time by one day. The question is whether section 14 applies. Up to a certain point I think that there is no difficulty. I think that there is no reason to doubt that the plaintiff prosecuted the former suit with due diligence and in good faith. It has been attempted to show want of due diligence and good faith, but the attempt has, I think failed, and I need say no more as to that. In the next place, I think that the present suit is undoubtedly founded, so far as the present plaintiff is concerned, on the same cause of action as the former suit. In the third place, I think that by reason of the misjoinder in the former suit the Court was "unable to entertain" that suit, by which I mean was unable to consider the questions involved in that suit. It was unable to entertain it by reason of sections 26, 31 and 45 of the Code of Civil Procedure, which show that plaintiffs cannot join in respect of distinct causes of action against the same defendants. In such a case either the plaint must be rejected, if not amended so as to remove the defect (and here from the nature of the case no amendment could have remedied the defect, so as to make that suit maintainable by all the then plaintiffs) or else the suit must be dismissed. In any event the Court could not have dealt with that suit upon the merits. In the fourth place, it [253] cannot be said that the Court was unable to entertain the former suit from defect of jurisdiction. But the question is—was the Court unable to entertain the suit from "other cause of a like nature" to defect of jurisdiction? Before dealing with these words it is necessary to bear in mind the essential object of section 14 and the principle which underlies it. The principle is, broadly speaking, the protection against the bar of limitation of a man honestly doing his best to get his case tried on the merits, but failing through the Court being unable to give him such a trial. That is the principle; and I think it is clearly applicable, not only to cases in which a man brings his suit in the wrong Court, that is, a Court having no jurisdiction to entertain it, but also where he brings his suit in the right Court, but is nevertheless prevented from getting a trial on the merits by something, which, though not a defect of jurisdiction, is analogous to that defect. Now the corresponding words in section 14 of the Limitation Act of 1859 were "or other cause." In section 15 of the Limitation Act of 1871 the words were first introduced in their present form "or other cause of a like nature." I think it is quite clear that in making this change the Legislature was adopting the view of the majority of the Full Bench of the Calcutta High Court in *Chunder Madhub Chuckerbutty v. Ram Coomar Chowdry*, (1866) B. L. R., Sup. Vol., 553; 6 W. R. C. R., 184. The majority of the Court held that the words "other cause" in the Act of 1859 must be construed as meaning "other cause of a like nature." Their judgments give instances of what, in their opinion, would not be causes of like nature to defect of jurisdiction. For example, in the case before them they held that those words would not apply where the plaintiff had been non-suited

on account of his neglect to state in his plaint the boundaries of the land which he claimed. Other instances which they gave were the failure of a plaintiff to appear or to produce his witnesses on the day fixed for the hearing, and his failure in a suit for damages for a wrongful act to specify the act of which he complained. Sir BARNES PEACOCK and Mr. Justice TREVOR held in effect that "other cause of a like nature" meant a cause not including any neglect on the part of the plaintiff either in stating his case or in other respects. Again, they say that it means a cause "not [254] connected with the plaintiff's own negligence." It is important to see why they adopt that meaning. Their reason is, that in the case of any cause which included any neglect on the plaintiff's part, he could not be said to have prosecuted the suit *bona fide* and with due diligence as required by the earlier words of the section. They do not, that is, enter into an inquiry as to what causes are of a like nature to defect of jurisdiction in the abstract and apart from section 14—an inquiry which would be difficult and perhaps impossible, and which would probably involve the laying down of propositions of dangerous generality. They seek for a test of likeness to defects of jurisdiction within the four corners of the section itself, supplied by its own words, and having reference to its requirements. Mr. Justice JACKSON, who agreed with Sir BARNES PEACOCK and Mr. Justice TREVOR, used less guarded language. He said:—"It appears to me that the inability of the Court must be either from unavoidable circumstances over which no one has any control, or something incidental to the Court itself and quite unconnected with the acts of the parties." I think that an earlier passage in the same judgment shows that this is too sweeping. As Mr. Justice JACKSON himself points out, a plaintiff's going to the wrong Court can hardly be described as an unavoidable cause over which no one has any control, or as quite unconnected with the acts of the parties. Still earlier in his judgment he says that it must be shown that the Court was unable to decide the case "from some cause quite unconnected with the default or negligence of the plaintiff." Now although he there adds the word "default" to the "negligence" spoken of by Sir BARNES PEACOCK, he goes on to give the same reason as the Chief Justice. He says:—"To hold otherwise would be inconsistent with the use of the words *bona fide* and with due diligence." I think therefore that by the word "default" also he must have meant some act of the plaintiff inconsistent with *bona fides* or with due diligence. The result may, I think, be stated as follows:—First, if the Court's inability to entertain the suit results from any cause connected with any want of good faith or due diligence on the plaintiff's part, that cause is not of a like nature to defect of jurisdiction. Secondly, if the Court's inability to entertain the suit results from a cause quite unconnected with any [255] want of good faith or due diligence on the plaintiff's part, that cause is of a like nature to defect of jurisdiction. There is a third proposition which, I think, is established by later cases, namely, that, given good faith and due diligence, a cause is not prevented from being of like nature to defect of jurisdiction merely because it was in the plaintiff's own power to avoid, or resulted from his own act or from a *bona fide* mistake of law or procedure. I think that is the result of the decision of the Full Bench in *Brij Mohan Das v. Mannu Bivi*, (1897) I. L. R., 19 All., 348, and of the Calcutta High Court in *Deo Prasad Singh v. Pertab Kaur*, (1883) I. L. R., 10 Cal., 86, and the observations of the Division Bench in *Bishambhur Haldar v. Bonomali Haldar*, (1899) I. L. R., 26 Cal., 414 at pp. 416, 417. As pointed out in the first of the Calcutta cases just mentioned, the test cannot be whether the cause was one within the plaintiff's own power to avoid, because it is equally in the plaintiff's own power to avoid suing in a Court which for defect of jurisdiction is unable to entertain the suit. Two decisions of this Court have been discussed in the argument.

The first is the case of *Ram Subhag Das v. Gobind Prasad*, (1880) I. L. R., 2 All., 622. There the former suit had failed by reason of misjoinder of plaintiffs and causes of action. In the second suit this Court held that the defect in the former suit was not a cause of like nature to defect of jurisdiction, apparently because it was "a defect for which the plaintiff must be held responsible." If that means a defect which the plaintiff could have avoided, I think that this proposition is too wide for the reasons given in the passage to which I have just referred in the judgment in *Deo Prosad Sing v. Pertab Kairee*. Not a word is said as to whether the plaintiff in the former suit acted without good faith or due diligence. The next case in this Court, *Jema v. Ahmad Ali Khan*, (1890) I. L. R., 12 All., 207, is, I think, clearly distinguishable. There the former suit was dismissed on the ground that the debt sued for was due, not to the plaintiff alone, but to the plaintiff and a partner who had not joined in the suit. The judgment expressly says "it was not merely a case of procedure; it was a case of a plaintiff coming into Court and failing to prove a cause of action in himself against the defendant, and [256] thus failing to establish the defendant's liability to him, the plaintiff in the suit." Clearly the failure of the plaintiff to prove his cause of action and to establish the defendant's liability does not, in the first place, make the Court "unable to entertain the suit," because the suit is entertained and dismissed; and in the second place, is in no sense analogous to defect of jurisdiction in the Court. The dissent which the judgment in that case expresses from the decision in *Deo Prosad Sing v. Pertab Kairee* and its approval of the decision in *Ram Subhag Das v. Gobind Prasad* must, I think, be regarded as *obiter*. I shall only refer briefly to the principal cases decided by the other High Courts which were cited to us. I agree with the decision in *Deo Prosad Sing v. Pertab Kairee*, (1883) I. L. R., 10 Cal., 86, which was a case of misjoinder of causes of action. In the case of *Mullick Kefait Hossein v. Sheo Pershad Singh*, (1896) I. L. R., 23 Cal., 821, the abortive suit was instituted on distinct causes of action against different sets of defendants severally, and it was held that the inability of the Court to entertain that suit was due to a cause of like nature to defect of jurisdiction. It is curious that the judgment does not in any way consider whether the former suit was prosecuted in good faith and with due diligence, but it may be assumed that the Court found on those questions in the plaintiff's favour. The only Bombay case that seems to be in point is *Bai Jamna v. Bai Ichha*, (1886) I. L. R., 10 Bom., 604, where it was held that, assuming the Court to have been within the meaning of section 14 unable to entertain the former suit, the cause was not of a like nature to defect of jurisdiction, as it was the plaintiff's own laches in not producing a registered certificate. That is substantially to the same effect as the view of Sir BARNES PEACOCK and Mr. Justice TREVOR in the early Full Bench case in the Calcutta High Court. The view taken of the section by the Madras High Court appears to have fluctuated. In *Narasimma v. Mutayan*, (1890) I. L. R., 13 Mad., 451, the Court agreed with the decision in *Deo Prosad Sing v. Pertab Kairee*, but gave no reasons. In *Tirtha Sami v. Seshagiri Pai*, (1893) I. L. R., 17 Mad., 299, the Court disagreed with *Deo Prosad Sing v. Pertab Kairee*, but gave no reasons. In *Subbarau Nayudu v. Yagana Pantulu*, (1895), I.L.R., 19 Mad., 90, the former suit had failed by reason of the plaintiff having [257] acted in accordance with a rule made by the High Court which, by the time the suit came to be decided, was discovered to be *ultra vires*. In the subsequent suit it was held that the plaintiff was entitled to the benefit of the section because there had been no default, negligence or want of *bona fides* on his part, and the judgment of Mr. Justice JACKSON in the early Calcutta Full Bench case was relied on. In *Venkiti Nayak v. Murugappa Chetti*, (1896) I. L. R., 20 Mad., 48, the Full Bench made what appears to me to be a rather

startling extension of the principle laid down in the preceding case. They applied it to a case where the former suit had been dismissed because the plaintiff had joined certain matters without the leave required by section 44 * of the Code. They do not consider how it came about that the plaintiff did not obtain, and apparently did not even apply for, the leave which the Court was perfectly competent to have given under section 44. They do not inquire whether in that respect or otherwise in the former suit the plaintiff had acted with good faith or due diligence. That case seems to me to have given section 14 of the Limitation Act a dangerously wide extension. The last Madras case is *Assan v. Pathumma*, (1897) I. L. R., 22 Mad., 494, a case, like the present, of misjoinder of plaintiffs and causes of action. The Court followed the previous Full Bench decision, as to which the judgment forcibly observes:—

"When the provision thus applies to a proceeding which becomes abortive owing to an unauthorized joinder of matters, the joinder whereof the Court on application of the parties could have authorized, how can it consistently be held that the provision does not apply to a proceeding which fails on account of a misjoinder that the Court could not sanction and which is prohibited by the law absolutely?" Elsewhere in their judgment, no doubt, the Court held that good faith and due diligence on the plaintiff's part were proved.

I think that the result of the authorities taken as a whole, and the view which I take of the true principle, may be fairly summarized by saying that if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within [258] the meaning of section 14 of the Act. I think that this view of the words "other cause of a like nature" corresponds most closely with the object of the Legislature in enacting the section as stated by me in the earlier part of this judgment. Now, applying this principle to the present case, the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action. There was on the plaintiff's part in that former suit no want of good faith or due diligence. That being so, it is immaterial that the plaintiff in framing that suit made a *bond fide* mistake of procedure. I think that in the present suit he is entitled under section 14 to the exclusion of the whole of the period from the 14th March 1893 to the 19th September 1896, that consequently the present suit was within time, and that the Court below was wrong in dismissing it as barred by limitation. That is the answer I would give to this reference to the Full Bench.

Banerji, J.—My answer to the reference is the same as that of the learned Chief Justice. The question which we have to determine is whether the period of the pendency of the former suit should, under section 14 of the Limitation Act, be excluded in computing the period of limitation for the present suit. If that section applies, it is beyond question that the whole period from

Only certain claims to be joined with suit for recovery of land.

* [Sec. 44 :—Rule a.—No cause of action shall, unless with the leave of the Court, be joined with a suit for the recovery of immoveable property, or to obtain a declaration of title to immoveable property, except—

- (a) claims in respect of mesne profits or arrears of rent in respect of the property claimed,
- (b) damages for breach of any contract under which the property or any part thereof are or is held, and
- (c) claims by a mortgagee to enforce any of his remedies under the mortgage.

Claims by or against executor, administrator, or heir.

Rule b.—No claim by or against an executor, administrator or heir as such, shall be joined with claims by or against him personally, unless the last mentioned claims are alleged to arise with reference to the estate in respect of which the plaintiff or defendant sues or is sued as executor, administrator or heir.]

the commencement of the first suit to its termination including the period which intervened between the date of decision by the first Court and that of the institution of an appeal to this Court, should be excluded. The ruling of the Full Bench in *Ajoodhya Pershad v. Bisheshur Sahai*, N.-W. P., H. C. Rep., 1874, p. 141, is conclusive on this point. Now does section 14 apply to this case? Two essential conditions for the application of that section are that the first suit has been prosecuted with due diligence and that it has been prosecuted in good faith. Where negligence, or inaction, or bad faith is established against the plaintiff, he cannot avail himself of the benefit of the section. The mere fact of diligence and good faith on the part of the plaintiff being proved will not, however, make the section applicable unless the further condition is fulfilled that the Court in which the first suit was prosecuted was unable to entertain it by reason of defect of jurisdiction or other cause of a like nature. However diligent the plaintiff [259] may have been, and whatever may have been the amount of good faith with which he prosecuted the first suit, the cause which led to the failure of the first suit must have been a cause of the nature mentioned above and must have prevented the Court from entertaining the suit, that is, as the learned Chief Justice has remarked, from considering the questions involved in the suit. A cause like the absence of a right of action in the plaintiff will not make section 14 applicable. That was the cause in *Jema v. Ahmad Ali Khan*, (1890) I. L. R., 12 All., 207. The ruling in that case therefore is not an authority against the appellants, though it must be admitted that there are expressions of opinion in the judgment in that case which are undoubtedly against him. In the present case no question of want of jurisdiction arises. The reason which prevented the Court from entertaining the first suit *qua* the present plaintiff was a misjoinder of plaintiffs and causes of action. Is such a misjoinder a cause of a like nature to defect of jurisdiction within the meaning of section 14? This question was answered in the negative in the ruling of this Court in *Ram Subha Das v. Gobind Prasad*, (1880) I. L. R., 2 All., 622, and that case is a direct authority against the plaintiff-appellant. The Calcutta Court, however, has held the contrary view in *Deo Prasad Singh v. Pertab Kairee* (1883) I. L. R., 10 Cal., 86, and in *Mullick Kefait Hossein v. Sheo Pershad Singh*, (1896) I. L. R., 23 Cal., 821, and so has the Madras High Court in the recent case of *Assan v. Pathumma*, (1897) I. L. R., 22 Mad., 494. That case is on all fours with the present case. The rulings of the Madras High Court are, as pointed out by the learned Chief Justice, not consistent; but the tendency of that Court in recent cases has been in favour of the view taken in the case last mentioned. I agree with the rulings mentioned above, and am unable to concur with the view taken by this Court in *Ram Subha Das v. Gobind Prasad*. The reason assigned by the learned Judges who decided that case for holding a misjoinder of causes of action not to be a cause of a similar nature to defect of jurisdiction is that it is a defect for which the plaintiff must be held responsible. But, as pointed out in *Deo Prasad Singh v. Pertab Kairee*, the plaintiff is equally responsible for filing a suit in the [260] wrong Court. The test therefore which was applied by this Court in the case of *Ram Subha Das v. Gobind Prasad* is not the true test. It seems to me that section 14 applies where the plaintiff has acted in good faith and with due diligence, but where he has made some *bona fide* mistake of law, procedure or fact, which has precluded the Court from considering the issues involved in the case, either by reason of absence of jurisdiction, or by reason of rules of procedure prescribed in the Code of Civil Procedure, or some other cause of a similar nature; the inability, however, of the Court to consider the case must not be due to wilful neglect or default on the part of the plaintiff. I do not

think it is easy to lay down a hard and fast rule or to enumerate all the causes which should be regarded as of like nature to absence of jurisdiction, but I am clearly of opinion that a cause like the one which precluded the Court from hearing the former suit of the plaintiff is a cause which comes within the purview of section 14 of the Indian Limitation Act.

The learned counsel for the respondents attempted to establish that in the present instance the plaintiff did not act with due diligence or in good faith. As showing the absence of good faith he referred to the fact that in the suit which the plaintiff jointly with Tilakdhari Singh and Chhotu Singh brought in the Shahabad Court a plea of misjoinder was raised. But it appears from the judgment in that case that the defendant's plea was to the effect that there was a non-joinder of plaintiffs, and that the Court was of opinion that there was a misjoinder of defendants. It cannot therefore be said that when the former suit was instituted in the Court below, the plaintiffs in that suit were not acting in good faith when they jointly filed their plaint. There was clearly no want of diligence on the part of the plaintiff, inasmuch as he was not in a position to bring a new suit until the plaint in the former suit was returned to the plaintiffs for amendment. For the above reasons I hold that the plaintiff's claim is not barred by limitation.

Aikman, J.—I also am of opinion that on the facts as set forth by the learned Chief Justice the plaintiff in this case is entitled to the benefit of section 14 of the Indian Limitation Act, 1877, and that his suit is not beyond time. [261] It is clear that the Legislature did not intend to limit the privilege given by that section to cases in which the civil proceeding has been instituted in a wrong Court. Had this been its intention, the words "or other cause of a like nature" would not have been found in the section. To what cases do the words just quoted refer? The question is not free from difficulty, but after careful consideration I am of opinion that the intention of the Legislature was that, given good faith and due diligence on the part of the plaintiff, he was not to suffer from any *bona fide* mistake in procedure which would have the same effect as if he had gone to the wrong Court, that is, which would have had the effect of preventing the Court *in limine* from approaching the consideration of the case on its merits. I think the Legislature endeavoured to make this intention clear by the alteration which it made when enacting Act No. XV of 1877. In the concluding words of the first paragraph of the section in the preceding Act, No. IX of 1871, the words were "a Court which is unable to try it." In the present Act for the word "try" the Legislature has substituted the word "entertain." As has been pointed out in the case of *Deo Prasad Sing v. Pertab Kairee*, (1883) I. L. R., 10 Cal., 86, the responsibility of the plaintiff for the mistake which led to the earlier suit being thrown out is no true criterion as to whether section 14 is applicable. It is unnecessary for me to refer to the cases which have been cited in the judgment of the learned Chief Justice and my brother BANERJI. I concur in the answer proposed to be given to the reference.

On the appeal going back to the Bench which made the reference the following order was passed :—

Strachey, C. J., and Banerji, J.—The result of the judgment of the Full Bench is that the decree of the Court below dismissing the suit as barred by limitation must be set aside and the case remanded to that Court for disposal on the merits under section 562 of the Code. In dealing with the agreement of the 19th March 1887, the Court will have regard to our judgment in First Appeal

No. 165 of 1898, which was delivered on the 20th of February last. The appellant will have his costs of this appeal.

Appeal decreed and cause remanded.

NOTES.

[This was followed in (1901) 4 O. C., 281 ; (1911) 14 I. C., 437 (Burma) ; but see (1908) 35 Cal., 728 ; (1901) 24 Mad., 361 ; (1904) 29 Bom., 219 ; (1911) 13 I. C., 260 (Sindh).]

See also the explanation to sec. 14 of the Indian Limitation Act, 1908.]

[262] APPELLATE CIVIL.

The 9th March, 1900.

PRESENT :

MR. JUSTICE KNOX.

Abdul Ghafur.....Defendant

versus

Raja Ram.....Plaintiff.*

Civil Procedure Code, section 211—Mesne profits—Interest on mesne profits not given by decree—Interest not obtainable in execution—Costs of collection of rents by a trespasser in possession not to be set off against mesne profits—Execution of decree.

A plaintiff sued for cancellation of a certain lease, and for ejectment of the defendant as a trespasser, and for mesne profits with interest on such mesne profits. The decree which he obtained was a decree for cancellation of the lease and ejectment of the defendant, and ordered that mesne profits should be ascertained in the execution department, but was silent as to interest. *Held* that interest on the mesne profits could not be obtained in execution of the decree. *Hurro Durga Chowdhurani v. Surut Sundari Debi*, (1881) I.L.R., 8 Cal., 332, and *Kishan Nand v. Kunwar Partab Narain Singh*, (1884) L. R., 11 I. A., 88, referred to.

Held also that as the defendant had thrust himself into an estate and not acted in the exercise of a *bond fide* claim of right he was not entitled to charge collection expenses in reduction of the mesne profits. *McArthur and Co. v. Cornwall*, L. R., 1892, A. C., 75 distinguished.

THE facts of this case sufficiently appear from the judgment of the Court.

Maulvi Ghulam Mujtaba, for the Appellant.

Maulvi Muhammad Ishaq, for the Respondent.

Knox, J.—This appeal arises out of proceedings taken in execution of a decree passed on the 7th of December 1896 in favour of one Babu Raja Ram, respondent to this appeal. In order to understand the points which arise for determination, it will be necessary to state briefly the circumstances which gave rise to the suit in which this decree was passed. One Musammam Sahab Jan was the original owner of the property, over which between the years 1882 and 1884 she made three successive mortgages in favour of the ancestor of Raja Ram. Upon these mortgages Raja Ram obtained a decree for sale on the 4th of August 1890. After the decision had been passed, Sahab Jan, on the 7th of November 1890, executed a lease over the same property in favour of Sheikh Abdul Ghafur, the present appellant, and three days later she preferred an appeal to the High Court from the decree

* First Appeal No. 169 of 1899, from an order of Babu Jai Lal, Subordinate Judge of Azamgarh, dated the 12th August, 1899.

in favour of Raja Ram. This appeal was [263] eventually dismissed. Upon its being dismissed, Raja Ram put the property to sale and himself purchased it. The sale was confirmed on the 20th of September 1895, and an order for delivery given seven days after. Raja Ram applied for mutation of names to be effected over the property. Abdul Ghafur resisted the application, and it was rejected. Raja Ram had therefore to sue for possession, and he did so on the 5th of September 1896, asking for further mesne profits in respect of the property, both for the time during which he had been kept out of possession and from institution of the suit until delivery of possession with interest upon the same. On the 7th of December 1896 the Court gave him a decree, which is now under execution. It is a decree for possession by which the lease given to Abdul Ghafur is to be cancelled. As regards the mesne profits, the Court added that the plaintiff is decidedly entitled to the profits from the date of his purchase, but it reserved inquiry into the amount thereof, which was to be decided in the execution department. Neither in the judgment, nor in the decree which followed, was any mention made of the interest upon mesne profits for which Babu Raja Ram had asked. On the 3rd of July 1899 Babu Raja Ram instituted proceedings in execution. He asked for mesne profits, including interest. The judgment-debtor took exception to the sum of Rs. 719-12-8 at which the plaintiff had assessed the sum he claimed as mesne profits. The objection raised by him was three-fold. He first contended that he should be allowed a proper sum for the expenses of collection incurred by him in getting in the rents. The second objection was that the decree-holder was not entitled to interest; and the third, that the decree-holder was not entitled to any sum on account of the sir lands, of which Saheb Jan had, by virtue of the decree, become an ex-proprietary tenant. He also took exception to the sum of Rs. 12-14 as pleader's fee on the ground that the decree did not award it. All these objections were overruled, and Abdul Ghafur now comes to this Court, and renews these objections. There was a further plea taken in appeal, namely the second plea, but this was expressly abandoned by the learned vakil for the appellant.

[264] I deal first with the issue—"Is or is not the decree-holder entitled to interest upon the mesne profits? The contention raised by the appellant is that as this interest was in express terms claimed, but the decree gained does not award it, it must be taken to have been in the discretion of the Court refused. To this it is replied that as the question of mesne profits was left to be determined by the executing Court, that Court had the power to confirm the decree that was passed, and was bound to construe the term mesne profits as including interest. This contention is based upon what may be termed the explanation clause to section 211 of the Code of Civil Procedure. It is therein stated that mesne profits of property mean certain profits which are defined "together with interest on such profits." I find myself unable to hold that the term "mesne profits" in the Code of Civil Procedure necessarily carries with it as an essential ingredient interest on such profits. It may, of course, and ordinarily does, include such interest, but it seems to me that section 211 leaves the matter in the discretion of the Court which determines the original suit. It is for that Court to say upon a consideration of the facts of the case whether any interest shall be allowed, and if allowed, at what rate it is to be allowed. If that Court in express terms refuses to grant interest, or if, when such interest is claimed, it passes a decree, the terms of which are silent as regards interest, it seems to me that in either case the Court which executes the decree, even when the amount of mesne profits is left for future inquiry, cannot add to the original decree interest which, as I

consider, the original Court refused to grant. To do so would be, as was pointed out in a somewhat similar case by their Lordships of the Privy Council in *Hurro Durga Chowdhurani v. Surut Sundari Debi*, (1861) I. L. R., 8 Cal., 332, to add to the decree. The case *Kishna Nand v. Kunwar Partab Narain Singh* also decided by their Lordships of the Privy Council, (1884) L.R., 11 I. A., 88, confirms me in the belief that the question whether interest is or is not to be allowed in awarding mesne profits is a matter for decision of the Court which determines the original suit. In this last case the explanation added to section 211 was expressly [265] considered. I therefore hold that the decree-holder is not entitled to any sum as interest upon the mesne profits awarded.

As regards the question whether the judgment-debtor is entitled to charge the expenses of collection against the receipts which he has received from the land during the period he was in wrongful possession, I hold that he is not so entitled. The learned vakil for the appellant took his stand upon the decision of this Court, *Altaf Ali v. Lalji Mal*, (1877) I. L. R., 1 All., 518. His contention was that Shaikh Abdul Ghafur entered upon the property with a *bond fide* belief that he was entitled to do so under the lease he had obtained from Musammatt Saheb Jan. In any case the learned vakil argued that this issue had been expressly raised by him in his written statement, and the question whether the lease was or was not a *bond fide* lease had been left undetermined. Shaikh Abdul Ghafur should therefore be given an opportunity of having this issue tried before he was fined by the refusal of the Court to allow his collection charges. He was, however, prepared that it should be determined here, as the materials for the determination was upon the record, and he pointed to the evidence of Kundan, Shaman Khan and Mangli Khan, which will be found in the printed book of the appellants in First Appeal No. 39 of 1897. All that these witnesses state is that Saheb Jan executed the lease in favour of Abdul Ghafur because she had some difficulty in collecting the rent and paying the Government revenue. This is hardly to be wondered at in the year 1890, seeing that a decree for sale of the property had been obtained, and the tenants must have felt conscious that the property was about to pass out of her hands. The evidence of Kundan above quoted and that of Mehdi Hasan, to be found in the respondent's printed book, page 1, together with the written statement of Musammatt Saheb Jan Bibi at page 3 of the same book, satisfies me that Abdul Ghafur must have been cognizant of the fact that the decree ordering the sale of this very property had been obtained on the 4th of August 1890, and he must also have known that the appeal, which he virtually filed on the very last day possible, was purely for the purposes of gaining time. This is a case in which he has, in defiance of the rights of another, thrust himself into an estate, and [266] not a case where he entered upon an estate in the exercise of a *bond fide* claim of right. I am not prepared to allow him charges for collection. Reliance was placed upon a passage in *Hurro Durga Chowdhurani v. Surut Sundari Debi*, (1861) I. L. R., 8 Cal., 332, at page 335, in which their Lordships give an opinion that the amount which might have been received from the land deducting the collection charges were the mesne profits of the land. It does not appear what were the facts of that case, and the probability is that the trespasser there was a trespasser in the exercise of a *bond fide* claim of right. Reliance was also placed upon *McArthur and Co. v. Cornwall*, L. R., 1892, A. C., 75. This case, however, is a peculiar one, and the trespassers therein mentioned had hardly passed the line of trespass in exercise of a *bond fide* claim. In the present case I feel satisfied that the action of Sheikh Abdul Ghafur was purposely taken either to delay or abet the delaying of the just claims of the decree-holder.

There remains a question whether or not the decree-holder is entitled to get any rents in respect of the sir land. Here the argument is that as soon as the sale took place Musammat Saheb Jan Bibi became by process of law proprietary tenant of all the sir land held by her at the time when her property passed out of her possession. The decree-holder could not obtain anything from Musammat Saheb Jan Bibi until he at first got a rent fixed by the Rent Court. That being the case nothing could be obtained in respect of these lands. This contention overlooks the possibility which the law also allows of Musammat Saheb Jan Bibi and the purchaser coming to terms by mutual agreement, that is to say, upon the day of or the day after the sale. But it is added that as Musammat Saheb Jan had, prior to the lease in favour of Sheikh Abdul Ghafur, leased all sir lands to one Din Muhammad, Sheikh Abdul Ghafur could recover nothing. The lease itself refutes this contention. The clause relating to the so-called lease to Din Muhammad confirms me in the view that Din Muhammad was a mere man of straw. Abdul Ghafur in fact entered upon this sir and realized rents from the sub-tenants, as is abundantly proved by the evidence of the patwaris and khationis. The learned vakil for the [267] appellant said in the course of his argument that he did not object to pay what his client could have realized from Din Muhammad. This contention appears to me to be entitled to no favour, and I disallow it.

There remains the last item on account of the pleader's fee. On this I hold that the respondent is entitled to pleader's fee in the Court below upon the sum which I now determine to be the sum payable to him.

The result is that this appeal is so far allowed that the appellant is entitled to deduct from the sum awarded against him by the lower Court the amount assessed as interest on the mesne profits. In other respects, the judgment and decree of the lower Court are confirmed. Parties, will get costs in this Court and the Court below in proportion to their success and failure in this Court.

[See also in connection with the second point in the case *Sharaf-ud-din Khan v. Fatehyab Khan*, Weekly Notes, 1898, p. 28 ; I.L.R., 20 All., 208.—FD.]

Decree modified.

NOTES.

[The decision was reversed on Letters Patent Appeal, in (1901) 28 All., 252.

See also (1902) 24 All., 376 where the trespass was held to be of a very aggravated and malicious character.]

[22 All. 267]
REVISIONAL CRIMINAL.

The 24th March, 1900.

PRESENT :
MR. JUSTICE AIKMAN.

In the matter of the petition of Lachman and another.*

Criminal Procedure Code, Sections 133, 135—Order of Magistrate for removal of unlawful obstruction—Application for appointment of a jury—Effect of verdict of jury.

Where a person against whom an order has been made under section 133 of the Code of Criminal Procedure applies for a jury under section 135 of the Code, the applicant is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bond fide* claim of right.

IN this case a Magistrate of the first class issued an order to the petitioners to remove certain obstructions to an old passage for cattle. The petitioners filed a written statement and prayed for the appointment of a jury under section 135 of the Code of Criminal Procedure to try whether the order was reasonable and proper. The petitioners themselves nominated two persons; two others were appointed by the complainants, and the Magistrate appointed an umpire. Three of the jurors and the umpire returned [268] a verdict that the passage sought to be opened was an old way for cattle, and that the order for its being re-opened was a proper one. The order was accordingly made absolute. Thereupon the petitioners applied to the High Court for revision, pleading that their action in closing the passage was taken in pursuance of a *bond fide* claim of title and ought not to have been thus decided by the Magistrate.

* Mr. C. Dillon, for the Applicants.

* The Government Pleader (Munshi Ram Prasad), for the Crown.

Aikman, J.—An order was issued to the applicants by a duly empowered Magistrate, directing them under the provisions of section 133 of the Code of Criminal Procedure to remove an unlawful obstruction from a road which was said to be a public road, or to appear within a time fixed and move to have the order set aside. The applicants put in a petition, in which they denied that there ever was a road as asserted by the other side. Had they adhered to this position, and had the Magistrate, without considering whether the applicants' plea was or was not a *bond fide* claim of right, passed the order complained against, it would have been a case for interference in revision. But instead of adopting this course the applicants asked the Magistrate to appoint a jury, that being the third alternative given by section 135 of the Code. The Magistrate nominated the two men named by the applicants, namely, Bachu Lal and Ganesh Prasad Narain. He also appointed two men whose names were supplied by the opposite side, and he appointed as umpire one Munshi Nazir Ali, Manager of the Dubari Estate. Four persons, including the umpire, agreed in finding that the order complained of was a reasonable and proper order. The fifth person did not for some reason join the jury, and did not concur in the verdict. Amongst the four persons who agreed in finding that the Magistrate's order was a reasonable and proper one were Bachu Lal and Ganesh

* Criminal Revision No. 114 of 1900.

Prasad Narain, the two persons nominated by the applicants. I am asked to interfere in revision on the ground that there was a disputed question of title, and that therefore there was no jurisdiction to pass the order. On the facts set forth above I decline to do this and reject the application.

NOTES.

[See also 30 All., 364.]

[269] APPELLATE CIVIL.

The 30th March, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Baldeo Bharthi.....Defendant

versus

Bir Gir and others.....Plaintiffs.*

Civil Procedure Code, section 30—Numerous persons interested similarly in the result of a suit—Permission given to some to sue on behalf of all—Permission granted after the filing of the suit.

Held, that the permission required by section 30 of the Code of Civil Procedure may be granted after the filing of a suit by some only of the persons interested therein. *Fernandez v. Rodrigues*, (1897) I. L. R., 21 Bom., 784, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi *Ram Prasad*, for the Appellant.

Pandit *Sundar Lal*, for the Respondents.

Burkitt and Aikman, JJ.—In this appeal it is frankly admitted for the appellant that he has no case whatever on the merits. The learned advocate who appears for him raises a technical plea founded on the following facts. The plaintiffs are mahants of a religious body who style themselves Niranjani Akhara comprising hundreds of followers and worshippers. The persons originally claiming in the plaint were the mahants or heads of this body. An objection was taken by the defendants in their written statement that the plaintiffs alone could not sue and that it was necessary that all the other members of the akhara should join as plaintiffs. Upon this an application was made by the plaintiffs, purporting to be under section 30 of the Code of Civil Procedure, asking that, as provided in that section, notices should issue to the various parties who, the defendants alleged, ought to be joined as plaintiffs in the suit, and that permission should be given to the plaintiffs to sue on their behalf. The permission asked for was granted, and the suit proceeded to trial and judgment. It is now contended (judgment having been given against the defendants) that

* First Appeal No. 185 of 1898 from a decree of Babu Prag Das, Subordinate Judge of Saharanpur, dated the 22nd June 1898.

the permission given after the suit had been instituted and after the defendants had been summoned, was a bad permission, and that therefore the trial was vitiated, and the decree a bad one. As to this contention it [270] is sufficient to refer to the case of *Fernandez v. Rodrigues*, (1897) I. L. R., 21 Bom., 784. In that case it was held by a Full Bench that the permission required by section 30 of the Code of Civil Procedure may be given subsequently to the filing of the suit. In that decision and in the reasoning on which it was based we fully concur. As remarked by the learned Chief Justice in that case, the question is only one of adding parties. We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This was followed in (1901) 25 Mad., 399; (1915) 29 M. L. J., 91: 29 I. C., 248. See also (1901) 33 Cal., 905; (1901) P. R., 91.]

[22 All. 270]

FULL BENCH.

The 27th March, 1899.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX
AND MR. JUSTICE BLAIR.

Edward Caston.....Petitioner

versus

L. H. Caston and W. T. Cogdell.....Respondent and Co-respondent.*

* *Act No. IV of 1869 (Indian Divorce Act), sections 17, 20—Decree for nullity of marriage passed by a District Judge—Confirmation of decree by High Court—Period for confirmation—Effect of confirmation, if made before statutory period has elapsed—Act No. I of 1872 (Indian Evidence Act), sections 41, 44.*

Section 20 of the Indian Divorce Act, No. IV of 1869, does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. *A v. B*, (1898) I. L. R., 23 Bom., 460, dissented from.

Assuming the proviso in section 17 to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired, cannot on that ground be treated as made by a Court not competent to make it, within the meaning of sections 41 and 44 of the Indian Evidence Act, 1872, and is therefore, under section 41 conclusive proof that the marriage was null and void.

THIS was a reference arising out of a suit for divorce pending in the Court of the District Judge of Agra. The suit was brought by the husband as petitioner against his wife and a co-respondent. In the course of the hearing the counsel for the co-respondent put in a petition in which he represented

* Matrimonial Reference No. 1 of 1900.

that the suit must be dismissed, inasmuch as the petitioner had never been lawfully married to the respondent. The facts upon which that contention [271] was based were the following:—The respondent had formerly gone through a ceremony of marriage with one Elloy. On the 18th of June 1888 she obtained a decree declaring that marriage null and void in the Court of the Judicial Commissioner of Oudh, who, until the passing of section 42 of Act No. XX of 1890, was a "District Judge" within the meaning of section 3, clause 2, of the Indian Divorce Act, for Oudh. On the 7th of December 1888 the decree of nullity was confirmed by this Court, which had jurisdiction over Oudh under section 3, clause 1, of the Act. On the 21st December 1888 the respondent was married to the petitioner. It was contended that under section 20, read with the proviso in section 17, the High Court was not competent to confirm the Judicial Commissioner's decree of nullity until after six months from the pronouncing thereof; that the order of confirmation, having been made less than six months from the date of the decree, must be held to be illegal and void; that therefore the decree must be treated as not having been validly confirmed; and that consequently the subsequent marriage of the respondent with the petitioner was also illegal and could not be made the subject of a decree for dissolution of marriage. The District Judge accordingly stayed proceedings and referred to the High Court, under section 9 of the Indian Divorce Act, 1869, the question whether, having regard to the facts just stated, the marriage sought to be dissolved was a valid marriage.

Mr. W.K. Porter (as *amicus curiæ*) for the Co-respondent. I submit that the proceedings held by the High Court on the 7th December 1888 for confirmation of the decree of nullity of marriage passed by the Judicial Commissioner on the 18th July 1888 in the suit between the respondent and Elloy were null and void, and that therefore the marriage between the respondent and Elloy has never yet been annulled. Section 20 of Act No. IV of 1869 renders applicable to decrees made by a District Judge, which the Judicial Commissioner for the purposes of these proceedings was, in a suit for nullity of marriage, the provisions of section 17, clauses 1, 2, 3 and 4. The term "clause" is nowhere defined in the Act, but, turning to section 17, it will be seen that it consists of six paragraphs. The fifth paragraph contains a material proviso to the effect that "no decree shall be confirmed under this section [272] till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs." This proviso is indissolubly connected with all the four preceding paragraphs, so that, if the "clause" spoken of in section 20 means one of the paragraphs of section 17, then "clauses 1, 2, 3 and 4" must include also the fifth paragraph of section 17. If this be so, there is a direct statutory prohibition against the confirming of a decree for nullity of marriage passed by a District Judge until after six months from the date of the pronouncing thereof. I rely on the case of *A. v. B.*, (1898) I. L. R., 23 Bom., 460. If there has been a proceeding held within the statutory period of six months purporting to confirm such a decree, such proceeding will be of no legal validity. See the remarks made by EDGE, C. J., near the commencement of the judgment in the case of *Percy v. Percy*, (1896) I. L. R., 18 All., 375.

Mr. R. K. Sorabji (as *amicus curiæ*) for the Petitioner.

Section 20 of the Indian Divorce Act directs—"that the provisions of section, 17 clauses 1, 2, 3, 4 shall, *mutatis mutandis*, apply to such decrees," *i. e.*, decrees of nullity.

Section 17 contains six paragraphs. The fifth paragraph evidently applies to all the four preceding paragraphs. It can hardly be said to be a part of

paragraph 4, for that paragraph makes complete sense without it; and it, in turn, is quite intelligible without reference to the particular paragraph preceding it. It, in fact, is a clause by itself, *i.e.*, it is the fifth clause of section 17, and, as such, is not made applicable to decrees of nullity by section 20. If punctuation be any guide to the construction to be put on Acts of the Legislature, the full stop, in the original edition of the Act, at the end of paragraph 4, would seem to indicate that the following paragraph was not intended to be read as part of the preceding clause.

In *A. v. B.*, (1898) I. L. R., 23 Bom., 460, the acting Chief Justice's reference to sections of the Criminal Procedure Code to support the argument that paragraphs 4 and 5 of section 17 form one clause, is not so forcible as might at first sight appear, for it is quite evident that each of the provisos, in the sections to which he refers, has no meaning apart from the clause immediately preceding.

[273] The Act very clearly shows that it saw no reason for delay in nullity decrees. Section 16 expressly provides that a decree for dissolution of marriage, passed by a High Court, should be *nisi*, and also provides for intervention. Section 17 provides for intervention during a suit for dissolution in the Court of a District Judge. As there are no such provisions with regard to suits for nullity, it is evident that the Legislature intended that there need be no delay in the confirmation of decrees of nullity.

And in reality there is no call for delay. The grounds for decrees of nullity are—(a) Impotency. (b) Consanguinity and affinity. (c) Lunacy and idiocy. (d) The existence at the time of marriage of a former husband or wife. All these are matters which are capable of direct proof at once, and are reasons which existed at the time of the marriage. The reasons for dissolution are such as arise subsequent to the marriage, and are acts of one or other party—and are less capable of proof than the reasons for nullity—and may be mere allegations, the result of collusion.

The fact that English law, at the time the Act was passed, required no delay in decrees of nullity, would have led the Legislature to have made it very clear, had they intended delay in nullity decrees in India.

Nor can it be claimed that under section 7 of the Act, the present English Procedure should govern decrees of nullity out here; for section 7 only applies English law where the Act is silent—but section 20 taken with section 17 makes it very clear what the Legislature intended with regard to delay, *viz.* that it was necessary in regard to decrees of dissolution, but not in regard to decrees of nullity.

Strachey, C.J.—This is a reference to the Court under section 9 of the Indian Divorce Act (IV of 1869), by the District Judge of Agra, of a question arising in a suit for dissolution of marriage pending in this Court. The suit was brought by the husband as petitioner against his wife, the respondent, and against a co-respondent. In the course of the hearing, counsel for the co-respondent contended that the petition must be dismissed on the ground that the respondent had never been lawfully married to the petitioner. It appears that the respondent had formerly gone through a ceremony of marriage with one [274] Elloy. On the 18th July 1888, she obtained a decree declaring that marriage null and void in the Court of the Judicial Commissioner of Oudh, who, until the passing of section 42 of Act XX of 1890, was "a District Judge," within the meaning of section 3, cl. 2 of the Indian Divorce Act, for Oudh. On the 7th December 1888, the decree of nullity was confirmed by this Court, which had jurisdiction over Oudh under section 3, cl. 1

of the Act. On the 21st December 1888, the respondent was married to the present petitioner. The contention now raised by the counsel for the correspondent is that under section 20, read with the proviso in section 17, the High Court was not competent to confirm the Judicial Commissioner's decree of nullity until after six months from the pronouncing thereof; that the order of confirmation, having been made less than six months from the date of the decree, must be held to be illegal and void; that, therefore, the decree must be treated as not having been validly confirmed; and that, consequently, the subsequent marriage of the respondent with the petitioner was also illegal, and cannot be made the subject of a decree for dissolution of marriage. The District Judge has accordingly stayed the proceedings pending a reference under section 9 of the question whether, having regard to the facts just stated, the marriage sought to be dissolved was a valid marriage.

There are two questions to be considered. The first is, whether the High Court's decree of the 7th December, 1888, was in contravention of section 20, read with section 17 of the Act. The second is whether, if so, it follows that that decree was void and inoperative as a confirmation of the Judicial Commissioner's decree of the 28th July 1888. In regard to the first point, reliance is placed on the decision of the High Court of Bombay in *A v. B*, (1898) I. L. R., 23 Bom., 460. In that case no question arose as to the effect of a confirmation made by the High Court before the time, if any, prescribed by the Divorce Act. It was a submission by a District Judge of a decree for nullity for confirmation under section 20, upon which the petitioner applied to the High Court for immediate confirmation. The Court held that it could not confirm the decree before the expiration of six months from the [275] pronouncing thereof, and so rejected the application with leave to renew it when the six months' period had expired. We have first to consider whether we agree with the construction placed by the Bombay High Court upon sections 17 and 20 of the Act. After the fullest consideration I am unable to agree with it. Section 20 provides that "every decree of nullity of marriage made by a District Judge shall be subject to confirmation by the High Court, and the provisions of section 17, clauses 1, 2, 3 and 4 shall, *mutatis mutandis*, apply to such decrees." Section 17 provides for the confirmation by the High Court of decrees for dissolution of marriage made by a District Judge. It consists of six paragraphs. The fifth paragraph is as follows:—"Provided that no decree shall be confirmed under this section till after the expiration of such time, not less than six months from the pronouncing thereof, as the High Court by general or special order from time to time directs." If this fifth paragraph is the fifth "clause" of section 17 within the meaning of section 20, then section 20 does not make it applicable to decrees of nullity of marriage made by a District Judge, and such decrees, therefore, need not wait for six months, but may be confirmed at once. If, though the fifth paragraph, it is to be regarded as the fourth "clause" of section 17 within the meaning of section 20, then section 20 makes it applicable to decrees of nullity of marriage, and such decrees, like decrees for dissolution of marriage, cannot be confirmed till after the expiration of six months from the pronouncing thereof.

Now the word "clause" used in section 20 is nowhere defined in the Act. The paragraphs into which section 17 is divided are not numbered, and so far as the form of the section is concerned there is nothing to suggest that one paragraph is more or less a "clause" than another, or that the fifth paragraph is not a clause. It is rather difficult to gather from the judgments in the Bombay case what the learned Judges considered to be the exact relation between the proviso and the other paragraphs of section 17. Mr. Justice PARSONS

says :—" The fifth paragraph is not, in my opinion, a clause of the section. It is a proviso to the clause which precedes it, joined to it as printed in the Government of India (Legislative Department) edition 1887 of the Acts, by a colon, and must be [276] considered to be a part and parcel of the foregoing clauses, governing and controlling them, and not forming itself a separate clause." Mr. Justice RANADE says :—" The proviso appears as a separate paragraph, but it is clear from its context that it cannot be read as a separate clause from paragraph 4, which it qualifies. It does not, as the preceding four paragraphs, or the succeeding sixth paragraph, relate to distinct subject-matters." Mr. Justice FULTON holds that " the proviso governs and forms part of the fourth clause." Now if it is correct to say that the fifth paragraph is " a proviso to the clause which precedes it " and " forms part of " that clause and cannot be read as separate from that clause, it seems contradictory to say, as Mr. Justice PARSONS goes on to say, that it " must be considered to be a part and parcel of the foregoing clauses governing and controlling them." Apart from this, it appears to me quite impossible to hold that the proviso merely forms part of the clause immediately preceding it. That clause relates only to cases in which the District Judge has, upon the direction of the High Court, made further inquiry or taken additional evidence. That is clearly shown by the word " thereupon." If the proviso merely formed part of that clause, it would follow that it did not apply to the far more numerous cases in which no further inquiry or additional evidence is required, and the result would be that, contrary to the obvious intention of section 17, the vast majority of decrees for dissolution of marriage might be confirmed at once. As then the proviso clearly applies to cases not falling within the preceding clause, it cannot merely form part of that clause ; and if it does not merely form part of any one of the previous clauses, but governs and controls each, there can be no reason for not regarding it as itself a clause. Upon similar reasoning to that of the Bombay High Court, it would be logical to hold that paragraph 4 also was not a separate clause, as, notwithstanding the observation of Mr. Justice RANADE to the contrary, it also does not " relate to distinct subject-matters : " it is merely consequential to clause 3 ; and there is, in my opinion, more reason to hold that paragraph 4 forms part of clause 3, and is therefore not a separate clause, than to hold that the proviso forms part of clause 4. In regard to Mr. Justice PARSONS' argument based on the colon at the end of paragraph 4, the Privy [277] Council in *The Maharani of Burdwan v. Krishna Kamini Dasi*, (1886) I. L. R., 14 Cal., 365, at page 372 of the report say (in accordance with many English authorities) that " it is an error to rely on punctuation in construing Acts of the Legislature." The soundness of this principle is well illustrated in the present instance by the fact that in the original edition of the Indian Divorce Act (see that *Gazette of India*, March 6th, 1869, p. 375), there is not a colon at the end of the fourth paragraph of section 17, but a full stop. Mr. Justice PARSONS proceeds to give illustrations from the Code of Criminal Procedure in support of the proposition that if in section 17 of the Indian Divorce Act the clauses had been numbered, the proviso would not have been numbered as a clause. When the sections of the Code to which he refers—sections 33, 35, 48, 57 and 123—are looked at, I think it clearly appears that they establish no such proposition. In every one of those sections it is obvious from the context that the proviso was intended to apply to, and govern the immediately preceding proposition only, and that to mark this the proviso was not separately numbered. But, for the reasons which I have just given, it is impossible to hold that the proviso in section 17 was intended to apply to and govern the fourth paragraph only. I agree with Mr. Justice RANADE, that from the point of view of considerations of expediency or public policy, such as the interests of

children, the prevention of collusion, and so forth, decrees for dissolution and decrees of nullity should stand on the same footing. But the question is whether that was the view of the Legislature in 1869 when the Indian Divorce Act was passed. So far as collusion is concerned, it certainly was not. It is obvious from section 20 that the Legislature deliberately excluded from the case of decrees of nullity the last paragraph of section 17, authorizing intervention on the ground of collusion during the progress of a suit for divorce in the District Court. Further, in regard to suits tried by the High Court in its original jurisdiction, whereas under section 16 a decree for dissolution must, in the first instance, be a decree *nisi*, not to be made absolute for at least six months, during which period any person may show cause why the decree should not be [278] made absolute by reason of collusion, or concealment of material facts; on the other hand, a decree for nullity under section 18 is made absolute at once, and there is no provision for intervention. Again, in England in 1869 the same distinction obtained, and it was not until the passing of the Matrimonial Causes Act, 1873, that decrees for dissolution and decrees of nullity were assimilated in respect of confirmation and intervention. It cannot therefore be argued that there was in 1869 any *a priori* probability or presumption that because a decree for dissolution made by a District Judge had to wait for confirmation for six months, therefore the Legislature considered a similar delay as appropriate for the confirmation of decrees of nullity. Mr. Justice RANADE in connection with the Matrimonial Causes Act, 1873, relies on section 7 of the Indian Divorce Act, which provides that "subject to the provisions contained in this Act, the High Courts and District Courts shall, in all suits and proceedings hereunder, act and give relief on principles and rules which, in the opinion of the said Courts, are as nearly as may be conformable to the principles and rules on which the Court for Divorce and Matrimonial causes in England for the time being acts and gives relief." In the first place, that section is "subject to the provisions contained in this Act." This shows, I think, that the principles mentioned in the section are only applicable in the absence of express provisions in the Act: they cannot be applied to construe the provisions contained in the Act, such as sections 17 and 20, or to extend or restrict the operations of those provisions. In *Abbott v. Abbott*, (1869) 4 B. L. R., 51, Mr. Justice MACPHERSON held that "section 7 of the Divorce Act applies not to points of procedure, but to the general principles and rules on which the Court is to act and give relief." Sections 17 and 20 relate to "points of procedure" only. In *A. v. B.*, (1898) I. L. R., 22 Bom., 612, it was held by Sir CHARLES FARRAN, C. J., and Mr. Justice TYABJI, that the principles and rules referred to in section 7 were not mere rules of procedure, such as the rules which regulate appeals: and I think that the same may be said in reference to the rules which regulate confirmation, especially when it is remembered that in England there is nothing which precisely corresponds to the matrimonial jurisdiction of a District Court in India, or the [279] confirmation of the decrees of those Courts by the High Court. I understand the practice of this Court to have been in accordance with the view that section 20 of the Divorce Act does not make the proviso in section 17 applicable to the confirmation of decrees of nullity made by a District Judge. I see no reason to think that this practice is wrong, and I am therefore of opinion that this Court had power, on the 7th December 1888, to confirm the Judicial Commissioner's decree of nullity of the 28th July 1888.

The next question is, assuming that by reason of the proviso in section 17 the High Court ought not to have confirmed the Judicial Commissioner's decree until after the expiration of six months from the pronouncing thereof, does it

follow that the confirmation was null and void, and the subsequent marriage of the respondent with the petitioner invalid? The District Judge in his reference assumes that the answer to this question must be in the affirmative; but he gives no reasons, and I cannot agree with him. The decree of the High Court of the 7th December 1888, was a decree of the kind specified in section 41 of the Indian Evidence Act, 1872. It was a final decree made in the exercise of matrimonial jurisdiction, declaring the present respondent not to be the wife of the then respondent. If it was the decree of "a competent Court," then, however erroneous or irregular it may have been, it is under the section conclusive proof that the respondent's previous marriage was a nullity. The effect of such conclusive proof can only be avoided by showing that the High Court was not "a competent Court" within the meaning of section 41, or was "a Court not competent to deliver" the decree within the meaning of section 44. Unless that can be shown, the decree is conclusive, as no fraud or collusion is suggested. The question then is, was the High Court's decree of the 7th December 1888, "delivered by a Court not competent to deliver it? It appears to me that this question must be answered in the negative. The High Court had undoubted jurisdiction in the suit for nullity of marriage. As regards place, it possessed the local jurisdiction defined by the Act. It possessed personal jurisdiction over the parties to that suit who were persons governed by the Divorce Act; and it had jurisdiction over the subject-matter, or the class of suit as [280] disclosed in the petition for declaration of nullity. It was properly seised of the case, which was duly transmitted to it by the Court of the Judicial Commissioner, and notice of the date fixed for confirmation was duly served upon the parties, of whom the petitioner was represented at the hearing by a pleader. There was no appeal to Her Majesty in Council from the decree of confirmation, as there might have been under section 56. Since the High Court had jurisdiction in the suit, it follows that it had jurisdiction to consider and determine every question of law or fact arising in the suit. This would of course include any question of procedure, such as a question of the construction of sections 17 and 20 of the Indian Divorce Act. To illustrate this, let us suppose that at the hearing either the petitioner or the respondent had formally taken the objection that an adjournment was necessary, as under the proviso in section 17 the decree could not be confirmed until the six months' period had expired. Suppose further that, after full argument on the point, the High Court had taken a view of section 17 different from that expressed in the Bombay case, and had confirmed the decree of the Judicial Commissioner accordingly. In such a case surely the Court would not only be competent but bound to decide the question thus raised and argued. If competent to consider and decide the question, it cannot be supposed that the Court was "competent" to decide it in one particular way only. This shows that even if the decision was erroneous or irregular, the Court was nevertheless "competent to deliver" it. If not, what is the alternative? Could any Court, however subordinate, in any subsequent suit, at any distance of time, treat the High Court's decree as a nullity and the parties still husband and wife? For instance, could a creditor successfully sue the former husband in a Small Cause Court for the price of necessaries supplied to the wife after the decree, on the ground that the decree was void, as the High Court had taken an erroneous view of the proviso in section 17? Again, after the High Court's decree, could either of the parties re-marrying be prosecuted for bigamy and the children of the subsequent marriage be held illegitimate? If these conclusions would be absurd where the High Court decided the question of the construction of section 17 after argument, they must equally be so in a case [281] like the present. The competency or jurisdiction of the Court cannot possibly depend on whether a point which it decides has been raised or argued

by a party or counsel. An express decision upon the construction of sections 17 and 20 and an implied decision must stand on the same footing. The view that the decree was a nullity by reason of the proviso in section 17 could only be supported on the principle that wherever a decision is wrong in law, or violated a rule of procedure, the Court must be held incompetent to deliver it. Such a principle is obviously unsustainable. In the first place, it is opposed to the language of sections 41 and 44 of the Evidence Act, which were undoubtedly meant to make the decrees which they refer to conclusive except in a very restricted class of cases. If the intention had been to make such decrees questionable on the ground of any legal defect or irregularity, very different expressions would have been used, and it would be inaccurate to describe such decrees as constituting "conclusive proof." In the second place, if the principle were sound, any judgment might be collaterally attacked by contending that it was in violation of such rules of procedure as the rule of *res judicata* contained in section 13 of the Code of Civil Procedure, or the rule of limitation contained in section 4 of the Limitation Act, 1877. These rules are expressed in language as peremptory as that of the proviso in section 17 of the Divorce Act; but it has never been held, and it could not be held, that a Court which erroneously decrees a suit which it should have dismissed as time-barred, or as barred by the rule of *res judicata*, acts without jurisdiction and is not competent to deliver its decree. The insecurity of titles and of status arising from the adoption of such a principle is just what sections 41 and 44 of the Evidence Act were intended to prevent. The sections recognize that, given the competency of the Court, even error or irregularity in the decision is a less evil than the total absence of finality which would be the only alternative. In the third place, the judgment of the Privy Council in *Amir Hasan Khan v. Shao Bakhsh Singh*, (1884) I. L. R., 11 Cal., p. 6; L. R., 11 I. A., 237, shows that, even for the purposes of direct attack in revision under section 622 of the Code of Civil Procedure, a decree cannot be held to have been made without jurisdiction [282] or illegally, merely because it is wrong in law or alleged to be in violation of such rules of procedure as those contained in sections 13 and 43 of the Code. If so, then *a fortiori* such a decree could not be regarded as made without jurisdiction for the purposes, not of direct but merely collateral attack in a subsequent suit. In *Sardarmal Jagonath v. Aranvayal Sabhapathy Moodliar*, (1896) I.L.R., 21 Bom., 205, a judgment-creditor sought to maintain an attachment on the property of his debtor who had previously been adjudicated an insolvent by the Madras Insolvent Court, and to resist a claim by the Official Assignee, under section 278 of the Code, for the release of the property from attachment, on the ground that the order of adjudication and the vesting order were null and void, and gave no title to the Official Assignee, inasmuch as the original petition to the Insolvent Court disclosed no act of insolvency on which an order of adjudication could legally be passed under the Statute. I held that as the Madras Court was undoubtedly competent to deal with the petition, and was both competent and bound to consider whether the acts alleged in the petition constituted acts of insolvency within the meaning of the Statute, the order, even if wrong in law, was not one which the Madras Court was not competent to deliver within the meaning of section 44 of the Evidence Act, and that therefore it could not be treated in collateral proceedings as null and void, but was conclusive of the insolvency and of the Official Assignee's title. At page 214 of the Report, I said:—"Once recognize that a Court is competent to decide a suit or a petition in insolvency or any other matter, and it follows that it is competent to decide all questions which arise in that matter, whether they are questions of fact or of law, and whether they appear on the face of the plaint or petition or arise subsequently. If it decides them wrongly, its decision may be

subject to reversal on appeal or otherwise, but cannot be treated as a nullity." The same principle is, I think, recognized in the judgment of Mr. Justice KNOX and Mr. Justice AIKMAN in *Durga Prasad v. Mahabir Prasad*, Weekly Notes, 1899, p. 199. The English, Indian and American authorities collected in Mr. Hukm Chand's learned Treatise on the Law of *Res Judicata*, Chap. VII, sections 186, 187, 189, 190 and 192, establish that for the purpose of showing [283] in collateral proceedings that a judgment is void for want of jurisdiction or competency in the Court, it is not sufficient to show error in law, irregularity in practice, or departure from the provisions of the law of procedure, as for instance, by taking the proceedings at a wrong or unauthorized time. In one American case cited at p. 475, it was said "the principle is so well settled that it is said to be an axiom of the Law, that when a Court has jurisdiction over the subject-matter and the parties, its judgment cannot be impeached collaterally for errors of law, or irregularity in practice." In another American case cited at page 476, it was said :—"Jurisdiction having been obtained, the fact that the judgment was rendered sooner than it should have been, does not make the judgment void: a judgment thus rendered is irregular only." The whole subject is elaborately discussed by a learned American author, Mr. Vanfleet, in his work "The Law of Collateral Attack on Judicial Proceedings" (see especially Chapter VIII). In Chapter XIV, sections 710, 711, 712 and 713, the author gives instances to show that a "premature judgment," that is, a judgment given before it ought to have been given according to the law of procedure, cannot therefore be treated in collateral proceedings as void and given by a Court without jurisdiction. "An administrator's order to sell land could not be granted lawfully until after the final account of the personal assets had been settled; but an order granted before that had been done is not void. The Missouri Statute required the Court to delay the approval of an administrator's or guardian's sale of land until the next term after it was made, but such a sale is not void because approved at the same term or an adjourned term."

For these reasons I would answer the reference by saying that, in our opinion, the marriage of the respondent with the petitioner was not invalid by reason of any want of jurisdiction in the High Court's decree of the 7th December 1888.

I desire to repeat what I stated at the hearing, that the Court is much indebted to Mr. Porter and Mr. Sorabji, who appeared as *amici curiæ* for the co-respondent and the petitioner, respectively, for the assistance rendered to the Bench by their very able argument.

[284] **Knox, J.**—I fully concur both in the reasons and in the conclusions arrived at by the learned Chief Justice, and have nothing further to add.

Blair, J.—I also entirely concur in the conclusions arrived at by the learned Chief Justice and in the reasoning on which those conclusions are based. I have only one addition to make. It is that, in my opinion, the judgment of a Bench of this Court confirming the decree for nullity of marriage is an authority on the question of law whether for the validity of such a confirming order a delay of six months is necessary. The Bench which implicitly decided that the six months' delay imposed in cases of dissolution of marriage was not necessary in cases of nullity was a Bench similarly constituted to the present, and of co-ordinate authority; and, if not by strict law, by the comity of the Courts, the law in such a decision ought to be taken as authoritative until declared to be erroneous by a Full Bench of the Court. *A fortiori* it was not open to an inferior Court to question the decision of any Bench of this Court. It is impossible to draw the inference which appears to be suggested by the District Judge that the matter was not considered and decided by the Bench of

this Court which confirmed the decree of nullity. It was necessary as a foundation for the order which it made that it should have adjudicated on that question and decided that the six months' delay was not in that case imposed by the law. Therefore on authority as well as on the reasoning set forth in detail in the learned Chief Justice's judgment I would make the same answer to this reference.

NOTES.

[See also (1904) 26 All., 522 where this decision was explained.]

[22 All. 285]

The 3rd April, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, MR. JUSTICE KNOX,
MR. JUSTICE BLAIR, MR. JUSTICE BANERJI, MR. JUSTICE BURKITT AND
MR. JUSTICE AIKMAN.

Bisheshur Dial and another.....Plaintiffs

versus

Ram Sarup.....Defendant.*

*Act No. IV of 1882 (Transfer of Property Act), Section 82—Mortgage—
Purchase by mortgagee at auction of portion of the mortgaged property—
Effect of such purchase in reducing the mortgage debt.*

When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect [285] of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Lakshmidas Ramdas v. Jamnadas Shankar Lal*, (1896) I. L. R., 22 Bom., 304, followed. *Nand Kishore v. Raja Hariraj Singh*, (1897) I. L. R., 20 All., 23; and *Sumera Kuar v. Bhagwant Singh*, Weekly Notes, 1895, p. 1; and *Chunna Lal v. Anandi Lal*, (1896) I. L. R., 19 All., 196, considered. *Mahabir Pershad Singh v. Macnaghten*, (1889) I. L. R., 16 Cal., 692, *Nawab Azmat Ali Khan v. Jawahir Singh*, (1870) 13 Moo., I. A., 404, and *Mahtab Singh v. Misri Lal*, N.-W. P., H. C. Rep., 1867, p. 88, referred to.

THE facts of the case are as follows:—Balak Ram, the ancestor of the defendants, made a simple mortgage for Rs. 1,000 in favour of Jai Gopal, the plaintiffs' ancestor, on November 3rd, 1885. In 1893 the property mortgaged was advertised for sale in execution of a decree of one Kunj Behari and another. As the amount of the decree of Kunj Behari was only Rs. 1,155-1-9, only half of the property was sold by auction and it was purchased, on November 21st, 1893, by the plaintiffs for Rs. 1,500. At the time of the auction sale an application was made to notify the amount of the mortgage-money. The plaintiffs, alleging that as they had purchased only half of the property, one-half only of the mortgage-debt had been discharged, brought a suit against the defendants claiming that the remaining half of the property in the hands of the defendants was liable for the other half of the mortgage-debt, together with interest, and asking that that amount might be awarded to them and

* Second Appeal No. 221 of 1897, from a decree of Maulvi Muhammad Siraj-ud-din, Subordinate Judge of Agra, dated the 22nd December 1896, reversing a decree of Maulvi Muhammad Fida Husaini Munsif, of Agra, dated the 30th of June 1896.

in default of payment sale of that half of the property which remained with the defendants. The defendants objected that, the plaintiffs having purchased half of the property, the whole hypothecation debt should be charged against that half.

The first Court decreed the claim for a moiety of the principal and dismissed the claim for interest. The Lower Appellate Court allowed the appeal of the defendants, dismissing the suit of the plaintiffs on the ground that the property purchased by them was worth, approximately, Rs. 3,000, and that as they had purchased it for Rs. 1,500 only it must be taken that they purchased it for Rs. 1,500 plus Rs. 1,000, the mortgage-money [286] due to them, and which mortgage was duly proclaimed at the time of the sale of half the property.

Pandit *Sunder Lal*, with whom was *Munshi Ram Prasad*, for the Appellant.

Where several parcels of property are jointly mortgaged to secure a mortgage-debt, in the absence of a contract to the contrary each parcel is jointly and severally liable for the whole debt due to the mortgagee. If one of these parcels is purchased by a person other than the mortgagee, it may be sold in execution of the decree obtained by the mortgagee on his mortgage. As between themselves each parcel is liable to contribute rateably to the debt secured by the mortgage (*vide* section 82 of Act IV of 1882). The parcel purchased by the stranger from the mortgagor as between it and other mortgaged parcels was liable to contribute its quota of the mortgage-debt apportioned according to the valuation of each of the mortgaged parcels and so was every other parcel mortgaged.

If the whole of the mortgaged debt was recovered by sale of the parcel purchased by the stranger, the owner of this parcel could claim contribution from the owners of the other parcels for the sum recovered from it in excess of its proper quota, under section 82 of Act IV of 1882.

If the mortgagee himself purchased one of the parcels, as owner of the parcel purchased, he is bound to pay to himself the quota of the mortgage-debt for which the parcel in question is liable under the rule formulated in section 82 of Act IV of 1882. In such case there is a confluence of the estates of the mortgagor and the mortgagee in the same person, and to the extent of the quota of the mortgage-debt, for which this property is liable, the mortgage is extinguished, the balance of the mortgage-debt being still recoverable by the mortgagee. The last paragraph of section 60 of Act No. IV of 1882 is based on the same principle. Where the mortgagee himself purchases a part of the mortgaged property, the remainder of the mortgaged property might be redeemed "on payment of a proportionate part of the amount remaining due on a mortgage." These propositions are supported by the following cases:—*Nawab Azmat Ali Khan v. Jawahir Singh*, (1870) 13 Moo. I. A., 404; *Mahtab Singh v. Misri Lal*, N.-W. P., H. C. Rep., 1867, p. 88; [287] *Kesree v. Seth Roshan Lal*, N.-W. P., H. C. Rep., 1870, p. 4; *Sobha Sah v. Inderjeet*, N.-W. P., H. C. Rep., 1873, p. 148; *Nathoo Sahoo v. Lalah Ameer Chand*, (1875) 15 B. L. R., 303; *Gossyen Luchmee Narain Poori v. Bicram Singh*, (1879) 4 C. L. R., 294; *Hirdy Narain v. Syed Allaoollah*, (1878) I. L. R., 4 Cal., 72; *Bisheshar Singh v. Laik Singh*, (1883) I. L. R., 5 All., 257; *Lakhmidas Ramdas v. Jamnadas Shankar Lal*, (1896) I. L. R., 22 Bom., 304; *Flint v. Howard*, L. R., 1893, Ch. D., Vol. II, p. 54.

The Honorable Mr. Justice AIKMAN referred to *Maharajah Kishen Pertab Sahee Bahadoor v. Lalla Nund Coomar Singh Parray*, (1876) 25 W. R., 388; *Sheonath Doss v. Janki Prasad Singh*, (1888) I. L. R., 16 Cal., 132. These.

cases support the appellant's contention. A mortgagee purchasing a part of the mortgaged property at a public auction with the leave of the Court is exactly in the same position as a stranger purchaser.

The rule laid down in *Sumera Kuar v. Bhagwant Singh*, Weekly Notes, 1895, p. 1, is based on no principle. On this rule the liability of each parcel of the property would depend :—(a) upon who the purchaser is at the public auction, whether he is the mortgagee himself or a stranger ; (b) upon the fluctuations of the market at the sale of each parcel of the mortgaged property.

In the case, say of a mortgage of ten parcels of property, the amount for which the last parcel is liable to the mortgagee, would fluctuate with the prices fetched by each of the nine other parcels and upon the purchaser of the parcel being the mortgagee or a stranger. The true rule is the one on which the last paragraph of section 60 and section 82 of Act IV of 1882 are based.

The principle upon which the ruling of the majority in the Full Bench in *Nand Kishore v. Raja Hariraj Singh*, (1897) I. L. R., 20 All., 23, is based also supports my case.

The reason for the rule I contend for is thus explained in N.-W. P., H. C. Rep., 1873, at p. 150 :—

"The reason of this is obvious. The whole estate as to one portion of the property has merged in the mortgagee, and the mortgagor, if compelled to redeem by payment of the whole debt, would have to sue the mortgagee for contribution afterwards [288] and thus by two suits between the same parties attain the result which, under the law as above interpreted, is now attained by one suit."

Pandit Madan Mohan Malaviya, for the Respondent.

Banerji, J.—This appeal has arisen in a suit brought under section 88 of Act No. IV of 1882 for sale upon a mortgage, dated the 3rd of November 1885. A moiety of the mortgaged property was sold by auction on 21st of November 1893, in execution of a simple decree for money held by other creditors of the mortgagor, and was purchased by the mortgagee subject to the above mortgage. The plaintiffs, who represent the mortgagee, seek in this suit to bring to sale the other moiety of the mortgaged property for recovery of a moiety of the amount due upon the mortgage. The Court of First Instance made a decree in favour of the plaintiffs for one-half of the principal amount of the mortgage and dismissed the claim for interest. Upon the appeal of the defendant, who represents the original mortgagor, the Lower Appellate Court dismissed the suit. The Court found that the market value of the moiety of the mortgaged property purchased by the mortgagee, if sold as unincumbered property, was Rs. 3,000, that the price paid for it by the mortgagee was Rs. 1,500, and that the difference between those two sums was equal to the amount due upon the mortgage. The Court held that the purchase by the mortgagee had thus the effect of fully discharging the mortgage, and that the plaintiffs' claim was not therefore maintainable. The correctness of this conclusion has been challenged in this second appeal, and it is contended that the purchase of a moiety of the mortgaged property by the mortgagee extinguished the mortgage debt to the extent of one-half only, and not in its entirety.

The view of the Court below is supported by the ruling in *Sumera Kuar v. Bhagwant Singh*, Weekly Notes, 1895, p. 1. Having regard to that ruling and certain observations contained in the judgments of my brother BLAIR and myself in the Full Bench case of *Nand Kishore v. Raja Hariraj Singh*, (1897) I. L. R., 20 All., 23, this case has been referred to a Full Bench.

In some of the earlier cases decided by this Court, it was held that the mere fact of the mortgagee buying a part of the mortgaged [289] property subject to his mortgage had the effect of totally extinguishing the mortgage. This view was dissented from in the Full Bench ruling referred to above, and it was held that such a purchase "has not necessarily the effect of fully discharging the mortgage." To what extent the mortgage should be held to have been discharged by the purchase was not decided in that case. That question, however, arises in this appeal, and is the only question to be determined by the Full Bench.

It is urged on behalf of the appellants that the price paid by the mortgagee for the portion of the mortgaged property purchased by him is not, in the absence of fraud, a material factor in determining the extent of the mortgage debt which is extinguished by the purchase, and that in each case the amount by which the mortgage debt is reduced, is that portion of it for which the property purchased was proportionately liable. After careful consideration I am of opinion that this contention is valid.

When several parcels of property are mortgaged to secure one debt, every parcel is liable to the mortgagee for the whole amount of the debt; but as between themselves each parcel is liable, in the absence of a contract to the contrary, to contribute to the debt in the proportion which its value bears to the value of the whole property comprised in the mortgage. This is the rule enunciated in section 82 of the Transfer of Property Act, 1882. The primary liability on each of several properties included in a mortgage being thus a proportionate share of the mortgage debt, every person who purchases one of those properties incurs a liability to that extent. There can be no doubt that if persons other than the mortgagee purchase different parcels of the mortgaged property, their liability, *inter se*, is, as stated above, proportionate to the relative value of the property purchased by each of them, and it is immaterial what price was paid for it. If any such purchaser has to discharge the whole of the mortgage debt, he is entitled to claim contribution from the owners of the remainder of the mortgaged property, and this right subsists even if the price of the parcel purchased by him was grossly inadequate, and the difference between that price and the actual market value of the property was in excess, not only of the amount of the proportionate liability of the property, but also of the whole amount [290] of the mortgage debt. For instance, if three parcels of property, each of the value of Rs. 500, are mortgaged to secure a debt of Rs. 300, each parcel is liable for Rs. 100. If one of them be purchased at auction for Rs. 50 and the purchaser be compelled to discharge the mortgage, he would be entitled to claim from the mortgagor or purchasers of the other two parcels Rs. 200, the amount for which those parcels were liable, although he himself benefited immensely by his purchase. The above is no doubt an extreme case, but it is not one which is wholly inconceivable. In such a case the price paid by the purchaser is never taken into account, and it has never been held that any equities exist as between him and the mortgagor or the purchasers of the remainder of the mortgaged property. Upon this point there is no controversy.

Does the case become different if the purchaser of a part of the mortgaged property be the mortgagee himself? When he buys a portion of that property, the rights of the mortgagee and the mortgagor, as regards the portion purchased, become vested in the same person, and the result is that a part of the mortgage debt is wiped out by reason of this fusion of interests, and the balance only is recoverable from the remainder of the mortgaged property. It is in consequence of this confluence of interests and the discharge of a portion

of the mortgage debt, that upon the mortgagee purchasing a part of the property, the integrity of the mortgage is broken up, and the mortgagee is not allowed to recover the whole amount of the debt from the remainder of the property. As has been already stated, each parcel of the mortgaged property is liable for the debt rateably to its value. Therefore when the rights of the mortgagee and the mortgagor become vested in the same person, only so much of the debt can be held to have been discharged as was proportionate to the value of the property in respect of which the confluence of rights takes place. There appears to be no difference in this respect between the case of a purchase by a stranger and that of a purchase by the mortgagee. When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, all that the mortgagor or other person interested in the remainder of the mortgaged property can claim is, that he should not be placed in [291] a worse position than that in which he would have been had the purchase been made by an outsider; that is to say, that the property in his hands should not be rendered liable for a larger amount than the sum with which it would have been chargeable in the case of a purchase by a stranger. In the latter case, if the mortgagor or other owner were compelled to discharge the whole of the debt he would be entitled to contribution from the purchaser rateably to the value of the property purchased by him. In the case of a purchase by the mortgagee there appears to be no reason why the mortgagor or his representative should be allowed anything beyond a right to have his liability reduced to the same extent as in the case of a purchase by an outsider, and this seems to be the only equity to which he is entitled. It has been held by the Privy Council in *Mahabir Pershad Singh v. Macnaghten*, (1889) I. L. R., 16 Cal., 682, that a mortgagee who buys the mortgaged property at auction with the leave of the Court is not a trustee for the mortgagor, and is in the same position as any independent purchaser. As against the mortgagee, therefore, no higher equity exists in this respect in favour of the mortgagor than that which exists against any other purchaser. These considerations were overlooked in the case of *Sumera v. Bhagwant*, Weekly Notes, 1895, p. 1, and in my judgments in *Chunna Lal v. Anandi Lal*, (1896) I. L. R., 19 All., 196, and *Nand Kishore v. Raja Hariraj Singh*, (1897) I. L. R., 20 All., 23. When the mortgagee buys at auction the equity of redemption in a part of the mortgaged property for a grossly inadequate value, it no doubt appears at first sight that an injury has been done to the mortgagor, and that the mortgagee has taken advantage of his position. That was the case in *Sumera v. Bhagwant*, Weekly Notes, 1895, p. 1. But where no fraud has been perpetrated and no undue advantage has been taken by the mortgagee, and he has purchased the equity of redemption in good faith, like any other independent purchaser, there is obviously no reason for placing him in a worse position than any other purchaser.

In *Nawab Azmat Ali Khan v. Jawahir Singh*, (1870) 13 Moo., I. A., 404, where the mortgagee had purchased a part of the mortgaged property, their Lordships of the Privy Council observed that the proportion of the debt chargeable on each village ought to vary [292] according to the actual value of the village, and the plaintiff in that case was allowed to redeem the village Hosseinpore purchased by him upon payment of the proportion of the mortgage debt thus chargeable on his village. The actual value paid by the mortgagee for the villages purchased by him was not taken into account.

In *Mahtab Singh v. Misri Lal*, N.-W. P., H. C. Rep., 1867, p. 88, this Court held in a case similar to the case cited above that each purchaser, including the mortgagee, had "bought subject to a proportionate share of the "burden," and that the plaintiff was entitled to "redeem the village purchased

by him on payment of such portion of the mortgage debt "as is proportionate to the relative value of the mortgaged properties."

The case which most resembles the present is that of *Lakhmidas Ramdas v. Jamnadas Shankar Lal*, (1896) I. L. R., 22 Bom., 304. In that case three properties were mortgaged to the plaintiff for Rs. 90. In execution of a simple decree for money the equity of redemption in one of those properties, namely, a house, was sold by auction and purchased by the plaintiff-mortgagee for Rs. 2-2. He sold it to one Francis for Rs. 100, and subsequently brought his suit to recover Rs. 90, the whole of his mortgage money, by sale of the two remaining properties. The suit was dismissed by the Court of First Instance, on the ground that the plaintiff had realized Rs. 100 by the sale of the property purchased by him, and that therefore nothing was due. FARRAN, C.J., held "that the plaintiff, when he purchased the equity of redemption in the house, purchased it subject to its due proportion of the mortgage debt. That portion of the mortgage debt thus ceased to exist, and the plaintiff's right as mortgagee to recover the money secured by his mortgage was reduced to that extent. What proportion of the mortgage debt was thus wiped out depends upon the proportion of the value of the house to the value of the rest of the mortgaged properties." This is an instructive case, and shows that the price paid by the mortgagee is not to be taken into account in determining the extent of the mortgage debt discharged by the purchase made by the mortgagee. Upon further consideration, I am of opinion that the rule laid down by the Bombay [293] High Court is the true rule, and that when the mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage-debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt that the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. It is not necessary to say in this case whether the same result will ensue if the purchase by the mortgagee is made under a private contract with the mortgagor and not at auction.

The learned vakil for the respondent referred to the rulings in *Gokaldas v. Puran Mal*, (1884) I. L. R., 10 Cal., 1035, and *Hart v. Tara Prasanna*, (1885) I. L. R., 11 Cal., 718, and section 90 of the Indian Trusts Act. The first case has no bearing upon the question before us, and, having regard to the decision of the Privy Council in *Mahabir Pershad Singh v. Macnaghten*, (1889) I. L. R., 16 Cal., 682, the argument based on the other ruling and on section 90 cannot prevail.

As the mortgagee in this case purchased a moiety of the mortgaged property, the mortgage debt became extinct to the extent of a moiety only, and the plaintiffs were entitled to recover the other moiety by the sale of the remainder of the mortgaged property. The Court of First Instance granted them a decree for a half of the principal mortgage amount. The plaintiffs submitted to that decree and did not appeal. They are not therefore entitled to a decree for a larger amount than that decreed to them by the first Court. The result is that I would allow this appeal with costs, set aside the decree of the Court below with costs, and restore the decree of the Court of First Instance.

Strachey, C. J.—I concur in the judgment of my brother BANERJI.

Knox, J.—I also concur.

Blair, J.—I also concur..

Burkitt, J.—I am of the same opinion.

Aikman, J.—I also concur in the judgment of my brother BANERJI,
Appeal decreed.

NOTES.

[By the mortgagee's purchase of a portion of the mortgaged property, the mortgage-debt is proportionately reduced :—(1914) 36 All., 272 ; (1911) 10 I. C., 235 (All.) ; (1911) 33 All., 434 (*sir* lands, mortgagor becoming ex-proprietary tenant) ; (1903) 26 All., 72 ; (1906) 4 C. L. J., 317 ; (1906) 4 C. L. J., 195 ; (1901) 26 Bom., 88 ; (1904) 6 Bom. L. R., 284 ; (1908) 12 C. W. N., 745 ; 8 C. L. J., 92 (*private sale*) ; (1904) 7 O. C., 307 ; (1906) 9 O. C., 259.

The case of the mortgagee himself bringing the property to sale was distinguished in (1901) 26 Bom., 88 ; (1906) 28 All., 700 ; see also (1915) 29 M.L.J., 319 ; (1915) 29 I. C., 124 (Mad.) ; (1908) 31 Mad., 333 ; (1909) 14 C. W. N., 165 ; (1912) 10 A. L. J., 211 ; (1905) 32 Cal., 1077 as regards the effect of a partial release. In (1906) 4 C. L. J., 573, it was held that the question of release could not be raised in execution proceedings.

See also, on this subject, (1915) 37 All., 474 ; (1915) 37 All., 101 ; (1915) 21 C.L.J., 104.]

[294] APPELLATE CIVIL.

The 3rd April, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND

MR. JUSTICE BANERJI.

Ishri Prasad Singh.....Plaintiff

versus

Lalli Jas Kunwar and another.....Defendants.*

Lalli Jas Kunwar and another.....Defendants

versus

Ishri Prasad Singh.....Plaintiff.*

Act No. 1 of 1872 (Indian Evidence Act,) sections 65 and 90—Presumption as to ancient documents—Destruction of original—Presumption applied to certified copy—Regulation No. LII of 1803, section 37—Disqualified proprietor—Procedure preliminary to taking estate under the Court of Wards—Procedure prescribed by the regulation to be strictly followed.*

Held that the presumption allowed by section 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno*, (1879) I. L. R., 5 Cal., 886 ; S. C., 6 C. L. R., 199, followed.

The procedure prescribed by Regulation No. LII of 1803 for disqualifying proprietors and taking their estates under the Court of Wards must be strictly followed in order

* First Appeal Nos. 129 and 127 of 1898, from a decree of Maulvi Muhammad Mazhar Hasan, Subordinate Judge of Mainpuri, dated the 21st February 1898.

that the disabilities incident to the status of a disqualified proprietor may ensue. *Mohummud Zahoor Ali Khan v. Mussumat Tahkoorani Rutta Koeri*, (1867) 11 Moo. I. A., 468, referred to. It is incumbent therefore upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor" to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law.

THE facts of this case, so far as they are necessary for the purposes of this report, appear from the judgment of the Court.

Pandit *Moti Lal*, for the Appellant in No. 127, Respondent in No. 129.

Mr. *D. N. Banerji*, Pandit *Sundar Lal* and Babu *Jogindro Nath Chaudhri*, for the Respondents in No. 127, Appellants in No. 129.

Strachey, C. J., and Banerji, J.—The plaintiff in this case claiming to be the nearest reversioner to the estate of Thakur Chaturbhuj Singh, deceased, sues for declaratory relief in respect of certain acts done by Thakurain Mahtab Kunwar, widow of [295] Chaturbhuj, by Lalli Jas Kunwar, his daughter, and by the second defendant Thakur Umrao Singh. The acts complained of are:—

(1) a transfer made about the year 1850 by the widow Mahtab Kunwar of two villages belonging to the Kotla estate left by Chaturbhuj, namely, Ajaibpur Rakhauli and Ahmadpur Madha, in favour of her daughter, the defendant Lalli Jas Kunwar;

(2) a transfer made by Lalli Jas Kunwar on the 18th February 1876, during the lifetime of Mahtab Kunwar, of the same two villages, in favour of Mohinder Kunwar, the deceased wife of the second defendant, who is in possession of them by inheritance from her;

(3) an entry obtained by Lalli Jas Kunwar after Mahtab Kunwar's death in April 1889, of her name in the revenue records in respect of two other villages of the Kotla estate, namely, Khairgarh and Noner, upon the allegation that they formed part of her *stridhan*;

(4) a denial by the defendants in their written statements filed on the 23rd August 1892, in a suit brought by the present plaintiff in the Court of the Subordinate Judge of Agra, of the plaintiff's title as next reversionary heir of Chaturbhuj to succeed to the Kotla estate as absolute owner after the death of Lalli Jas Kunwar.

The reliefs claimed by the plaintiff are:—

(1) A declaration that he is the next reversionary heir of Chaturbhuj Singh in respect of the whole Kotla estate.

(2) A declaration that the transfer by Mahtab Kunwar in favour of Lalli Jas Kunwar of Ajaibpur Rakhauli and Ahmadpur Madha was void and inoperative as against the plaintiff beyond the life-time of Lalli Jas Kunwar.

(3) A declaration that the four villages named in the plaint are not the *stridhan* of Lalli Jas Kunwar, and that she has no right to make a transfer of them beyond her life-interest.

The defendants raised various pleas, for the most part of a technical character, and to two of which it is unnecessary to refer. Their main pleas were (1) that the plaintiff was not the nearest reversionary heir of Chaturbhuj Singh, and was therefore not entitled to bring the suit; (2) that, in any event, the first prayer of the plaint for declaration of his reversionary title was [296] not maintainable; (3) that the suit was barred by limitation; and (4) that the four villages named in the plaint formed part of the defendant Lalli Jas Kunwar's *stridhan*.

The Court below has held, first, that the first prayer of the plaint must be refused on the ground that no suit would lie for such a declaration as prayed therein; secondly, that the second prayer of the plaint was barred by Art. 125

of the second schedule of the Limitation Act, 1877; thirdly, that the villages Ajaibpur Rakhauli and Ahmadpur Madha were given to Lalli Jas Kunwar on her marriage as dowry, and therefore constitute her *stridhan*; fourthly, that as regards all the properties left by Chaturbhuj Singh other than Ahmadpur Madha and Ajaibpur Rakhauli, the plaintiff was entitled to the declaration claimed in the third prayer of the plaint, namely, that Lalli Jas Kunwar had only a life-interest and not any alienable absolute interest. The rest of the claim was dismissed. From this decision both parties have appealed, and we have heard the two appeals together. First Appeal No. 127 of 1898 is the appeal of the plaintiff. First Appeal No. 129 of 1898 is the appeal of the defendants. Both appeals may be disposed of in one judgment.

As regards the first point, the Court below apparently holds that the plaintiff has, during the lifetime of Lalli Jas Kunwar, only a contingent interest as reversioner, and not a vested interest sufficient to support a suit for a declaration under section 42 of the Specific Relief Act, 1877. In support of this view the Subordinate Judge refers to *Hunsbutti Kerain v. Ishri Dut Koer*, (1879) 1. L. R., 5 Cal., 512; S. C., 4 C. L. R., 511; and *Greeman Singh v. Wahari Lall Singh*, (1881) 1. L. R., 8 Cal., 12. In the view which we take of the case, it is not necessary for us to decide or discuss this point. It is difficult to say upon what grounds the Subordinate Judge has made the declaration contained in the decree as to the villages left by Chaturbhuj Singh other than those mentioned in the plaint. It is clear from the plaint that those other villages were only included in the suit in reference to the first prayer which the Court below has disallowed. No cause of action is disclosed by the plaint in reference to those other villages either as regards the alienations mentioned in [297] paragraphs (4) and (6) (as to which the suit has been dismissed as time-barred), or as regards the allegation as to *stridhan*, the plaintiff not alleging that Lalli Jas Kunwar ever claimed as her *stridhan* any villages besides the villages named in the plaint or in paragraph (18) of the written statement. Upon the view taken by the Subordinate Judge it appears to us that he ought to have dismissed the suit, except to the extent of a declaration that the villages Khairgarh and Noner were not the *stridhan* of Lalli Jas Kunwar.

In the argument of these appeals, as in the Court below, the main question discussed has been whether the plaintiff is the nearest reversioner to the estate of Chaturbhuj Singh so as to entitle him to maintain a declaratory suit impeaching the acts of the widow and the daughter. There can be no question, having regard to the rulings of their Lordships of the Privy Council, that if he cannot show this the whole suit must fail. In the plaint he claims that he stands in that relation to Chaturbhuj Singh by virtue of two adoptions,—first, an adoption of his father Har Narain Singh, secondly, an adoption of Chaturbhuj Singh himself. He further contends that, even if neither of those adoptions is held proved, he is still, with reference to the genealogical table annexed to the plaint, the nearest reversioner to the estate of Chaturbhuj Singh.

In reply to the suit, the defendants in their written statements deny both adoptions, deny the genealogical table asserted by the plaintiff, and set up a different genealogical table of their own. It is, of course, for the plaintiff to prove the adoptions and the genealogical table upon which his title to sue as nearest reversioner is based.

To explain the plaintiff's case as to the relation in which he stands to Chaturbhuj Singh, we may for the present assume the correctness of the genealogical table found to be correct by the Subordinate Judge, and printed in his judgment at page 45 of the paper book, and which does not entirely adopt

either the pedigree set up by the plaintiff or that set up by the defendants. According to the plaintiff, Chaturbhuj Singh, who was the son of Bhup Singh in Harkishen Das' branch of the family, was adopted to Sundar Singh in the branch of Raja Ram, brother of [298] Harkishen Das, by Sundar Singh's widow, at Kunwar, about the year 1831. He further alleges that his own father, Har Narain Singh, also in the branch of Harkishen Das, was adopted to Bhagwan Singh, a member of Raja Ram's branch, by Bhagwan Singh's widow, Dhan Kunwar, in 1829. If both these adoptions are proved, the result would be to make Chaturbhuj Singh and Har Narain Singh, the grandson and great-grandson respectively of two brothers Kishen Singh and Jawahir Singh, grandsons of Raja Ram, brother of Harkishen Das. As there are admittedly no other persons living who are descended from Kishen Singh or Jawahir Singh it follows that the plaintiff, as the son of Har Narain Singh, would be the nearest reversioner to Chaturbhuj Singh, whose widow, Mahtab Kunwar, made the alienation first complained of in the plaint, and whose daughter, the first defendant, Lalli Jas Kunwar, is in possession of the bulk of the estate. As already stated, however, the plaintiff further contends that even if neither adoption is proved, there would still be no nearer reversioner than himself to Chaturbhuj Singh, and that, therefore, his declaratory suit would still be maintainable. He seeks to prove this by the genealogical table annexed to the plaint. One of the respects in which that table differs from the table accepted as correct by the Subordinate Judge is that the plaintiff denies that Pahar Singh was a son of Harkishen Das, and consequently denies the relationship of Chaturbhuj Singh of all the descendants of Pahar Singh. If, as the defendants contend, and as the Subordinate Judge finds, Pahar Singh was a son of Harkishen Das, then admittedly there are several persons who would be nearer reversioners than the plaintiff to Chaturbhuj Singh; for instance, the grandsons of Arjun Singh, son of Pahar Singh, and the second defendant Umrao Singh, who is the great-grandson of Pahar Singh's son Madho Singh.

The defendants contend that Har Narain was descended, not as alleged by the plaintiff, from Mandhata, a son of Harkishen Das, but from Sartaj Singh, an uncle of Harkishen Das, and that Mandhata died childless. The result of that would be that the plaintiff would be much more distantly related to Chaturbhuj Singh than several other persons. We need only say that the Court below has found that Har Narain was, as the plaintiff [299] asserts, descended from Mandhata, and that as to this we see no reason to disagree with the decision which has hardly been disputed in the appeal before us. The defendants also contend that Harkishen Das had a brother Hansram, whose descendants would also be nearer to Chaturbhuj Singh than the plaintiff. In the view which we take of the case, it is not necessary for us to decide that point.

The result of these opposing contentions may be shortly stated thus. If the plaintiff succeeds in proving both the adoptions alleged by him, he establishes his position as the nearest reversioner to Chaturbhuj Singh. If he proves the adoption of Har Narain Singh only, the suit must fail, as in that case the plaintiff, having passed by reason of the adoption out of Harkishen's branch into that of Raja Ram, would not be the nearest reversioner to Chaturbhuj Singh in the presence of other persons admittedly living in the branch of Harkishen Das himself to which Chaturbhuj belonged. If the plaintiff proves the adoption of Chaturbhuj only, he can only succeed if Pahar Singh was not a son of Harkishen Das, for, if he was, then, as stated above, several of the descendants of Pahar Singh would be nearer.

to Chaturbhuj Singh than the plaintiff. If the plaintiff proves neither of the adoptions, then he can only succeed by proving that Pahar Singh was not a son of Harkishen Das.

We will consider in turn each of the two alleged adoptions—and first that of Har Narain Singh. The Subordinate Judge, after a very full statement of the evidence bearing on that adoption, came to the conclusion that it was proved to have taken place in fact, and also that it was a valid adoption in law. So far as the fact of the adoption is concerned, we have arrived at the conclusion that we ought not to dissent from the Subordinate Judge's finding, which is confirmed by materials which were not before the Court below. The earliest documents bearing on the question are a group of three purporting to date from about the time of adoption itself. The first is an agreement purporting to be executed by Dhan Kunwar, and bearing her seal, on the 2nd December 1829. It states that she has for the preservation of the estate adopted as her son Har Narain, son of Sarup Singh, and adds that the document has been written by way of an [300] agreement and of a deed of adoption. The second is a document, dated 3rd December 1829, by which Sarup Singh, the natural father of Har Narain Singh, states that he has of his own accord given his son Har Narain Singh to Dhan Kunwar, and that she of her own free will adopted the said son as her own, and made him a substitute for a real son in connection with the estate of her deceased husband. The third is an agreement, dated the 11th December 1829, purporting to be executed by Ganga Kunwar, widow of a cousin of Bhagwan Singh, the husband of Dhan Kunwar, setting forth the adoption of Har Narain Singh, and stating in substance that she also has put Har Narain Singh in possession of the entire estate in her possession and made him owner thereof. The two first documents bear the seal of a Kazi, and the attestations of numerous witnesses, zamindars and others. All three documents obviously are of great age, and it has not been disputed that they were produced from proper custody. Apart from the general evidence contesting the adoption of Har Narain Singh, no serious argument was addressed to us to show that these documents were not genuine. We agree with the Subordinate Judge in accepting them as genuine, and we base this conclusion partly on the absence of suspicious circumstances in the documents themselves, and partly on the corroboration which, in our opinion, they derive from other documents to which we shall presently refer. The first piece of corroborative evidence is an order passed by the Collector of the Shahabad District, on the 3rd December 1829, that is, on the day following that on which the instrument executed by Dhan Kunwar purports to have been made. The order recites that Dhan Kunwar, widow of Thakur Bhagwan Singh, intends to adopt the son of Thakur Sarup Singh, and that as the *ilaka* is, by sanction of the Commissioner, under the Court of Wards, she had, under section 37 of Regulation No. LII of 1803, no authority to make the adoption without the sanction of the Court of Wards. The order goes on to direct that a copy of the proceedings should be sent to the Magistrate of the Etawah District, in which the lady lived, asking him to "prevent the said Musammat from adopting the son of the Thakur aforesaid; that a *parwana* be sent to the Thakurain aforesaid containing the aforesaid particulars; and [301] that a *parwana* be sent also to Maulvi Muhammad Azam, Kazi of *pargana* Ferozabad, preventing him from affixing the seal to the *hibanuma* (deed of gift, &c.), at the request of the aforesaid Musammat." At the hearing of the appeal we admitted this document in evidence on the application of the defendants, under section 568 of the Code for the reasons stated in our order of admission. What authority the Collector had to ask the Magistrate to prevent

the adoption, or to forbid the Kazi to affix the seal, it would be difficult to say, and it is unnecessary to discuss. The Collector, as an Officer of the Court of Wards, would no doubt consider it his official duty to warn Dhan Kunwar against making an adoption without the sanction of the Court of Wards, which he believed to be required. The document is of importance as showing that the Collector then treated Dhan Kunwar as contemplating the immediate adoption of Har Narain Singh. There is on the record a document, dated 13th December 1829, described as "application of Jugul Kishore, Sazawal, tahsil Narkhi, etc.," upon which there is an order dated the 17th December 1829, by the Collector, directing that a letter be written to the members of the Court of Wards. The report sets forth, upon hearsay information, that Dhan Kunwar had adopted a boy whose description obviously answers to Har Narain Singh, but we have discarded the document as evidence of the facts therein stated, partly because the information is merely hearsay and partly because there is nothing to show that the report was made by the Sazawal in the execution of any official duty, but we think it may be referred to as explaining the official order of the Collector, which shows that the Collector on the 17th December 1829, reported to the Court of Wards, who would be interested in any such adoption, information to the effect that it had actually taken place. At the hearing of the appeals we also admitted in evidence, for reasons stated in our order of admission, an order of the Collector, dated 3rd July 1830. This is described as a "Precept to Thakur Sarup Singh, ancestor of Har Narain Singh, adopted son of Musammat Dhan Kunwar, zamindar of Katgi, pargana Ferozabad." The order reminds Sarup Singh (who, it will be remembered, was the natural father of Har Narain Singh), that at the time when Dhan [302] Kunwar adopted Har Narain Singh and made a gift of her zamindari property in his favour, an agreement had been made with Sarup Singh for the satisfaction of debts due to creditors. It calls upon him to submit an explanation showing why he had not performed the promise on which he had given his son in adoption to the said Musammat. We have also admitted in evidence, under section 568 of the Code, an official letter addressed by the Commissioner of the Agra Division to the Sadr Board of Revenue, dated the 16th of February 1831, to which we shall more fully refer presently. In that report Har Narain is referred to as the boy "whom the Thakurain had adopted without authority and consequently illegally, after the estate had been taken under the Court of Wards." Lastly, there is a petition by Dhan Kunwar to the Collector of Pharah, dated the 28th September 1831, dealing principally with her disputes with Sumer Singh—disputes to which we need not at present more particularly refer. In that petition Musammat Dhan Kunwar sets forth that she had adopted Har Narain Singh from Sarup Singh "in 1829 by going through the adoption ceremonies according to Hindu law." To this extent we think that the statements in the petition may be accepted as true, more especially as the petition refers to official applications and proceedings in which the adoption was asserted, which, owing to lapse of time and destruction of records during the Mutiny, are not now forthcoming, but which Dhan Kunwar in 1829 would hardly have ventured to refer to if they had not been in existence. On behalf of the defendants it was objected that this document was not properly proved to have been executed by Dhan Kunwar. The document is a certified copy purporting to be a copy of an original petition of Dhan Kunwar, dated the 28th September 1831. The copy purports to have been granted on the 20th October 1831. It was filed in the Court below on behalf of the plaintiff. It is common knowledge, of which we are entitled to take notice, that the original records of the Agra Division were destroyed during the mutiny of 1857, and therefore under section 56, cl. (c) of the Indian Evidence Act, the copy is admis-

sible as secondary evidence of the original. Under section 90 we may presume that the document was duly executed by Musammat [303] Dhan Kunwar. To this it has been objected that section 90 does not apply so as to warrant the presumption in question, where the original document is not produced in Court, and in support of this argument great stress is laid upon the word "produced" in the section. In *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno*, (1879) I. L. R., 5 Cal., 1886; S. C. 6 C. L. R., 199, Mr. Justice WILSON applied the presumption of section 90 to a copy of a document which had been lost and was more than 30 years old, and in reference to the argument based on the words "is produced," said, "I do not think the use of these words limits the operation of the section to cases in which the document is actually produced in Court." Although the matter is not free from doubt, we think that we should follow this ruling, and under section 90 of the Evidence Act, presume the genuineness of the petition of Musammat Dhan Kunwar. We have excluded from consideration a document referred to by the Subordinate Judge, which purports to be a written statement, dated the 9th of November 1885, filed by Har Narain Singh as defendant in a suit brought in the Court of the Munsif of Agra, by one Parasram Singh against Mahtab Kunwar, Har Narain Singh and others. That written statement has not been proved to our satisfaction as a written statement made by the Har Narain Singh whose adoption is in question in this case.

The documents which we have just considered strongly corroborate the documents of 1829 in regard to the adoption of Har Narain Singh, and satisfy us that he was in fact adopted by Dhan Kunwar in December 1829. The next question to be considered is whether that adoption was a valid adoption in law. This question has been discussed from two different points of view. In the first place, it was contended on behalf of the defendants that at the time of the alleged adoption, the estate left by Bhagwan Singh was under the management of the Court of Wards; that by section 37 of Regulation No. LII of 1803, it was enacted that "no adoption by disqualified landholders shall be deemed valid without the previous consent of the Court of Wards, on application made to them through the Collector"; and that inasmuch as there is no evidence of any sanction having [304] been given by the Court of Wards to the adoption of Har Narain Singh by Dhan Kunwar (who, it is contended, was a "disqualified landholder" within the meaning of the Regulation), that adoption, if it took place, was invalid. The Court of Wards spoken of in section 37 is shown by section 2 to be the Board of Revenue. Now in regard to this argument, we are satisfied that at the time of the adoption the estate then held by Dhan Kunwar was, as a matter of fact, in the possession of the Court of Wards. We think this is the only possible inference from the Collector, Mr. Deeds' orders of the 3rd and 17th December 1829, from his precept to Sarup Singh of the 3rd July 1830, and from the Commissioner's letter to the Board of Revenue of the 16th February 1831. The same official documents further show, in our opinion, that the adoption was not sanctioned by the Board of Revenue. But the further question arises whether the possession and management of the estate was not only in fact, but also in accordance with law, assumed by the Court of Wards. Unless that question is answered in the affirmative, section 37 of the Regulation would not apply, and the adoption would not be invalidated by the absence of such sanction. Now the legal requisites of an assumption by the Court of Wards of the possession and management of an estate are set forth in the Regulation. The landholder must be a "disqualified landholder" within the meaning of section 3, and under sections 8 and 9, where the landholder is

a female, the procedure prescribed is for the Board of Revenue, upon the report of the Collector, to take the estate under their care, and to report the circumstance to the Governor-General in Council, to whom the power is reserved of exempting any female proprietor from the operation of the Regulation. In *Mohummud Zahoor Ali Khan v. Mussumat Thakooranee Rutta Koer*, (1867) 11 Moo. I. A., 468, decided under the Regulation, their Lordships of the Privy Council held that "the provisions of such a law should be strictly pursued in order to effect the disqualification of any particular person," and that it must not be assumed that a female proprietor was necessarily a disqualified person from the estate being in fact under the charge of the Court of Wards. They added, "under this Regulation the Collector is to report a [305] female proprietor as disqualified to the Board of Revenue, and the Board of Revenue, in their capacity of a Court of Wards, are to report that they have taken the estate under their charge to the Governor-General in Council, so as to enable him to exercise his discretion of exempting her from the operation of the Regulation. Nor are these mere forms. They are necessary preliminaries to the disqualification of a female." Their Lordships comment on the fact that the decisions of the Courts below were based exclusively on the ground that the estate was in the custody of the Court of Wards, and that "the question whether any formal report was ever made of Rattan Koer being a disqualified female was left wholly unnoticed." In that case their Lordships agreed with the Courts below in finding that, except for the period of the Mutiny, the Court of Wards was continuously in the actual possession of the estate from the year 1811 to August 1862. We think that it follows from this decision that it rests upon one seeking to invalidate an adoption by reason of the provisions of section 37 to give strict proof, not only that the estate was in the actual possession of the Court of Wards, but that the necessary legal preliminaries to the disqualification of the female proprietor had regularly taken place. Now upon this point the letter of the Board of Revenue to the Commissioner of the Agra Division, dated the 1st March 1831, is of the utmost importance. In that letter the Board state, "as the property has been managed for 10 years by the Thakurain, and it was not proposed to place it under the Court of Wards until her affairs had fallen into such a state of confusion as to render it improbable that the interference of the Court could be productive of any good effect, the Board consider the order passed by the late Commissioner, under date the 25th June 1829, to have been both injudicious and irregular,—injudicious for the reasons above stated, and irregular inasmuch as the Commissioner was not competent of his own authority to place the estate under the management of the Court of Wards." Again: "Under all circumstances it appears to the Board that any further interference in the affairs of the estate by the officers of Government ought to be carefully avoided, and that the orders of the late Commissioner should be considered of no effect, as having [306] been issued without due authority." That statement made by the Board of Revenue—the Court of Wards itself—shows that the estate was taken under the management of the Court of Wards irregularly and without proper authority, and in disregard of the provisions of the Regulation which the Privy Council held must be strictly pursued. Against this it has been contended on behalf of the defendants that notwithstanding this statement, the Commissioner had, independently of the Board of Revenue, authority to take the estate under the management of the Court of Wards. That contention is based upon the provisions of Regulation I of 1829, constituting Commissioners of Revenue in certain specified divisions, including Shahabad, and upon section 4, which provides that "the said Commissioners shall, until otherwise specifically provided

by law, possess and exercise within the several districts comprised in their respective divisions, the powers and authority now vested in the Board of Revenue and Court of Wards, subject to the control and direction of a Sadr or Head Board to be ordinarily stationed at the Presidency, unless otherwise directed by the Governor-General in Council, and to such restrictions and provisions as the Governor-General in Council or the said Board with his authority or sanction may prescribe." That section expressly reserves the control and direction of the Board of Revenue as Court of Wards, and subjects the action of the Commissioners to restrictions and provisions prescribed by the Board of Revenue. The letter of the Board to which we have just referred is an explicit statement by the controlling authority that the Commissioner ought not to have taken the estate under management without reference to them, and that such taking over was in fact contrary to their intention. It is impossible after the lapse of so many years to ascertain what were the directions prescribed by the Sadr Board of Revenue to its subordinate in connection with estates under the Court of Wards. But it must, we think, be presumed that the Board, in 1831, correctly interpreted the relation in which it stood to the Commissioner, and had sufficient grounds for condemning as it did the assumption of the management of Dhan Kunwar's estate as unauthorized and illegal. At all events so much doubt is thrown [307] upon the matter that, particularly in the absence of further evidence as to the circumstances in which the Commissioner acted, we think it impossible to hold that the proof required by the Privy Council in such matters has been given in this case. That being so, the defendants have, in our opinion, failed to establish that the adoption of Har Narain Singh was invalid by reason of the provisions of section 37 of Regulation LII of 1803, and it is unnecessary for us to consider the argument addressed to us by Pandit Moti Lal as to the construction and effect of that section assuming it to apply. So far therefore as the Court of Wards is concerned, we see no reason to doubt the validity of the adoption of Har Narain Singh by Dhan Kunwar in 1829.

[Only so much of the judgment is here printed as deals with the points referred to in the head note. After discussing several other questions raised in the appeal, their Lordships finally dismissed the plaintiff's suit, holding that he had failed to establish the position necessary for his success.—Ed.]

NOTES.

[This was followed in (1907) 21 M. L. J., 981; see also (1910) 7 M. L. T., 117; and the criticisms of 5 Cal., 886 and of 25 Mad., 674 by Cunningham, and Ameer Ali and Woodroffe in their respective commentaries on the Indian Evidence Act, 1872.]

[22 All. 307]

The 5th April, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE, AND MR. JUSTICE
BANERJI.

Muhammad Askari.....Plaintiff

versus

Radhe Ram Singh and othersDefendants.*

Act No. IX of 1872 (Indian Contract Act), section 43—Joint contract—Right of promisee to sue any or all of the joint promisors—Right of joint promisors to be joined as defendants—Decree against some only of several joint promisors—Effects of such decree—Civil Procedure Code, section 29—Hindu law—Joint Hindu family—Position of managing member—Suit against managing member—Subsequent suit against other members.

The effect of section 43† of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in the cases of *King v. Hoare*, (1844) 13 M. and W., 494, and *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, is no longer applicable to cases arising in India, at all events in the Mufassil, since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors. *King v. Hoare*, (1844) 13 M. and W., 494; *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504; *In re Hodgson*, (1885) L. R., 31 Ch. D., 177; *Hammond v. Schofield*, (1891) I. Q. B., 453; *Nuthoo Lall Chowdhry v. Shoukee Lall*, (1872) 10 B. L. R., 200; S. C., 18 W. R., 468; *Hemendro Coomar Mullick v. Rajendrolal Moonsshee*, (1878) I. L. R., 3 Cal., 353; *Gurusami Chetti v. Samurti Chinna Mannar Chetti*, (1881) I. L. R., 5 Mad., 37; *Lukmidas Khimji v. Purshotam Haridas*, (1882) I. L. R., 6 Bom., 700; *Rahmubhoy Hubibbhoy v. Turner*, [308] (1890) I. L. R., 14 Bom., 408; *Chockalinga Mudali v. Subbaraya Mudali*, (1882) I. L. R., 5 Mad., 133; *Narayana Chetti v. Lakshmana Chetti*, (1897) I. L. R., 21 Mad., 256; *Sitanath Koer v. Land Mortgage Bank of India*, (1883) I. L. R., 9 Cal., 888; *Nobin Chandra Roy v. Magantara Dassya*, (1884) I. L. R., 10 Cal., 924; *Roy Lutchmiput Singh Bahadur v. The Land Mortgage Bank of India*, (1886) I. L. R., 14 Cal., 469, note; *Radha Pershad Singh Bahadur v. Ramkkelawan Singh*, (1895) I. L. R., 23 Cal., 302; *Blukandas Vijbhukandas v. Lallubhai Kashidas*, (1892) I. L. R., 17 Bom., 562; *Laksmishankar Devshankar v. Vishnuram*, (1899) I. L. R., 24 Bom., 77; *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301; *Motilal Bechardass v. Ghellabhai Hariram*, (1892) I. L. R., 17 Bom., 6; *Brinsmead v. Harrison*, (1872)

* First Appeal No. 177 of 1897, from a decree of Babu Nilmadhab Ray, Subordinate Judge of Benares, dated the 20th of May 1897.

Any one of joint promisors may be compelled to perform.

Each promisor may compel contribution.

from the contract.

Sharing of loss by default in contribution.

† [Sec. 43.—When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise.

Each of two or more joint promisors may compel every other joint promisor to contribute equally with himself to the performance of the promise, unless a contrary intention appears

If any one of two or more joint promisors makes default in such contribution, the remaining joint promisors must bear the loss arising from such default in equal shares.

Explanation.—Nothing in this section shall prevent a surety from recovering from his principal payments made by the surety on behalf of the principal, or entitle the principal to recover anything from the surety on account of payments made by the principal.]

L. R., 7 C.P., 547; *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.*, (1893) 1 Q. B., 422; *Robinson v. Geisell*, (1894) 2 Q.B., 685; *Balmakund v. Sangari*, (1897) I. L. R., 19 All., 379; *Priestley v. Fernie* (1865) 3 H. and C., 977; *Bir Bhaddar Sewak Pande v. Sarju Prasad*, (1887) I. L. R., 9 All., 681; *Bhawani Pershad v. Kallu*, (1895) I. L. R., 17 All., 537; *Dhunput Singh v. Sham Soonder Miller*, (1879) I. L. R., 5 Cal., 291, referred to.

The managing member of a Hindu joint family holds a position in relation to the other members of the family and the family property peculiar to himself and not precisely analogous to anything known to English law. He is not the agent of the other members of the family.

The plaintiff sued *B and M*, alleged to be the managing members of a joint Hindu family, for sale upon four mortgages executed by them in respect of property owned by the joint family and obtained a decree in 1894. He brought the present suit against defendants Nos. 1 to 15, other members of the same family, said to be the brothers, brother's sons and cousins of *B and M*, claiming enforcement of the same mortgages against the said defendants by sale of their interests in the mortgaged property. *Held*, that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of 1894, and that the suit against them is not barred.

THE facts of this case sufficiently appear from the judgment of the Chief Justice.

Messrs. *T. Conian and Karamat Husain*, for the Appellant.

Mr. *Abdul Mujid*, for the Respondents.

Strachey, C. J.—This appeal raises an important question, never yet decided, whether the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, and *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, as to the effect of a judgment on a joint contract upon a subsequent suit against co-contractors who were not parties to the former suit, should be applied in these Provinces, notwithstanding section 43 of the Indian Contract Act, 1872.

The suit was a suit for sale on four mortgages executed in 1886, 1888, 1889 and 1890, and was brought against seventeen persons who are admittedly members of a joint Hindu family. In the plaint the plaintiff alleges that the defendants Nos. 16 and 17, Budh Ram Singh and Mahabir Singh, who are *pro forma* [309] defendants only, were the managers of the joint family carrying on its business, and that as such managers and for the purpose of meeting necessary family expenses, these defendants borrowed money from the plaintiff's father and the plaintiff himself on the security of the mortgages in suit, which are mortgages of shares in zemindari property owned and possessed by the joint family. On these mortgages, which were executed by the defendants Nos. 16 and 17 in their own names, the plaintiff formerly sued those defendants only, and obtained a decree for sale for Rs. 12,857-1-3, which became final on the 5th May 1894. In execution of the decree the mortgaged property was advertised for sale. Thereupon the defendants Nos. 1 to 15 brought a suit against the decree-holder for a declaration that, as they had not been made parties to the first suit, as they should have been with reference to section 85 of the Transfer of Property Act, 1882, they were not affected by the decree, and their interests in the family property could not be sold in execution of it. The Court trying that suit gave the declaration prayed for, on the authority of the decision of the Full Bench in *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537. Thereupon the plaintiff brought the present suit, claiming enforcement of the mortgages against the defendants Nos. 1 to 15 by sale of their interests. According to the pedigree annexed to the plaint, these defendants are brothers, brother's sons and cousins of Budh Ram Singh and Mahabir Singh. In defence the defendants raised various pleas, in which they denied that Budh Ram Singh and Mahabir Singh were managers of the joint family and that the loans were taken for purposes binding on the family, and other

contentions to which it is unnecessary to refer. The Court below has dismissed the suit on a preliminary point of law. It has held in effect that by the decree of the 5th May 1894, against two only of the persons alleged to be jointly liable under the mortgages, the whole cause of action in the case of each mortgage was merged and could not be made the subject of a fresh suit against joint debtors not parties to the suit in which the decree was passed. The Subordinate Judge in his judgment says that he therefore dismisses the suit as barred by section 43 of the Code of Civil Procedure. The reference to that section is an obvious mistake, as section 43 [310] of the Code applies only where the former suit was between the same parties or between parties under whom the parties to the subsequent suit claim. *Balmakund v. Sangari*, (1897) I. L. R., 19 All., 379. I think, however, that the reference to section 43 of the Code is a mere slip, as the judgment is expressly based on the decision in *Nuthoo Lall Chowdhry v. Shoukee Lall*, (1872) 10 B. L. R., 200; s. c., 18 W. R., 458, which proceeded, not on the principle of splitting claims now embodied in section 43 of the Code, but on the principle of *King v. Hoare*, (1844) 13 M. & W., 494. The question is whether, having regard to that principle and to the provisions of section 43 of the Contract Act, the principle is applicable to cases of joint liability in this country.

The case of *Nuthoo Lall Chowdhry v. Shoukee Lall*, (1872) 10 B. L. R., 200; s. c., 18 W. R., 458, was decided before the Contract Act came into force. Since then it has been held that, notwithstanding section 43 of the Contract Act, the doctrine of *King v. Hoare*, (1844) 13 M. & W., 494, should be applied to cases arising in the Presidency towns: *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353; *Gurusami Chetti v. Samurti Chiuna Mannar Chetti*, (1881) I. L. R., 5 Mad., 37; *Lakmidas Khinji v. Purshotam Haridas*, (1882) I. L. R., 6 Bom., 700, and *Rahmubhoy Hubibbhoy v. Turner*, (1890) I. L. R., 14 Bom., 408, which, however, related not to joint contractors but to joint wrong-doers, to whom of course section 43 has no application. In *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353, Mr. Justice MARKBY's judgment appears to have proceeded partly on the fact that the case was one arising in the High Court's original jurisdiction and was governed by English law. In the other High Courts it has often been assumed, though never formally decided after argument, that the doctrine of *King v. Hoare*, (1844) 13 M. & W., 494, would also be applicable in the Mufassil: *Chockalinga Mudali v. Subbaraya Mudali*, (1882) I. L. R., 5 Mad., 133, at p. 135; *Narayana Chetti v. Lakshmana Chetti*, (1897) I. L. R., 21 Mad., 256; *Sitanath Koer v. Land Mortgage Bank of India* (1883) I. L. R., 9 Cal., 888; *Nobin Chandra Roy v. Magantara Dassya*, (1884) I. L. R., 10 Cal., 924; *Roy Lutchimput Singh Bahadur v. The Land Mortgage Bank of India*, (1886) I. L. R., 14 Cal., 469, note; *Radha Pershad Singh Bahadur v. Ramkhelawan Singh*, (1895) I. L. R., 23 Cal., 302, *Bhukhandas Vijbhu-* [311] *kandas v. Lallubhui Kashidas*, (1892) I. L. R., 17 Bom., 562, and *Laksmishankar Devshankar v. Vishnuram*, (1899) I. L. R., 24 Bom., 77, several of these relate to suits against joint mortgagors. In this Court the question does not appear to have been raised except in *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301, where, however, it was not decided, as it was held that the liability there under consideration was not a joint liability. In two at least of the above cases much doubt has been expressed as to whether it is desirable to extend the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, to India, at all events to cases in the Mufassil. Such doubts were expressed by Mr. Justice MARKBY in *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353, where, however, the learned Judge was clearly mistaken in saying that the doctrine has been repudiated in America. See Bigelow on the

Law of Estoppel, 4th edition, pp. 104 to 110, and Vanfleet on the Law of Former Adjudication, pp. 1061 to 1063, and also by Mr. Justice MUTTUSAMI AYYAR in *Gurusami Chetti v. Samurti Chinna Mannar Chetti*, (1881) I. L. R., 5 Mad., 37. The conclusion at which I have arrived is that the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, is not applicable in India, at all events in the Mufassil, and since the passing of the Indian Contract Act. This conclusion, however, is not based on any view of the doctrine as a merely technical one, or as being inexpedient or unjust. That is a question on which many learned Judges have expressed conflicting opinions, and with which we as Judges are not particularly concerned. It was expressly held by the majority of the Law Lords in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, and by Lord Justice BOWEN in *In re Hodgson*, (1885) L. R., 31 Ch. D., 177, at p. 188, that the rule was not a merely technical one, but was based on considerations of public policy relating to the protection of joint debtors. So far as general expediency or public policy is concerned, considerations of the importance, on the one hand, of checking undue multiplicity of suits, and, on the other hand, of compelling people to pay their debts, are, in India at least, fairly evenly balanced. My objections to the application of the doctrine are based on purely legal grounds. The doctrine now rests not so much on *King v. Hoare*, (1844) 13 M. and W., 494, as on the judgment of the Law Lords in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504. As [312] explained in those judgments, the doctrine that there is in the case of a joint contract a single cause of action which can only be once sued on is essentially based on the right of joint debtors in England to have all their co-contractors joined as defendants in any suit to enforce the joint obligation. That right was in England enforceable before the Judicature Acts by means of a plea in abatement, and since the Judicature Acts by an application for joinder which is determined on the same principles as those on which the plea in abatement would formerly have been dealt with. In India that right of joint debtors has been expressly excluded by section 43 of the Contract Act, and therefore the basis of the doctrine being absent, the doctrine itself is inapplicable. *Cessante ratione legis, cessat ipsa lex*.

That this right of joinder is the real basis of the doctrine appears from *King v. Hoare*, (1844) 13 M. and W., 494, itself, though not nearly so clearly as from *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, and other later cases. It appears with special distinctness from the judgment of Lord CAIRNS, L. C., at pp. 515 and 516, of Lord HATHERLEY at p. 522, and of Lord BLACKBURN at pp. 542—544. It is equally implied by the dissentient judgment of Lord PENZANCE. The main difference of opinion was that in the view of Lord PENZANCE the joint contractor had, by the abolition of pleas in abatement by the Judicature Acts, lost his absolute right to be sued only in conjunction with his co-contractor. "He can no longer be heard to maintain either that his co-contractor must be sued with him or that, it being impossible so to sue him by reason of his having been sued already, he is himself discharged. * * * Since the Judicature Acts it is not true that the plaintiff's only right is to sue the defendant jointly with the others." The other Lords, while agreeing that the doctrine of merger depended on the right of the joint contractor to have his co-contractor joined as defendants, held that, notwithstanding the Judicature Acts, the right still remained, though the mode of enforcing it was no longer a plea of abatement, but an application to have the person omitted included as a defendant. As to the basis of the doctrine of merger, therefore, there was no difference of opinion. The best statement of the effect of *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, is, I think, that of Lord

[313] Justice BOWEN *In re Hodgson*, (1885) L. R., 31 Ch. D., 177, at p. 188 of the report. "The common law principle that a judgment recovered against a joint debtor is a bar to a further action to be prosecuted against another joint debtor is explained at length in the case of *King v. Hoare*, (1844) 13 M. and W., 494. There is in the cases of joint contract and joint debt as distinguished from the cases of joint and several contract and joint and several debt, only one cause of action. The party injured may sue at law all the joint contractors, or he may sue one, subject in the latter case to the right of the single defendant to plead in abatement; but whether an action in the case of a joint debt is brought against one debtor or against all the debtors, it is for the same cause of action—there is only one cause of action. This rule, though the advantage or disadvantage of it may have been questioned in times long past, has now passed into the law of this country. I should only wish to observe that whether or no the rule by the light of pure reason and unassisted by authority might or might not have recommended itself to modern minds, the rule is by no means a technical rule. It is based, rightly or wrongly, on the idea that a joint debtor has a right to demand, if he pleases, that he shall be sued at one and the same time with all his co-debtors. To enforce this right he is only entitled to plead in abatement, but the right is one of considerable business value, and is so recognized by the law. In order to protect each of the joint debtors the law treats the cause of action as being a joint one, and as capable of being merged whenever it is pursued to a judgment. It is absorbed and merged in the judgment which is recovered against one of the debtors, not only as against him but as against all the rest, and the object is to prevent the prejudice which the law conceives might arise to a joint debtor who is not being sued, if he were left with future litigation still hanging over his head. All his liability is merged therefore in the judgment, the old debt disappears and the judgment is left in its place. That is the legal view which has been laid in *King v. Hoare*, (1844) 13 M. and W., 494, and that was the real ground of the decision in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504." Again in *Hammond v. Schofield*, (1891) 1 Q. B., 453, at p. 457, VAUGHAN WILLIAMS, J., said:—"It seems also to be well settled by a series of [314] cases, beginning with *Rice v. Shyte* and ending with *Kendall v. Hamilton*, that the basis of this defence is not the election or unconscious election, if there can be such a thing, of the plaintiff, but the right of the co-contractor when sued in a second action on the same contract to insist, though not a party to the first action, on the rule that there shall not be more than one judgment on one entire contract. These decisions seem to be the logical result of the rule of pleading that non-joinder of defendants is not matter which can be pleaded in bar, but only matter which can be pleaded in abatement."

The authorities also show that where the obligation is not joint but joint and several the doctrine of merger does not apply, and a judgment against one of the debtors without satisfaction is not a bar to a suit against the others. See *King v. Hoare*, (1844) 13 M. and W., 494, and the cases cited in Leake on Contracts, p. 808, Bullen and Leake, p. 751, and *Dhunput Singh v. Sham Soonder Mitter*, (1879) I. L. R., 5 Cal., 291. In *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, the appellant unsuccessfully contended that as the debt sued on was a partnership debt, the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, did not apply, as in equity all partnership debts were joint and several. Under order 16, Rule 6 of the Rules under the Judicature Act, which is identical with section 29 of the Code of Civil Procedure, the plaintiff may at his option join as parties to the same suit all or any of the persons severally or jointly and severally liable on any one contract.

The result is, first, that the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, and *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, depends on the ordinary right possessed by a joint contractor in England to have all the co-contractors joined as defendants in a suit on the joint obligation; secondly, that the rule is not applicable where the liability sought to be enforced is joint and several. That being so, how does the matter stand in India? Section 43 of the Contract Act provides:—"When two or more persons make a joint promise, the promisee may, in the absence of express agreement to the contrary, compel any one or more of such joint promisors to perform the whole of the promise." Illustration (a) is as follows:—"A, B and C jointly promise to pay D Rs. 3,000. D may compel either A or B [316] or C to pay him Rs. 3,000." This is a clear departure from the English law, and in my opinion excludes the right of a joint contractor to be sued along with his co-contractors. That this is the effect of section 43 is clearly recognised by several decisions: what they do not recognise is that it cuts away the foundation of the English doctrine and makes it inapplicable to India. The explanation of this is, I think, that the cases all follow *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353, which was decided before the House of Lords in *Kendall v. Hamilton*, (1879) I. L. R., 4 A. C., 504, showed more distinctly than *King v. Hoare*, (1844) 13 M. and W., 494, that the right of joinder is the real foundation of the English rule. In *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353, the judgment of Mr. Justice KENNEDY in the first Court was based in part on the doctrine of election, which the majority of the House of Lords showed was in no sense the reason of the rule. GARTH, C.J., correctly stated the effect of section 43 to be that it "allows the promisee to sue one or more of several promisors in one suit, and so practically prohibits a defendant in such a suit from objecting that his co-contractors ought to have been sued with him." If the learned Chief Justice had had before him the later judgments in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, and *In re Hodgson*, (1885) I. L. R., 31 Ch. D., 177, he would, I think, have recognised that the effect of such a prohibition is to make the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, inapplicable. In the mistake which he made he was followed by Mr. Justice MUTTUSAMI AYYAR in *Gurusami Chetti v. Samurti Chinna Mannar Chetti*, (1881) I. L. R., 5 Mad., 37. Similarly in *Lukmidas Khimji v. Purshotam Haridas*, (1882) I. L. R., 6 Bom., 700, Mr. Justice LATHAM expressly held that section 43 of the Contract Act materially altered the rules of the English common law, and disallowed an objection by a partner defendant that the other partners should have been joined as defendants; and yet, while thus clearly recognising that by reason of section 43 a joint debtor has no right to have his co-contractors joined as defendants, the learned Judge nevertheless held that the rule in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, would bar a fresh suit against the other partners. In *Motilal Bechardas v. Ghellabhai Hariram*, (1892) I. L. R., 17 Bom., 6, Mr. Justice FARRAN held in reference [316] to section 43 that "as far as the liability under a contract is concerned, it appears to make all joint contracts joint and several." If that is a correct view of section 43, the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, is admittedly not applicable. In *Narayana Chetti v. Lakshmana Chetti*, (1897) I. L. R., 21 Mad., 256, the Court, following *Lakmidas Khimji v. Purshotam Haridas*, (1882) I. L. R., 6 Bom., 700, held that "it is not incumbent on a person dealing with partners to make them all defendants: he is at liberty to sue any one partner as he may choose." The Court expressly applied to partners not only section 43 of the Contract Act, but section 29 of the Code of Civil Procedure, which relates not to joint but to several and to joint and several liability. In *Rahmubhoy Hubibbhoy v.*

Turner, (1890) I. L. R., 14 Bom., 408, SCOTT, J., in the first Court said that "section 43 of the Contract Act IX of 1872 is not perhaps quite clear whether a complete adoption of the English rule is intended." He, however, applied the decision in *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353, to the case, which was one of joint wrong-doers. Whether the rule as to joint wrong-doers laid down in *Brinsmead v. Harrison*, (1872) L. R., 7 C.P., 547, should be applied in the Indian Mufassil is a question which I need not consider. To such a question section 43 of the Contract Act would have no application.

In the other cases the effect of section 43 of the Contract Act on the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, is altogether ignored. In their note to section 43, Messrs. Cunningham and Shephard, at pp. 158-159 of their commentary on the Indian Contract Act (7th ed.) say that "if this section is intended to deny to joint debtors the right to be sued jointly in one suit, it involves a departure from English law," and that "in view of this section and the 29th section of the Code of Civil Procedure it is clear that the non-joinder of a co-debtor is no ground of defence to a suit; but it is apprehended that an application made under the 32nd section of the Code to add as a defendant an omitted co-debtor would be dealt with in the same manner as it is in England." I cannot agree with this view. As the judgments in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, show, such an application would in [317] England be dealt with in the same manner as the old plea in abatement, and the effect of the latest decisions is that a joint debtor, though he has not an absolute, has an ordinary and a *prima facie* right to have his co-debtors joined. *Wilson, Sons & Co. v. Balcarres Brook Steamship Co.*, (1893) 1 Q. B., 422, *Robinson v. Geisel*, (1894) 2 Q. B., 685. I agree with GARTH, C. J., LATHAM, J., and the Madras High Court that under section 43 of the Contract Act the joint debtor has no such right.

For these reasons I am of opinion that the doctrine of *King v. Hoare* (1844) 13 M. and W., 494, and *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, does not apply to the present case; that the cause of action against the defendants Nos. 1 to 15 on the mortgages in suit was not merged in the decree of the 5th May 1894, against the defendants Nos. 16 and 17 only; and that so far the suit against them is therefore not barred. Nor is it in my opinion barred by section 85 of the Transfer of Property Act, 1882: *Balmakund v. Sangari*, (1897) I. L. R., 19 All., 379; *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301. It was suggested that the suit was barred on a somewhat different ground, namely that the defendants Nos. 16 and 17 were in the position of agents of the joint family, contracting in their own names for themselves and the rest of the family, and that the decree of the 5th May 1894 against them was a bar to a subsequent suit on the contract against their principals, the other defendants, by reason of the principle laid down in *Priestley v. Fernie*, (1865) 3 H. and C., 977, applied by Lord CAIRNS in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, at p. 514 of the report, and followed by this Court in *Bir Bahaddar Sewak Pande v. Sarju Prasad*, (1887) I. L. R., 9 All., 681. In India the matter depends on the provisions of the Contract Act, and in particular on Chapter X of that Act relating to Agency. It is sufficient to say that it has never been held that the managing member of a joint Hindu family is an agent within the meaning of that chapter and of the rule in *Priestley v. Fernie*, (1865) 3 H. and C., 977. I agree with the passage at p. 108 of the Tagore Law Lectures for 1870 where Mr. Cowell says:—"When therefore we come to define the relation of each member, especially of the managing member, to the joint family and the joint estate, we are brought into contact

with a relationship which has no counterpart in English [318] law. Neither the term partner, nor principal, nor agent, nor even co-parcener will strictly apply."

I am of opinion that the Court below ought not to have dismissed the suit, as it did, on the preliminary point, and that the appeal of the plaintiff should be allowed, the decree of the Court below set aside, and the case remanded to that Court under section 562 of the Code of Civil Procedure for disposal on the merits. The appellant will have his costs of this appeal. Other costs will abide the result.

Banerji, J.—I agree in the judgment and order of the learned Chief Justice.

The Court below has held that the 43rd section of the Code of Civil Procedure bars the claim. That view is clearly erroneous. As the defendants Nos. 1 to 15, who are the real defendants to the suit and against whom alone the plaintiff seeks relief, were not parties to the former suit brought against the defendants Nos. 16 and 17, that section has no application. Although the learned Subordinate Judge refers to section 43, the basis of his decision is, as pointed out by the learned Chief Justice, that the cause of action for the present suit is the same as that for the previous suit; that both the suits relate to a joint debt; that the cause of action has merged in the decree obtained in the former suit; and that the present action is consequently not maintainable. He has followed the ruling in *Nuthoolall Chowdhry v. Shoukee Lall*, (1872) 10 B. L. R., 200: s. c., 18 W. R., 458, which apparently adopted the principle recognised in the well-known case of *King v. Hoare*, (1844) 13 M. and W., 494. The main question which we have to determine in this appeal, therefore, is whether the former judgment, though unsatisfied, bars this suit. That question was not decided in *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301, on which the learned counsel for the appellant relied. It was held in that case that it was not a case of a joint debt and joint contractors.

The judgment in the former suit would operate as a bar to the present claim if two conditions are fulfilled, namely, first, that the contracts of mortgage upon which the plaintiff's claim is founded were joint contracts by and on behalf of all the [319] defendants; and, second, that the rule laid down in *King v. Hoare*, (1844) 13 M. and W., 494, is applicable. As to the first point there is no controversy. As to second, if the doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, cannot be held to apply, there is nothing in reason or justice to bar the suit.

If the plaintiff's statements are true the defendants Nos. 1 to 15 and their interest in the mortgaged property are equally with the defendants Nos. 16 and 17 and their interest liable for the debt, and unless a legal bar exists, of which the defendants are entitled to take advantage, they are not in a position to dispute the claim.

Now, is the rule adopted in *King v. Hoare*, (1844) 13 M. and W., 494, applicable to this case? The reason for that rule was stated by Lord CAIRNS, L. C., in the later case of *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, to be "that it is the right of persons jointly liable to pay a debt to insist on being sued together." I agree with the learned Chief Justice that that reason cannot apply to cases in this country, at least outside the presidency towns, since the passing of the Contract Act. Section 43 of that Act enables a promisee, in the absence of a contract to the contrary, to compel one or more of several joint promisors to perform the whole of the promise. Under section 43 therefore, it is not open to a defendant who has been sued as one of the several promisors to contend that all his co-promisors should be made parties to the suit, and so

far as this country is concerned the reason on which the rule in *King v. Hoare*, (1844) 13 M. and W., 494, is founded has ceased to exist. That rule is consequently no longer applicable. Further, the effect of section 43 is, as observed by FARRAN, J., in *Motilal Beehardass v. Ghellabhai Hariram*, (1892) I. L. R., 1 Bom., 6, "to make all joint contracts joint and several." Where the liability is joint and several and the judgment first obtained has remained unsatisfied a second suit is not barred. This is a proposition which admits of no doubt and is supported by the authorities cited by the learned Chief Justice in his judgment. Therefore, since the enactment of section 43 of the Contract Act, the recovery of a judgment against one of several joint debtors does not bar a subsequent suit against his co-debtors. The result is that in either view the present claim is maintainable. I am moreover not satisfied as to the expediency of extending the [320] doctrine of *King v. Hoare*, (1844) 13 M. and W., 494, and *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504, to suits arising in these provinces. Having regard to the fact that those cases were based mainly on doctrines and rules of procedure peculiar to English law, there is evidently no reason why their authority should be recognised in the Courts in this country. The desirability of applying to cases in this country the rule laid down in those decisions was questioned by Mr. Justice MARKBY in *Hemendro Coomar Mullick v. Rajendrolall Moonshee*, (1878) I. L. R., 3 Cal., 353, and by Mr. Justice MUTTUSAMI AYYAR in *Gurusami Chetti v. Samurti Chinna Mannar Chetti*, (1881) I. L. R., 5 Mad., 37, and those learned Judges were of opinion that the rule might be productive of hardship in this country, as it undoubtedly would be in many cases. It was pointed out by Mr. Justice MARKBY that the rule was not recognised in any continental country in Europe, and in his dissentient judgment in *Kendall v. Hamilton*, (1879) L. R., 4 A. C., 504. Lord PENZANCE considered it not to be consistent with justice. "What justice," his Lordship observed, "is there in saying that when three persons are all and each individually liable to pay a debt, an action and judgment (still unsatisfied) "against two of them should extinguish the liability of the third?" He held the rule to be one of procedure, and characterized it as one "which, without affecting to assert any joint rights on the defendants, denies the aid of the law to enforce those of the plaintiffs." "Procedure," he said, "is but the machinery of the law after all—the channel and means whereby law is administered and justice reached. It strangely departs from its proper office when in place of facilitating, it is permitted to obstruct, and even extinguish legal rights, and is thus made to govern where it ought to subserve." Having regard to the fact that even in England the propriety of the rule has been questioned by high authority, I do not think there is sufficient justification for extending it to the Court in these provinces. Upon grounds both of law and expediency, therefore, I am unable to hold that the plaintiff is precluded from maintaining the present suit by reason of the decree obtained by him in 1894.

I fully concur with the learned Chief Justice in the view that the manager of a joint Hindu family is not in the position of an [321] ordinary agent as regards the other members of the family. The contention of the learned counsel for the respondents, based on the argument that the defendants Nos. 16 and 17 were agents of the other defendants, cannot therefore prevail.

Appeal decreed and cause remanded.

NOTES.

[The decision of STRACHEY C. J., is deemed conclusive by Messrs. Pollock and Mulla in their *Indian Contract Act*, 1872 (III Edn. 1913, p. 234). This was followed in (1902) 25 All., 57; (1902) 25 All., 162; (1901) 23 All., 355; (1910) 34 All., 601. See also (1907) 29 All., 544 (managers of a joint Hindu family).

In these cases it was held that sec. 43 abrogated the rule in *King v. Hoare*, in India :— (1892) 17 Bom., 6 (*contra* 24 Bom., 77); (1897) 21 Mad., 256; (1902) P. R., 37; (1902) P. L. R., 25; (1909) 33 Mad., 317; (1915) 27 I. C., 94 (Punjab).

See also 28 Bom., 383; and also 25 Bom., 378, as regards joining omitted parties under the C. P. C.]

[22 All. 321]

The 17th April, 1900.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Sheo Sampat Pande and another.....Plaintiffs

versus

Bandhu Prasad Misr and others.....Defendants.*

Act No. XIX of 1873 (N.-W. P. Land Revenue Act,) sections 166, 167, 168—

Act No. XII of 1884 (Agriculturists' Loans Act), section 5—Takavi

loan—Sale of house in default of payment of loan—Effect of such sale.

The provisions of sections 166, 167 and 168 of the North-Western Provinces Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance.

THE facts of this case sufficiently appear from the judgment of the Court.

Bubu Durga Charan Banerji, for the Appellants.

Pandit Sundar Lal (for whom *Maulvi Ghulam Muftaba*) and *Babu Jiwan Chandar Mukerji*, for the Respondents.

Banerji and Aikman, JJ.—The decree of the Lower Appellate Court cannot possibly be supported. The suit was one for sale upon a mortgage. The property mortgaged consisted of a house and certain zamindari property. Subsequently to the mortgage the mortgagor took takavi advances from Government which he did not repay. The Government therefore caused the said house, upon the security of which the takavi advance had been made, to be sold, and Sheo Sahai, defendant, purchased it. Both the Courts below have dismissed the claim in respect of the house on the view that the purchase by Sheo Sahai conveyed to him the house free from the incumbrance created by the mortgage in suit. The learned Judge has relied on the provisions of section 167 of Act No. XIX of 1873, and holds that as arrears of takavi are, by virtue of section 5 of Act No. XII of 1884, realized in the same manner as arrears of land revenue, property [322] sold for recovery of takavi loans is sold free of all incumbrances. The learned Judge has overlooked the fact that section 167 relates to the sale of the patti or mahal in respect of which as arrear of land revenue is due. In such a case the purchaser would no doubt acquire the patti or mahal sold free of all incumbrances. But if any property other than the patti or mahal in respect of which arrears are due be sold, the purchaser would only acquire the rights and interests which the defaulter had at the time of the sale, and any incumbrances created by him would not be rendered invalid by reason of the sale. This is clear from the provisions of section 168. The learned Judge no doubt refers to that section, but he says that the section would have applied had the house in question not been hypothecated to Government as security for the takavi loan.

* Second Appeal No. 700 of 1897, from a decree of Mr. V. A. Smith, Judge of Gorakhpur, dated the 22nd May 1897, confirming the decree of *Maulvi Saiyid Jafar Husain*, Subordinate Judge of Gorakhpur, dated 19th February 1897.

We fail to see how the fact of a hypothecation subsequent to that in favour of the plaintiff can in any way affect the plaintiff's right under his prior mortgage and invalidate that mortgage as against the purchaser under the later hypothecation. The mortgagor, when he made the hypothecation in favour of Government, hypothecated only such rights as he had at the time of the hypothecation. Those rights were nothing more than the right to redeem the mortgage in favour of the plaintiff. In our opinion the Courts below erred in exempting from the claim the house purchased by Sheo Sahai, and we think the plaintiffs were entitled to a decree for the sale of that house.

We notice that although in the judgment of the Court of First Instance the house was exempted from liability for the claim, the decree which was drawn up directed the sale of the house. This was evidently an oversight as the decree totally exempted Sheo Sahai from liability.

We allow the appeal and make a decree in favour of the plaintiff for the sale of the whole of the property mentioned in the plaint. We extend the time for the payment of the mortgage money to the 1st August 1900. The appellants will get their costs of this appeal and of the appeal to the Court below from Sheo Sahai, defendant, who will also be liable for the costs of the Court of First Instance.

Appeal decreed.

[323] REVISIONAL CRIMINAL.

The 20th April, 1900.

PRESENT :

MR. JUSTICE BURKITT.

Queen-Empress

versus

Samuel Luke.*

Act No. XI of 1878 (Indian Arms Act), section 19 (f)—Notification

No. 458 of the 18th March, 1898—Exemptions from the operation of the Arms Act—Volunteers.

A volunteer, being a person exempted in virtue of Notification No. 458, dated 18th March 1898, of the Government of India, is not exempted merely with reference to his duties as a volunteer, but generally (subject to the exceptions mentioned in the said Notification). It is therefore not unlawful for a volunteer to possess fire-arms and to use the same.

THIS was an application for revision of an order passed by a Magistrate of the Philibhit district. The facts of the case sufficiently appear from the order of the Court.

Mr. R. K. Sorabji, for the Applicant.

The Government Pleader (Munshi Ram Prasad), for the Crown.

Burkitt, J.—This is an application in revision against the conviction and sentence passed on the applicant by a Sub-Divisional Magistrate in the Philibhit district under section 19 (f) of the Indian Arms Act, No. XI of 1878. The Magistrate found that the petitioner had fire-arms in his possession in contravention of the prohibition contained in section 14 of the Act.

The learned Government Pleader very properly admits that the conviction and sentence cannot be supported. The plea raised by the learned counsel who appeared for the applicant is that "as a volunteer petitioner is exempted from

* Criminal Revision, No. 177 of 1900.

the operation of the section under which he has been convicted." That plea, in my opinion, is a good plea, and must be allowed.

The Magistrate who convicted the petitioner admits that the petitioner is a volunteer. It would therefore, *prima facie*, appear that under the provisions of the Government Notification No. 458, dated the 18th March 1898, the petitioner did not commit any offence in having fire-arms in his possession. The Magistrate, however, has an easy way of getting over that difficulty. He contemptuously brushes it aside by holding that though the petitioner is a volunteer, and as such "is exempt from the operation [324] of the Arms Act, 1878," * * * * * "he is exempt only for the purposes of volunteering. He is not exempt from possessing fowling pieces, which he did (*sic*) in spite of his fowling piece having been confiscated by the District Magistrate." The Magistrate further found that in spite of the previous warning the applicant "has again possessed himself of the fowling pieces," and "uses these fowling pieces in shooting wild animals." (The former case mentioned by the Magistrate is one in which in another district the applicant was convicted of a similar offence under the Arms Act. In that case he was let off with a warning, and his gun was confiscated. The Sessions Judge on appeal held that he ought to have been fined under section 19 (e) of the Arms Act, 1878). The Magistrate goes on to add that the petitioner "should have obtained a license under the Arms Act, 1878, if he wanted fowling pieces for the protection of his cultivation. As a volunteer he is not entitled to keep fowling pieces, nor is he entitled as such to use them for the purpose of protecting his cultivation." Acting on his view the Magistrate inflicted a fine on the applicant and directed his guns to be confiscated.

In my opinion the Magistrate has adopted an absurdly erroneous view of the law. I have no hesitation in holding that, being admittedly a volunteer, the applicant is (to use the language of the Magistrate) entitled to keep fowling pieces, and to use them for the purpose of protecting his cultivation. I know of no authority for the interpretation put by the Magistrate on the words "all volunteers" in the Notification mentioned above, nor has the Magistrate cited any. Those words, read in their ordinary grammatical sense, exempt "all volunteers" from the operation of all the prohibitions and directions contained in sections 13, 14, 15, and 16 of the Arms Act, with certain exceptions not in point in this case. The Magistrate does not accept that view. He holds that the applicant "is exempt only for purposes of volunteering." It is difficult to say what meaning the Magistrate intended to be put on those words. Most probably they mean that applicant was entitled to the benefit of the exemption only when attending volunteer parades and when in possession of the rifle which had been entrusted to his care as a volunteer. If this restricted meaning is to be attached to the words "all volunteers," a [325] similar restriction must necessarily be applied to all the other classes of person exempted in similar language. The result of this would be absurd in many cases: to take one case among many, it would render it illegal for native commissioned officers of Her Majesty's native army to possess or use, unless they had obtained license under the Act, any arms other than those supplied to them by Government for military purposes.

I cannot believe that it was intended that such a narrow and restricted interpretation should be placed on the Notification. On the contrary, I believe that the exemption of "all volunteers" from the operation of the prohibitions and directions contained in certain sections of the Arms Act, 1878, was granted with a view to encourage volunteering among that class of the public who otherwise would be subject to those prohibitions and directions.

But as interpreted by the Magistrate in this case the Notification is inoperative as far as volunteers of that class are concerned. It would leave them in exactly the same position as before under the Arms Act, and it would still be necessary for volunteers of that class, who, like the applicant, desire to possess and use fire-arms, to take out licenses under the Act. It follows, as a necessary consequence of this interpretation, that it is only by virtue of the exemption in the Government Notification mentioned above that volunteers, like the applicant, and officers and soldiers of the native army, can legally possess and use the arms supplied to them for volunteering and military purposes. In my opinion that interpretation is wrong and would defeat the object aimed at by the Notification. I hold that the applicant was not bound to take out a license for the fire-arms he possessed, and was therefore improperly convicted. Accordingly, setting aside the conviction and sentence, I direct that the fine, if paid, be refunded and that the confiscated guns be restored to the applicant.

[326] APPELLATE CIVIL.

The 27th April, 1900.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Ram Kunwar.....Plaintiff

versus

Ram Dai... ..Defendant.*

Hindu law—Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—

. • *Act No. IV of 1882 (Transfer of Property Act), section 39.*

The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement ; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bona fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. *Sham Lal v. Banna*, (1882) I. L. R., 4 All., 296, and *Lakshman Ramchandra Joshi v. Satyabhamabai*, (1877) I. L. R., 2 Bom., 494, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *D. N. Banerjee* and Pandit *Sundar Lal*, for the Appellant.

Pandit *Moti Lal*, for the Respondent.

Banerji and Aikman, JJ.—The appellant, who is the widow of one Thakur Gir Prasad Singh, brought the suit out of which this appeal has arisen to recover arrears of maintenance from her husband's sons and from the estate left by her deceased husband, a part of which is in the possession of the respondent, who was the third defendant in the Court of First Instance, under a usufructuary mortgage executed by one of the sons on the 19th April 1894. Previously to the institution of the suit the plaintiff had sued the sons

* Second Appeal No. 774 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 3rd June 1897, modifying a decree of Babu Bipin Behari Mukerji, Officiating Subordinate Judge of Aligarh, dated the 3rd March 1896.

for her maintenance, and obtained decrees, the earliest of which was passed in 1887. The present suit was opposed by the respondent, who claimed to be a transferee for consideration, without notice of the plaintiff's right. The Court of First Instance decreed the claim against her, but the Lower Appellate Court set aside that portion of the decree which affected the respondent. The plaintiff has preferred this appeal, and the question we have to determine is, whether the property in the hands of the respondent is liable for the amount claimed by the plaintiff. [327] Both the Courts below have found that the respondent is a mortgagee for consideration, but had notice of the plaintiff's right. The first Court also held that the transfer under which she is in possession was made with the intention of defrauding the plaintiff, and depriving her of her right, and applied the provisions of section 39 of the Transfer of Property Act. The Lower Appellate Court, however, was of a contrary opinion, and found that the mortgage was not made with the intention of defeating the plaintiff's right to maintenance. It held that the claim could not be enforced against that portion of the property which is in the respondent's hands, although she had notice of the appellant's rights.

It is conceded that the maintenance of a Hindu widow is not a charge upon the estate of her deceased husband, until it is fixed and charged upon the estate by a decree or by agreement. This was held by a Full Bench of this Court in this case of *Sham Lal v. Banna*, (1882) I. L. R., 4 All., 296. It is further conceded that there was no agreement by which any particular property was charged with the maintenance of the plaintiff. It is, however, contended that the decree obtained by the plaintiff on 22nd August 1887, created a charge upon the property left by the deceased husband of the plaintiff. If this is so, the respondent took the property, of which she is the mortgagee, subject to that charge, and cannot claim exemption from liability. We have examined the decree of 22nd August 1887, and have satisfied ourselves that the only charge declared by that decree was a charge for the amount of maintenance which had already accrued due and was decreed to the plaintiff. No charge for future maintenance was created by the decree. Such being the case, the learned counsel for the appellant next relies upon section 39 of Act No. IV of 1882, and in particular on the concluding words of that section. That section, so far as it relates to maintenance, provides that "where a third person has a right to receive maintenance from the profits of immovable property, and such property is transferred with the intention of defeating such right, the right may be enforced against the transferee, if he has notice of such intention, or if the transfer is gratuitous, but not against a transferee for consideration and without notice of [328] the right, nor against such property in his hands." The object of the section, so far as it relates to maintenance, is to declare in what cases a right of maintenance may be enforced against transferees of the property from which the maintenance is recoverable. In our opinion an essential condition for the enforcement of the right under the section against a transferee is that the transfer has been made with the intention of defeating the right. Where a transfer has been made with such intention and the transferee has notice of it, he cannot defeat the right, although he may be a transferee for consideration. Again, if the transfer is gratuitous, the transferee can in no case defeat the right. Where, however, the transfer is for consideration, and the transferee has no notice of the right, it cannot be enforced against him, even if the transfer was made with the intention of defeating the right. As we read the section, a condition precedent to the enforcement of the right against the transferee in all cases is that the transferor has acted in fraud of the person entitled to the right. The words "and

such property is transferred with the intention of defeating such right " govern all that follows those words. Given a right to receive maintenance from the profits of immovable property and given a transfer made with the object of defeating that right, the only transferee who can defeat the right is a transferee for value and without notice of the right. But where the transfer has not been made with such object, the right cannot be enforced against the transferee, although he had notice of the right. As observed in the commentaries on the Transfer of Property Act by Messrs. Shephard and Browne, something more than mere notice of the right has to be proved against a transferee. It must also be established that the transfer was made in bad faith, that is, with the intention of defeating the right. The reason for such a rule is not far to seek. A Hindu widow's right to receive maintenance has been held to be a right of an indefinite character, which, unless made a charge upon property by agreement or by a decree of Court, is only enforceable like any other liability in respect of which no charge exists. See the Full Bench decision in *Sham Lal v. Banna*, (1882) I. L. R., 4 All., 296, at p. 299. A right of such a nature should not equitably be enforced against a transferee for value unless the transfer was [329] made in fraud of the right of maintenance. In *Lakshman Ramchandra Joshi v. Satyabhamabai*, (1877) I. L. R., 2 Bom., 494, it was held that the mere circumstance that a purchaser for value had notice of the claim for maintenance is not conclusive of the widow's rights against the property in his hands. Mr. Justice WEST further held that " what was honestly purchased is free from her claim for ever : what was purchased in furtherance of a fraud upon her, or with knowledge of a right which would thus be prejudiced, is liable to her claim from the first." As pointed out by Mr. Mayne in his work on Hindu Law, paragraph 421, page 518, 5th Edition, section 39 of the Transfer of Property Act, substantially gives effect to the views expressed in the case cited above.

For these reasons we are of opinion that the view taken by the learned Judge of the Lower Appellate Court is right and that this appeal must fail. We dismiss it with costs.

Appeal dismissed.

NOTES.

[This was approved and followed in (1908) 12 C. W. N., 100 n ; (1906) 10 C. W. N., 1074 ; 4 C. L. J., 476 ; (1901) 24 All., 160 ; (1910) 10 I. C., 985 (Sindh).]

[22 All. 329]

The 28th April, 1900.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Ashiq Husain.....Objector

versus

Muhammad Jan and others.....Applicants.*

*Act No. XIX of 1873 (N.-W. P. Land Revenue Act), section 107 et seq—
Partition—Revenue Courts not competent to partition buildings.*

In a partition under the North-Western Provinces Land Revenue Act, 1879, neither buildings nor the materials thereof can be partitioned ; what is partitioned is the land in the

* Second Appeal No. 829 of 1897, from a decree of C. Rustomjee, Esq., District Judge of Moradabad, dated the 5th August 1897, confirming the order of Kuar Bahadur, Assistant Collector of Moradabad, dated the 18th June 1895.

mahal. Where such land is covered with buildings, the Court making the partition has to follow the provisions of section 124 of the Act ; but it can decide no question of right to the buildings, nor can it partition them.

THIS appeal arose out of an application made by the respondents for partition of certain resumed muafi and shamilat lands in the village of Muhammadpur, together with the buildings thereon, consisting of various shops and houses. Objections were filed by the appellant Ashiq Husain, including one, to the effect that the Revenue Court was not competent to partition the shops and houses. These objections were disallowed summarily by an Assistant Collector, but on appeal the District Judge made an [330] order of remand under section 562 of the Code of Civil Procedure. On this remand the Assistant Collector went into the case at length and passed an order directing the partition of nine shops and buildings appertaining thereto, as also of a certain *diwan khana* and *rath khana*.

From this order the objector, Ashiq Husain, appealed to the District Judge, again urging that the order for partition of the buildings was not within the competence of a Court of Revenue.

The District Judge, apparently without considering the question of jurisdiction raised by the appellant's first plea, dismissed the appeal and confirmed the order of the Assistant Collector

The appellant thereupon appealed to the High Court.

Pandit *Moti Lal* and Maulvi *Ghulam Mujtaba*, for the Appellant.

Munshi *Gobind Prasad*, for the Respondents.

Banerji and Aikman, JJ.—This appeal arises out of an application for partition made under Act No. XIX of 1873. Some objections having been raised, the Court of Revenue tried those questions under section 113 of the Act. In doing so the Assistant Collector determined the extent of the shares of the different owners of the mahal in respect of certain buildings, and ordered that the Amin should make a partition of the buildings, including rafters, bricks, stones and other materials of each building. We are surprised that such an order of the Assistant Collector, which was manifestly *ultra vires*, has been sustained by the learned District Judge. It is beyond question that in partition proceedings under the North-Western Provinces Land Revenue Act neither buildings nor the materials thereof can be partitioned. What is partitioned is the land of the mahal : where such land is covered by buildings the Court making the partition has to follow the provisions of section 124 of the Act, but it can decide no question of right to the buildings, nor can it partition them. We allow the appeal and set aside so much of the order of the Courts below as directs the partition of the buildings in question. The parties will pay their own costs in all Courts.

[This ruling was followed by BANERJI, J., in Second Appeal No. 13 of 1900 decided on the 9th June 1900, the judgment in [331] which is printed below.* See also the case of *Abdul Rahman v. Mashina Bibi*, Weekly Notes, 1899, p. 49,—*Id.*]

Decree modified.

NOTES.

[This was followed in (1915) 18 O. C., 80 : 27 I. C., 543 ; see also (1915) 26 I. C., 933.]

* **Banerji, J.**—I think that the decree of the Court below is right and this appeal must be dismissed. The suit relates to a one-fourth share of the walls of an enclosure, and to gates, and turrets appertaining to a garhi in the village Talra. The plaintiff claims a moiety of the said share. He is one of the three sons of one Jawahir Singh. The defendants are his nephews, being the sons of the plaintiff's brother Fatch Singh. The third brother, Anup

[22 All. 331]

The 30th April, 1900.

PRESENT :

MR. KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Shiam Karan and another.....Judgment-debtors

versus

Raghunandan Prasad and another.....Decree-holders.*

Letters Patent, section 8—Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor.

Held, that the presentation of an appeal by a person who was not an advocate, vakil or attorney, of the Court, nor a suitor, is not a valid presentation in law, having regard to section 8 of the Letters Patent of the High Court.

[332] IN this case the petition of appeal was signed and presented to the Court by a person who was neither an advocate, vakil or attorney of the Court, nor a suitor, but who appears to have been a mukhtar-a'am of the appellant. At the hearing of the appeal a preliminary objection was taken that this was not a valid presentation, having regard to section 8 of the Letters Patent.

Munshi *Gulzari Lal*, for the Appellants.

Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Munshi *Gokul Prasad*, for the Respondents.

Knox, Acting, C.J., and Blair, J.—A preliminary objection has been taken to the effect that the petition of appeal, which was presented in this Court, was presented by an agent and not by any of the persons enumerated in section 8 of the Letters Patent of this Court. The memorandum of appeal

Singh, is dead and left no issue. The plaintiff's case is that the three brothers were joint, that the property in question was acquired with joint funds, and that consequently he is entitled to a half share of the said property. It appears that a partition of the village has been effected and the shares owned by the parties have been divided by the Revenue Authorities. The walls, gates, and turrets in suit are said to have been allotted by the Revenue Authorities to the defendants as appertaining to their share. It is in consequence of this order of the Revenue Authorities that the plaintiff has brought the present suit. The Lower Appellate Court has found as a fact that the property was acquired by Anup Singh when the family was joint, that the plaintiff and the defendant's father Fateh Singh lived jointly with Anup Singh, and that upon Anup Singh's death both of them became owners in equal moieties of the property in question. It has also been found that the defendants had failed to prove that the property had been acquired separately by Fateh Singh. That Court has decreed the plaintiff's claim with the exception of a small portion of it with which we are not concerned in this appeal. The first two pleas taken in the memorandum of appeal are to the effect that the decision by the Revenue Authorities precludes the plaintiff from maintaining the present suit. This objection is, in my opinion, utterly untenable. It was not within the competency of the Revenue Authorities to partition a building. It is only the land of a mahal which the Revenue Authorities are empowered to partition by Act No. XIX of 1873. If those authorities took upon themselves to partition the buildings, that is, the walls, the gates, and the turrets in suit, they acted *ultra vires*. This was held in second appeal No. 829 of 1897, decided on the 28th of April 1900. Further, I notice that in this case the District Judge held in the appeal preferred to him from the order passed in the partition proceedings that the parties should have their rights to the buildings determined by a civil suit. It is clear, therefore, that the plaintiff is not precluded from maintaining the present suit in the Civil Court as held by the Courts below. The other grounds of appeal must, having regard to the findings of the Lower Appellate Court, fail. As I have said above, that Court has found, and I think upon cogent grounds, that the property was joint. Therefore the plaintiff was entitled to the decree which has been granted to him. I dismiss the appeal with costs.

* First Appeal from order No. 11 of 1892, from an order of Babu Kunwar Mohan Lal, Subordinate Judge of Benares, dated 15th July 1899.

appears to have been presented by some person who was clearly neither of the appellants before the Court, and who may or may not be a person holding a power-of-attorney to appear and act on behalf of the appellant. It is contended that a mere presentation of an appeal does not come within the words of section 8. We hold that this contention is wrong. The words of section 8 are very clear and positive. We accordingly dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[The case of a Pardanashin's agent was distinguished in (1901) 24 All., 172.]

[22 All. 333]

The 2nd May, 1900.

PRESENT :

MR. KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Manmothonath Bose Mullick.....Plaintiff

versus

Basanto Kumar Bose Mullick.....Defendant.*

Act No. VIII of 1890 (Guardian and Wards Act), section 41—Guardian and Ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts.

Held, that no suit would lie by a ward against the son of his late guardian for rendition of accounts. *Rameshur Tiwari v. Kishun Kumar*, Weekly Notes, 1882, p. 6, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri and Babu Satish Chandar Baherji, for the Appellant.

[333] Babu Juwan Chandar Mukarji (for whom Pandit Baldeo Ram Dave), for the Respondent.

Knox, Acting C.J, and **Blair, J.**—The plaintiff, who is the appellant before us, filed a suit in the Court of the Munsif of Allahabad, alleging that one Babu Tara Kinker Bose Mullick, who had been appointed his guardian, had not rendered accounts beyond the first year of such guardianship, that the said guardian died during plaintiff's minority, and that "the plaintiff has every reason to believe that out of the said assets the said Babu Tara Kinker Bose Mullick misappropriated a large sum of money to his own use." Nothing further was alleged either as to the nature, quantity, kind or manner of the misappropriation which the plaintiff believed had been made. But the plaintiff called upon the defendant, who is the son of the said guardian, to settle the accounts of the estate, to pay out of the estate any sum or sums found due upon such settlement of accounts, or if the accounts could not be settled, to pay such sum or sums as the plaintiff might succeed in proving to be due. The

* First Appeal from Order No. 117 of 1899, from an order of Khan Bahadur Mir Akbar Husain, dated the 14th September 1899.

Court of First Instance decided that the son was bound to render an account. In appeal the District Judge held that the son could not be called upon to render accounts, and that it was no business of his to do so; that the plaintiff could call upon him to hand over any papers, account-books, etc., relating to the estate which might have come into his possession. He further held that upon such a vague allegation of misappropriation no decree could be given against the defendant. He accordingly set aside the decree for the rendition of accounts, and remanded the case to the Court below with instructions to frame an issue regarding the items believed to have been misappropriated. In appeal before us the appellant urges that as the respondent is in possession of his father's estate, he can be held liable to render accounts, and more to account to him for the period of his father's management. For this proposition no authority was cited to us beyond certain principles said to be found in the case of *Concha v. Murrieta*, (1889) L. R., 40 Ch. D., 543. That case related to special circumstances based upon the law of Peru. On the other hand, we have a case of this Court, namely, *Rameshwar Tiwari v. Kishun Kumar*, Weekly Notes, 1882, p. 6. The learned [334] Judges who decided that case evidently considered that the law governing a relationship of the special nature must be looked for within the four corners of the Statute which created that relationship; the same law governs the present case; and they held that under section 21 of Act No. XL of 1858 the Judge had no power to require the heirs of a guardian to account for moneys received and disbursed by the father in the capacity of a guardian. The provisions of section 21 are personal to the guardian himself, and refer to cases in which his certificate has been recalled for incompetency, dishonesty or some other good cause, and not where his appointment has lapsed through death. This precedent was presumably known to the Legislature when they enacted Act No. VIII of 1890, and from the words used by them in section 41 of that Act, it seems to have been considered as the law which should prevail upon the point. The respondent has filed objections, and one of them is to the effect that the present suit would not lie. The objection is a good one and fatal to the suit.

We dismiss the appeal, and upon the objection taken we set aside the order of remand, and further direct that the suit as brought stand dismissed with costs in all Courts.

Appeal dismissed.

NOTES.

[This was followed in (1911) 9 I. C., 591 (Punjab); but dissented from in (1913) 18 I. C., 876; 17 C. W. N., 695. See also the criticism in Dr. Trevelyan's *Minors* (IV Edn., 1912), p. 182.]

[22 All. 334]

The 3rd May, 1900.

PRESENT :

SIR ARTHUR STRACHEY, KNIGHT, CHIEF JUSTICE,
AND MR. JUSTICE BANERJI.

Malik Muhammad Karim and others.....Plaintiffs

versus

Ganga Pande and others.....Defendants.*

Act No. XII of 1881 (N.-W. P. Rent Act), sections 93, 94—Suit for recorded share of profits—Suit for settlement of accounts— Limitation.

Where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardar or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts [335] incidentally to that main object, and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of section 93 (h) of the N.-W. P. Rent Act, 1881. *Rohan v. Jwala Prasad*, (1894) I. L. R., 16 All., 233, explained. *Indo v. Indo*, (1893) I. L. R., 16 All., 28, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdai Raoof*, for the Appellants.

Babu *Parbati Charan Chatterji*, for the Respondents.

Strachey, C. J., and Banerji, J.—We need not call upon the learned counsel for the appellants to reply. The suit clearly falls within section 93^(h) of the Rent Act (XII of 1881). The only question is whether it falls within the first category of suits mentioned in that clause, namely, suits by recorded co-sharers for their recorded share of the profits of a mahal, or within the second category of suits for a settlement of accounts. If it falls within the first category, then under the first paragraph of section 94 the period of limitation is three years from the day when the share became due: if it falls within the second category, then, under the third paragraph of section 94, the period of limitation is one year from the day on which the right to sue accrued. Mr. Justice BURKITT has held that the suit is one for a settlement of accounts, and that having been brought more than one year from the day on which the right to sue accrued, it was barred by paragraph 3 of section 94. Now in order to see whether the suit falls within the first or the second category mentioned in section 93 (h), it is necessary to look at the plaint. The suit purports to be brought by certain co-sharers of the village against certain other co-sharers. It is headed as a "claim for the recovery of Rs. 516-11-6 principal and interest after adjustment of account from 1301 to 1303 Fasli, on account of lands in mauza Poni, pargana Ghosi." It sets forth that the profits arising from the plaintiffs' share during the years in question amounted to Rs. 2,000 odd, out of which the plaintiffs received from the tenants Rs. 1,600 odd, and that the remaining sum of Rs. 436-11-6 due to the plaintiffs was appropriated by the defendants, first party. It further

* Appeal No. 5 of 1899 under section 10 of the Letters Patent.

alleges that out of the profits for the years in question the defendants have collected Rs. 436-11-6 on account of the plaintiffs' share in excess of the defendants' [336] own share of the profits, and have not paid it in spite of repeated demands. The only relief prayed in the plaint, apart from costs, is that a decree for the recovery of Rs. 436-11-6 principal, and Rs. 80 interest, in all Rs. 516-11-6 may be passed in favour of the plaintiffs against the defendants. There is no specific prayer referring to accounts. The only allusion to an account is in the heading of the plaint, where the claim is described as one for the recovery of Rs. 516 "after adjustment of accounts." It is thus clear that the main and substantial object of the suit is to recover from the defendants with interest a specific sum which the defendants are alleged to have recovered from the tenants in excess of their own share of the profits and to hold on account of the plaintiffs' share. For the purpose of ascertaining the correctness of the amount claimed, but for no other purpose, the Court is asked to adjust the accounts. Now this being the nature of the claim, the ruling of the Full Bench in *Rohan v. Jwala Prasad*, (1894) I. L. R., 16 All., 333, appears to us to show clearly that the suit falls within the first category mentioned in section 93 (h) and not within the second category. The Full Bench held in effect that where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardar or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts incidentally to that main object and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of section 93 (h). Now the claim in that case very closely resembled the claim in the present case. There a specific sum was claimed by a recorded co-sharer against four [337] other co-sharers in the village, not against the lambardar, as a share of the profits which the defendants were alleged to have realized in excess of what they were entitled to. The plaint asked for the recovery of the amount claimed "by means of adjustment of account," the same expression as is used in the plaint before us in the only reference which it makes to accounts. The prayer was there, as here, not any prayer referring to a settlement of accounts, but a decree for the specific amount claimed with interest. It was held by the Full Bench that, notwithstanding the reference to an adjustment of accounts, the suit fell within the first category of section 93 (h) and was for the purposes of limitation to be regarded as a suit for a share of the profits of a mahal. We cannot agree with the learned Judge who heard this appeal that the present suit falls within the second category of cases mentioned by the Full Bench. We think that it clearly falls within the first category. The learned pleader for the respondent has referred to an earlier Full Bench case of *Indo v. Indo*, (1893) I. L. R., 16 All., 28. It is not necessary to discuss that case beyond saying that if the decision lays down anything inconsistent with the case of *Rohan v. Jwala Prasad*, (1894) I. L. R., 16 All., 333, it must be taken to have been overruled by that case, which was decided by six Judges of the Court, including the three Judges who were parties to the former case.

Mr. Justice BURKITT does not in his judgment discuss the other points raised by the memorandum of appeal to this Court. We have heard the pleader

for the respondent in support of these pleas, and we think there is no force in any of them.

We allow this appeal, set aside the judgment of Mr. Justice BURKITT and dismiss the appeal to this Court with costs.

[A similar case was decided by BANERJI, J., on the 6th June 1900, S. A. No. 891 of 1899, the judgment in which is given below *.—ED.]

Appeal decreed.

NOTES.

[See also the criticism of the criterion laid down in this decision, in (1904) 7 O. C., 84 at 86, 88.]

[338] *The 5th May, 1900.*

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Bansidhar and others.....Defendants

versus

Ganeshi and another.....Plaintiffs†

Hindu Law - Mitakshara — Succession — Daughter's daughter.

Held that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grandfather.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri and Pandit Moti Lal, for the Appellants.

Mr. E. Chamier and Pandit Madan Mohan Malaviya, for the Respondents.

Henderson, J. (Burkitt, JJ., concurring).—In this case it appears that on the 21st July 1842, one Rai Singh sold certain land for Rs. 351. The sale-

* Banerji, J.—The suit which has given rise to this appeal was brought under cl. (h) of section 93 of Act No. XII of 1881, for the plaintiffs' recorded share of profits for the years 1302, 1303 and 1304 Fasli. The plaintiffs own a fourth share in Khata No. 21, and an eighth share in Khata No. 22, and they seek to recover the amount claimed as arrears of profits in respect of those shares for the three years mentioned above. The Lower Appellate Court was of opinion that the suit was one for a settlement of accounts, and applying to the suit the limitation of one year prescribed by section 94 of the Act, has dismissed the claim in respect of the profits for the years 1302 and 1303 Fasli on the ground of limitation. This view of the learned Judge is clearly erroneous. As I have said above, the suit was in terms a suit for profits and not one for a settlement of accounts. The distinction between the two classes of suits was explained by the Full Bench in the case of *Rohan v. Jwala Prasad*, (1894) I. L. R., 16 All., 333. It was there held that a suit for profits does not become a suit for a settlement of accounts because the Court may have to take an account for the purpose of granting a decree to the plaintiff. It is only when the main object of the suit is to have an account taken from the defendant that the suit becomes one for a settlement of accounts. Such is not the case here. The learned Judge of the Lower Appellate Court thinks that because an account had to be taken of the rent payable by the defendants for the *khudkashit* land held by them, the suit must be taken to be a suit for a settlement of accounts. Having regard to the Full Bench ruling referred to above, that view cannot be supported. The suit was in terms one for profits, and it was in substance a suit of that description. This case is very similar to the case of *Malik Muhammad Karim v. Ganga Pande* (L. P. A. No. 5 of 1899) decided on the 3rd of May 1899, and following the ruling in that case I hold that the present suit is one for profits and not for a settlement of accounts. No portion of the claim was therefore barred by limitation.

† Second Appeal No. 851 of 1897, from a decree of Maulvi Muhammad Anwar Hussain, Subordinate Judge of Aligarh, dated the 17th August 1897, reversing a decree of Maulvi Abdul Rahim, Munsif of Kasganj, dated the 18th December 1893.

deed, after reciting that the price had been paid and possession given to the vendee, contained the following provision :—" If the said vendee should on another occasion sell the said property, then for the same price he shall sell to *me the vendor*, and in case of my refusal he shall sell to any other person."

[339] On the 15th December 1892, the representatives of the vendee, who had in the meantime died, sold a one-sixth share of the land to the defendants for Rs. 1,000 without giving the persons claiming to be the representatives of the vendor, who had also died, the option of purchasing the share.

In 1893 the plaintiffs, who are the daughter's daughter of the vendor and her son, claiming to be the heirs of the original vendor, sued the defendants, the purchasers of the $\frac{1}{6}$ th share, to recover that share on payment of Rs. 58-8-0, that sum being a one-sixth of the original price.

The Lower Appellate Court dismissed the suit, and on an appeal preferred to this Court, it was held by another Bench that the provision in the deed to which we have referred amounted to a covenant running with the land and was binding upon any purchaser. It was also held that the benefit of the covenant inured to the heirs of the original vendor, and that they would be entitled to sue upon the covenant, and the case was remanded to the lower Court for re-trial.

On remand the Lower Appellate Court found that the plaintiffs are both heirs of the original vendor, and has given them a decree for possession of the land on payment of Rs. 58-8-0.

The defendants have now appealed to this Court. The questions whether the plaintiffs (or either of them) are entitled to the benefit of the provision which has been held by another Bench of this Court to be a covenant running with the land, and whether that provision is binding upon the defendants, is not now before us, and we therefore refrain from expressing any opinion upon those questions.

The only points which are now open to us are whether the plaintiffs are the heirs of the original vendor, and whether, on the construction of the deed of sale, the price to be paid on a re-sale was the original price, or the price which an intending purchaser was prepared to give.

As to the first point, we think it is clear, on the authorities which have been quoted before us, and the learned vakil for the appellant at the end of the argument on the other side was forced to admit, that in the absence of preferential male heirs the plaintiff Ganeshi is heir to her maternal grandfather, the original [340] vendor. It has been found by the Lower Appellate Court, and the finding has not been challenged, that there are no preferential male heirs.

The other point as to the construction of the deed is not free from difficulty. On the whole, however, we are of opinion that the contract between the original vendor and vendee was that the price to be paid on a re-sale was the original price mentioned in the deed of sale. We therefore dismiss this appeal and affirm the decree of the Lower Appellate Court as far as the female plaintiff is concerned.

The added plaintiff, the son of the female plaintiff, has no title during his mother's lifetime, and is not entitled to a decree jointly with her. His suit must be dismissed, but, under the circumstances, without costs. Musammam Ganeshi is entitled to her costs in this Court.

Decree modified.

NOTES.

[This is no longer law, as it has been held that in the Benares School of Law, females other than those expressly named cannot inherit :—(1905) 28 All., 187 ; (1905) 28 All., 307 ; (1906) P. R., 20. See also (1908) 4 N. L. R., 31 (where their heirship is recognised).]

[22 All. 340]

REVISIONAL CRIMINAL.

The 14th May, 1900.

PRESENT :

MR. KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Queen-Empress

versus

Narain Singh.*

Criminal Procedure Code, section 556—Act No. V of 1861 (Police Act), section 29—Trial by District Magistrate for breach of orders of a Reserve Inspector of Police—Magistrate not “ personally interested.”

Held, that the Magistrate of a district was not, on account of his being the head of the police of the district, debarred by reason of section 556 of the Code of Criminal Procedure from trying a person accused under section 29 of the Police Act, 1861, of a breach of the orders of a Reserve Inspector of Police.

THIS was a reference made under section 438 of the Code of Criminal Procedure by the Sessions Judge of Jhansi in respect of an order passed by the District Magistrate of Jhansi, whereby the Magistrate had convicted one Narain Singh of a breach of an order issued by a Reserve Inspector and had sentenced him to two months' rigorous imprisonment under section 29 of Act V of 1861. The Sessions Judge was of opinion (1) that it was not proved that the accused knew of the order in question and wilfully disobeyed it, and (2) that the Magistrate as head of [341] the police in the district was debarred by section 556 of the Code of Criminal Procedure from trying the case. The Sessions Judge was of opinion that “the Full Bench ruling of the Allahabad High Court in the matter of the petition of *Ganeshi*, (1893) I. L. R., 15 All., 192, has been practically overruled by the addition of the illustration to section 556, Criminal Procedure Code, by Act V of 1898.”

The facts of the case are more fully stated in the **order** of the Court.

Knox, Acting C.J., and Blair, J.—Narain Singh, a constable, was convicted by the District Magistrate of Jhansi of an offence under section 29 of Act V of 1861, and sentenced to two months' rigorous imprisonment. Narain Singh was a recruit, and, as such, under the orders of the Reserve Inspector. There is evidence on the record that all policemen at every parade from the 11th were informed by orders of the Reserve Inspector that no recruit was to be absent from the lines without a pass. Upon the evidence the District Magistrate rightly found, if he believed the evidence, which he did, that Narain Singh was absent from the roll-calls at which he was bound to be present at 7 P. M. and 9-30 P. M. on the 22nd February. The defence of the accused was that he was unable to be present at the first of the two roll-calls because he had been in the Court Inspector's office till 6-30 P.M. of that evening, and when he went home to get his food, was delayed because the food was not ready. As regards the second roll-call, he says he was asleep. He

* Criminal Revision No. 215 of 1900.

does not anywhere set up the defence that he was ignorant of the rule about the roll-call. The defence, moreover, is disbelieved, and we shall certainly not disturb the Magistrate's finding on these matters of fact. The finding proceeds upon evidence, with which he was more competent to deal, in that it was given in his presence, and he had better opportunities of appraising its worth. There is also much force in what the District Magistrate says, that he tried the offence summarily, and all that a Magistrate trying the case summarily is required by law to enter is the finding, and in case of a conviction, a brief statement of the reasons therefor. We do not expect to find the evidence in full, nor can we lay down, [342] for that would be legislation, that in a case of this kind the Magistrate is bound to do more than record a judgment embodying the substance of the evidence.

But it is contended that the Magistrate had no jurisdiction to try this case, and the contention is based upon the words contained in section 556 of the Code of Criminal Procedure. The argument is that the accused should not have been tried by the District Magistrate in one capacity for breach of an order issued by, or approved of by himself in another capacity as accused's superior officer. We have in this Court in Full Bench decided what meaning is to be put on the words "a party or personally interested," and that judgment is in no way affected by the explanation which has been added by Act No. V of 1898, certainly so far as the circumstances of this case are concerned. The accused could have at a proper stage raised this point; he did not do so, nor do we think he could have done so successfully, for we see in the case no substantial interest giving rise to real bias in the mind of the District Magistrate. We do not agree with the learned Judge that the fact that the District Magistrate was much concerned on account of riots between the police and the Madras Infantry Regiment, and that he was taking energetic steps to prevent disturbance of the public peace, is any evidence of any bias on the part of the District Magistrate. Any such conclusion as this we most emphatically decline to draw. A Magistrate may be very properly interested in securing the proper peace of his district, and be at the same time rigidly impartial in trying persons charged with a breach of that peace. The Code of Criminal Procedure recognises this when it gives the District Magistrate special powers of dealing in appeal with proceedings taken to insure security against any breach of the peace. The order therefore which we are now passing is in no way concerned with any such reasoning as that given above. We take into consideration that the accused was a recruit, that nothing was shown against his previous character. Three months is the maximum punishment provided by law, and we think that, on the whole, a sentence of one month's rigorous imprisonment would have sufficed. We accordingly reduce the sentence to one of rigorous imprisonment for one month with effect from the 28th February 1900. [343] Any imprisonment which the accused has suffered since that date will be deemed part of this sentence. Any balance of imprisonment not suffered will run from the date on which he is arrested or submit himself for arrest.

NOTES.

[The decision in (1908) 5 A. L. J., 357 (breach of exercise laws) is similar. See, likewise, 1900) 24 Mad., 238.]

[22 All. 343]
APPELLATE CIVIL.

The 14th May, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Najm-un-nissa.....Plaintiff

versus

Ajaib Ali Khan.....Defendant.*

*Muhammadan law—Pre-emption—Invalid sale—Time when right of
pre-emption arises.*

No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of the sale. *Begam v. Muhammad Yakub*, (1894) I. L. R., 16 All., 344, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. *Abdul Raoof* and Pandit *Moti Lal*, for the Appellant.

Mr. *Karamat Husain*, for the Respondent.

Henderson, J. (Burkitt, J., concurring).—These second appeals, No. 631 of 1897 and No. 687 of 1897, have been heard together.

The facts are very simple. One Amirullah, who was the owner of one of four adjacent houses, on the 17th May 1895, by a registered contract of sale, sold that house to Ajaib Ali, the respondent in this appeal, for Rs. 84 for the site, and a further sum for the buildings, to be ascertained by carpenters or masons to be appointed by the vendor and vendee, it being stipulated that upon the additional sum being ascertained and paid, possession of the house should be made over within ten days.

On the 14th July 1896, Abrar Husain, the owner of the remaining three houses, sold them to his wife, Najm-un-nissa, the [344] present appellant. It so happened that Amirullah did not carry out the terms of his contract with Ajaib Ali, refusing to join in appointing carpenters or masons to ascertain the price of the buildings, and the latter found it necessary to institute a suit for specific performance of the contract, and eventually obtained a decree on the 15th May 1896, whereby, *inter alia*, it was directed that the parties to the suit should within a month join in nominating four carpenters or masons to ascertain the value of the buildings, and that in default of their so doing, the Court Amin should ascertain the value. The parties did not carry out the first direction, and the Amin subsequently made an inquiry and ascertained the value to be Rs. 111-8-0. This sum Ajaib Ali paid on the 15th August 1896, and thereafter, on the 6th September 1896, he obtained possession under the decree. Neither the contract of the 17th May 1895 nor the decree in the suit for specific performance are upon the record, but the facts, as above stated, are admitted.

Najm-un-nissa and Ajaib Ali have now each sued the other, each claiming to have a right of pre-emption against the other. Both suits were filed on the

* Second Appeal No. 631 of 1897, from a decree of D. F. Addis, Esq., C. S., District Judge of Shahjahanpur, dated the 2nd August 1897, reversing a decree of Babu Baij Nath, Subordinate Judge of Shahjahanpur, dated the 3rd June 1897.

22nd February 1897. Najm-un-nissa in her suit alleged that the proprietary right or ownership in the house purchased by Ajaib did not pass to him on the execution of the contract of the 17th May 1895; and that on the date of her purchase, namely, on the 14th July 1896, he was not the owner, and in fact did not, according to Muhammadan law, become the owner until the 6th September 1896, when he got possession, and she claimed that her right of pre-emption against him then arose.

Ajaib Ali in his suit claimed to have been the owner of the house purchased by him as from the 17th May 1895, the date of the purchase by him, and, as such, to have been entitled to pre-emption as against Najm-un-nissa upon her purchasing her house on the 14th July 1896. In the other suit he contended that Najm-un-nissa could have no right of pre-emption against him, as her purchase was long after his.

The first Court decided in favour of Najm-un-nissa's contention and dismissed the suit of Ajaib Ali. On appeal the District Judge dismissed both suits.

[345] Both have now appealed to this Court. The only questions argued before us were as to the effect, according to Muhammadan Law, of the contract of sale of the 17th May 1895. Mr. *Abdul Raoof*, who appeared for Najm-un-nissa, contended—(1) that the contract of sale to Ajaib Ali was what is known to the Muhammadan Law as an invalid sale; (2) that no right of pre-emption can be claimed by or against the purchaser under an invalid sale so long as the invalidating circumstances or conditions exist; (3) that the sale to Ajaib Ali did not become complete until he obtained possession on the 6th September 1896, and that until that date the proprietary interest of his vendor did not pass to him. He has referred us to the case of *Begam v. Muhammad Yakub*, (1894) I. L. R., 16 All., 344, a case decided by a Full Bench of this Court, and to a large number of authorities on Muhammadan Law. The case referred to is an authority for the proposition that in considering whether a right of pre-emption arises the Muhammadan Law is to be applied, and that if there is a complete sale under that law, although not under the general law, the right of pre-emption will arise. It is also an authority for the proposition that the sale to Ajaib Ali was complete on the 6th September 1896, when the price had been paid and possession given to him; but it is not an authority, unless perhaps impliedly, upon the question whether the ownership in the house purchased by Ajaib did or did not pass to him as from the date of his purchase.

In support of the contention that the contract of sale of the 17th May 1895 was an invalid sale, a number of passages from Baillie's Muhammadan Law of Sale and other text-books on Muhammadan Law have been referred to. In Baillie's Muhammadan Law of Sale at p. 4, dealing with the conditions necessary to the validity of sale, it is said: (it is required) "thirdly, that both the thing sold and the price be so known and determined as to prevent dispute between the parties, and any ignorance that may tend to produce contention between them is sufficient to invalidate the sale, as in the case of a single goat undefined from a particular flock, or of *anything at a price to be fixed by another person*." * * * Fifthly, it is necessary to the validity of all sales that they be free from vitiating or invalidating [346] conditions which are of various kinds.

* * * They may be described generally in this place as conditions that are not in harmony with the contract or within the usual scope of such transactions among men, or conditions that are dependent on events that are either altogether fortuitous, or the time of the occurrence of which cannot be predicted with any degree of certainty."

The original text from which the former portion of the passage quoted has been taken with its translation is as follows :—

ومنها ان يكون المبيع معلوماً والثمن معلوماً علماً بمنع من المنازعة
فبيع المجهول جهاله تقضي اليها غير صحيح كبيع شاة من هذ القطيع
وبيع الشي بقسة و بحكم فلان *

عالمگیری جلد ثالث کتاب البیوع باب اول صفحہ ۳ - طبع نولکشور *

(Alamgiri, Vol. III, p. 3, Lucknow edition.)

"One of them (the conditions of the validity of sale) is that the thing sold and the price be so known as to avoid any dispute, hence the sale of a thing so unknown as to lead to dispute is invalid; for example, the sale of any goat in a particular flock and the sale of a thing for its price (whatever it may be) or (for such a price) as such an one may settle."

In Baillie's Moohummudan Law of Sale, at p. 176, it is said :—"Any ignorance of the thing sold or of the price that affords room for objection to its delivery prevents the legality of sale;" and again at p. 208 :—"When delay is stipulated for in the delivery of the thing sold and the thing is specific the contract is invalid." In Hamilton's Hedaya, edition 1870, at p. 242, it is said :—"It is here proper to observe that every species of uncertainty which may prove an occasion of contention is invalid in a contract of sale."

Having regard to those authorities, it appears to us that the contract of the 17th May 1896 amounted to an invalid sale. The price was not so known or determined as to prevent dispute; the contract was for the sale of a house at a price to be fixed by third parties; the delivery of possession was indefinitely delayed, being dependent upon the ascertainment at some future time of the value of the buildings.

[347] Mr. Karamat Husain, who appeared for Ajai Ali, did contend that the sale was of the category of operative sales, but such sales are defined as "sales which take effect immediately" Baillie's Moohummudan Law of Sale, p. 6; Baillie's Digest of Moohummudan Law, p. 484 (6), but he was forced to concede that in its inception, at all events, it was an invalid sale. *

If then the sale was an invalid sale, there are numerous passages in the Moohummudan Law books which show that such a sale cannot give rise to a claim for pre-emption by or against the purchaser so long as the invalidating circumstances exist. It is sufficient to refer to the following :—"The privilege of Shaffa cannot take place regarding a house transferred by an invalid sale"—Hamilton's Hedaya, p. 650. "There must also be an entire cessation of all right on the part of the seller. There is therefore no right of pre-emption for an invalid sale"—Baillie's Digest of Moohummudan Law, p. 477.

و منها زوال حق البائع فلا تجب الشفعة في الشراء فاسداً *

عالمگیری جلد رابع الشفعة باب اول صفحہ ۳ - طبع نولکشور *

Alamgiri, Vol. IV, p. 3, Lucknow edition. Book on Pre-emption, Chapter I.

"And one of them (the conditions of pre-emption) is the extinction of the vendor's title, hence the (right of) pre-emption does not arise in an invalid sale." "The right of pre-emption arises only when the contract transferring the right of property from the vendor to the vendee has become complete. A mere executory contract does not give rise to a right of pre-emption. * * * Nor does

the right take effect in respect of a transfer made under an invalid sale, for the transferor under such a sale-maintains all his rights intact, and so long as he has not delivered the property to the purchaser can exercise his right of pre-emption over the transfer of an adjacent property"—Syed Ameer Ali's *Muhammadian Law*, 2nd edition, p. 591.

The reason for the rule that a right of pre-emption does not arise upon an invalid sale is that the ownership of the vendor in the property sold must be extinguished before the right can arise. One of the conditions of Shaffa is that "there must be a cessation of the seller's right in the subject of the sale." *Baillie's Digest* [348] of *Muhammadian Law*, p. 476. So long as the proprietary right has not passed under a contract of sale from the vendor to the vendee, the vendor may himself claim a right of pre-emption against the purchaser of an adjacent tenement. This is clear from the following passage in the *Fatwa Alamgiri* :—

اگر مشتری نے بطور فاسد خریدی ہوئے دار کو اپنے قبضہ میں کر لیا حتیٰ کہ اُسکا مالک ہو گیا پھر اس دار کے پہلو میں دوسرا دار فروخت کیا گیا تو مشتری کو شفع حاصل ہوگا پس اگر اوسنے ہنوز دوسرے دار کو شفع میں نہ لیا تھا کہ اوسکے بائع نے اُس دار مبیعہ کو بوجہ فساد بیع کے واپس کر لیا تو مشتری کو دوسرے دار کے لینے کا اختیار نہ رہیگا اور اگر مشتری دوسرے کو بحق شفع لے چکا ہو پھر اوسکے بائع نے اوس سے مبیعہ بحکم فساد بیع واپس لیا تو بحق شفع لینا برقرار کہا جائیگا - یہ محیط میں ہی *

Alamgiri, Vol. IV, p. 5, Lucknow edition :—

"The purchaser of a house sold under an invalid sale took possession of it, whereby he became its owner. Then if a house adjacent to that house was sold the purchaser would have the right of pre-emption.

"If prior to his acquiring the second house by pre-emption his vendor took back the house sold to him owing to the invalidity in the sale, the purchaser will not then have a right to take the house by right of pre-emption.

"If the vendor takes back the house by reason of its invalidity after the vendee has acquired the second house by pre-emption, then the acquisition (of the house) by pre-emption will not be disturbed. This is in *Moheet*."

But in the case of an invalid sale the right of pre-emption arises when the contract transferring the property becomes complete by possession being given. According to the *Hedaya*, "in case of invalid sale, the purchaser becomes proprietor of the article upon taking possession of it, and is responsible for it, if it be lost in his hands"—*Hedaya*, p. 267. The same principle is also laid down in the following passage from the *Fatwa Alamgiri* :—

واما شرائط الصحة فعامة و خاصة فالعامة لكل بيع ما هو شرط الانعقاد لان مالا ينعقد لم يصح ولا ينعكس فان الفاسد عندنا منعقد نافذ اذا اتصل به القبض *

[349] عالمگیری جلد ثالث کتاب البیوع باب اول صفحہ ۳ - طبع نولکشور

لکھنؤ *

Alamgiri, Vol. III, p. 3, Lucknow edition: Book on sales. Chapter I.

"And the conditions of the invalidity (of the sale) are either general or special. The general condition in case of each sale is that which is the condition of the constitution (of the sale) because what is not constituted is not valid, and the contrary is not true, because according to us an invalid sale is constituted and takes effect when possession is joined with it"

So in Baillie's Muhammadan Law of Sale it is said:—"An unlawful sale is that which takes effect when followed by possession of the thing sold" (p. 7).

Having regard to the authorities quoted above, we are of opinion that the sale of the 17th May 1895 was an invalid sale; that the ownership in the subject of the sale did not pass to Ajaib Ali on the date of the contract, nor until the 6th September 1896, when he, on payment of the price, obtained possession.

On behalf of Ajaib Ali it has been contended by Mr. *Karamat Husain* that sale is completed by declaration and acceptance, that is to say, when the offer of the vendor has been accepted by the vendee; and he has referred us to the *Hedaya*, p. 241. The passage, however, appears to refer to the constitution of the contract of sale, and has no reference to the conditions necessary to its validity. With regard to the constitution of the contract of sale, there is no material difference between the Muhammadan and other systems of law. The contract, whether the sale be a valid or invalid sale, is complete, in the sense of the agreement being concluded, upon the offer of the seller being accepted by the purchaser.

In the case of a valid sale there is clear authority to show that ownership passes before delivery of possession. "The legal effect of sale is to establish a right of property in the buyer to the thing sold and in the seller to the price when the sale is absolute," i.e., absolute as distinguished from dependent (with an option) or invalid. Baillie's Muhammadan Law of Sale, p. 7. See Hamilton's *Hedaya*, p. 553, where it is said:—"If the Shafee bring the seller into Court whilst the house is still in his [350] possession, he (the Shafee) may commence his litigation against him, and the seller may retain the house in his own possession until he receive the price from the Shafee. The *Kazee*, however, is not in this case to hear the evidence until the purchaser also appear, as for his presence there is a two-fold reason; for, first, the purchaser is proprietor of the ground, and the seller the possessor; and as the decree of the *Kazee* must be against both, both therefore must be present. (It is otherwise where the purchaser has obtained possession; for then there can be no occasion for the presence of the seller, as he has become like a stranger, having neither the property nor the possession.)"

In the case of an invalid sale we have seen that the purchaser becomes the proprietor of the thing sold on taking possession of it: but it has been contended that he becomes owner as from the date of the original contract, and in support of this contention we have been referred to a number of texts. All these texts, however, deal with cases of sales with an option. The general rule appears to be that "when an option is reserved to the seller the right of property in the thing sold does not pass from him, but such right in the price passes from the purchaser;" and "when the option is reserved to the purchaser the right of property in the price does not pass out of him, but the thing sold passes from the seller." See Baillie's Muhammadan Law of Sale, pp. 67-68. To take the case of an option reserved to the seller, the sale on principle, so far as he is concerned, is otherwise a valid or out-and-out sale, and therefore the right of property passes from him as in the case of an ordinary valid or out-and-out sale.

It is a well recognized principle that there must be a cessation of the seller's ownership in the thing sold, and ownership in the pre-emptor "*at the time of the purchase* in the mansion on account of which he (the pre-emptor) claims the right of pre-emption"—Baillie's Digest, pp. 476-477. That there is no such cessation of the seller's ownership in the thing sold and ownership in the purchaser at the time of a contract of invalid sale seems to be clear from the fact that so long as the vitiating circumstances are not removed it is the seller, and not the purchaser, who is entitled to pre-emption in the case of a subsequent [351] sale of an adjoining tenement. The text quoted from the Alamgiri, Vol. IV, p. 5, to which we have already referred, seems to leave no doubt upon the point. That text seems also to show that when on the vitiating circumstances being removed, as by possession, an invalid sale becomes complete, the ownership does not pass from the seller to the purchaser as from the date of the sale.

The result is that we must find, firstly, that Ajaib Ali did not become the owner of the house purchased by him until the 6th September 1896, and therefore he was not entitled to claim pre-emption against Najm-un-nissa when she purchased her houses on the 14th July 1896; secondly, that Najm-un-nissa was entitled, on the sale to Ajaib Ali becoming complete on the 6th September 1896, to claim pre-emption against him. Accordingly we allow the appeal of Najm-un-nissa and dismiss that of Ajaib Ali. Najm-un-nissa will have her costs of both appeals.

Appeal decreed.

NOTES.

[See also (1914) 23 I. C., 385 (Calcutta): 18 C. W. N., 890; 19 C. L. J., 601.]

[22 All. 351]

The 18th May, 1900.

PRESENT:

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Damodar Das.....Plaintiff

versus

Muhammad Husain.....Defendant.*

Act No. IX of 1872 (Indian Contract Act), sections 135, 137—Principal and Surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged.

A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is there must be consideration therefor. *Philpot v. Briant*, (1828) 4 Bing., 717, *Tucker v. Laing*, (1856) 2 K. and J., 745, and *Clarke v. Birley*, (1888) L. R., 41, Ch. D., 422, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Mr. D. N. Banerji, for the Appellant.

Maulvi Ghulam Muftaba, for the Respondent.

Banerji and Aikman, JJ.—The question which arises in this appeal is whether the defendant Muhammad Husain, who was surety for the defendant

* Second Appeal No. 22 of 1898, from a decree of E. J. Kitts, Esq., District Judge of Bareilly, dated the 29th September 1897, confirming a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 24th February 1897.

Wali Ahmad, was discharged [352] under section 135 of the Indian Contract Act. What happened was this. Wali Ahmad had written a letter to the plaintiff, asking for time to pay the instalments which were payable by him. In reply to that letter the plaintiff wrote to say:—"If there is no legal impediment, then I agree; if there is, then I do not agree." It was contended in the Lower Appellate Court that this was a conditional acceptance of the proposal of the principal debtor. The learned Judge overruled this contention, and held that by reason of the creditor, plaintiff, accepting the proposal to grant time to the principal debtor the surety was discharged. It is contended before us, and in our opinion rightly, that a mere agreement between the creditor and the principal debtor does not discharge the surety unless the agreement amounts to a contract, that is, unless the agreement is one enforceable by law at the instance of the debtor. An agreement is not enforceable by law unless there is consideration for it. In this case there was no consideration for the plaintiff's agreement to delay the realization of the instalments originally fixed. This agreement was nothing more than a mere gratuitous forbearance on the part of the creditor within the meaning of section 137* of the Contract Act. Under section 135† the liability of the surety would cease if there was a contract between the creditor and the principal debtor by which the creditor promised to give time to the principal debtor. The real test for the application of that section is whether the agreement became a contract, that is to say, whether there was consideration for the promise made in the agreement. In the absence of such consideration the agreement could not be enforced by the debtor. The cases of *Philpot v. Briant*, (1828) Bing., 717; *Trucker v. Laing*, (1856) 2 K. and J., 745, and *Clarke v. Birley*, (1888) L. R., 41, Ch. D., 422, which were cited at the hearing, entirely support the contention of the learned counsel for the appellant. It was not suggested in this case that section 139 of the Contract Act had any application. For the above reasons we are unable to agree with the Courts below in holding that the surety was discharged by reason of the forbearance of the plaintiff to realize the instalments payable by the principal debtor. We allow this appeal and vary the decree of the Court below by setting [353] aside that portion of the decree which dismissed the claim against Muhammad Husain with costs, and we decree the claim against the said defendant with costs here and in the Courts below, and direct the property hypothecated by the said defendant to be sold for the realization of the amount decreed, together with interest at the rate of 6 per cent. per annum up to the date of realization, unless the amount payable under the decree is paid on or before the 15th November 1900. Our decree will be drawn up in the terms of section 88 of the Transfer of Property Act.

Decree modified.

NOTES.

[See also (1914) 24 I. C., 864 (Mad.) ; (1915) 30 I. C., 637 (Burmah).]

Creditor's forbearance to sue does not discharge surety.

* Discharge of surety when creditor compounds with, gives time to, or agrees not to sue principal debtor.

* [Sec. 137 :—Mere forbearance on the part of the creditor to sue the principal debtor, or to enforce any other remedy against him, does not, in the absence of any provision in the guarantee to the contrary, discharge the surety.]

† [Sec. 135 :—A contract between the creditor and the principal debtor, by which the creditor makes a composition with, or promises to give time to, or not to sue, the principal debtor, discharges the surety, unless the surety assents to such contract.]

[22 All. 353]

. The 19th May, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE AIKMAN.

Debi Sahai.....Defendant

versus

Sheo Shanker Lal and another.....Plaintiffs.*

Hindu law—Mitakshara—Stridhan—What constitutes Stridhan—Property inherited from a female—Descent of Stridhan.

Amongst property which becomes *stridhan* according to the law of the Mitakshara is property inherited from a female.

It is not the case that where such *stridhan* has once devolved according to the law of succession which governs the descent of this peculiar species of property it ceases to be ranked as *stridhan* and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Deyhee v. Rai Baluk Ram*, (1866) 11 Moo. I. A., 139; *Bhugwandeem Doobey v. Myna Bae*, (1867) 11 Moo. I. A., 487; *Chotay Lall v. Chunno Lall*, (1876) I. R., 6 I. A., 15; *Phukar Singh v. Ranjit Singh*, (1878) I. L. R., 1 All., 661; and *Muttu Vaduganadha Tevar v. Dora Singha Tevar*, (1881) I. L. R., 3 Mad., 290, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satya Chandar Mukerji), for the Appellant.

Pandit Sundar Lal and Munshi Haribans Sahai, for the Respondents.

Aikman, J. (Burkitt, J. concurring).—This is an appeal brought by the defendant to a suit instituted by the plaintiffs-respondents to recover possession of landed property of considerable value together with mesne profits, and for invalidation [354] of a deed of gift, dated the 8th October 1882, executed in favour of the defendant by one Musammat Dilla Kunwari. According to the plaint Dilla Kunwari had only a life interest in the property. She died on the 25th September 1895, and the plaintiff's case is that with her death any interest which her donee, the defendant, had in the property, determined.

The property in suit at one time belonged to Bhawani Dayal and Basant Lal, two brothers, members of a joint Hindu family. Bhawani Dayal died in 1851, leaving him surviving two widows, Kishen Kunwari and Dilla Kunwari, and a daughter by Kishen Kunwari named Jado Nath Kunwari. On Bhawani Dayal's death the property passed by right of survivorship to his brother Basant Lal, who died in 1859, leaving two widows, but no issue. These widows, who had entered into possession of the estate, both died in 1861. On their death the widows of Bhawani Dayal in some unexplained manner got possession of the estate in equal moieties, although it is admitted the title to it devolved on the nearest reversioners, Hanuman Prasad and Hanwant Prasad. The latter died in 1865, and his rights in the estate passed to his son Debi Prasad. On the 8th September 1866, Debi Prasad and his uncle Hanuman Prasad executed a deed of gift of the whole estate in favour of Musammat Jado Nath Kunwari, daughter of Bhawani Dayal. At that time Jado Nath's mother, Kishen Kunwari and Kishen Kunwari's co-widow Dilla Kunwari, were in possession in equal shares. Jado Nath's mother died in 1869, and Jado Nath then got possession of half of the estate. In 1870, Jado Nath Kunwari brought a suit against Dilla Kunwari and one Ram Manorath Lal, in whose favour

* First Appeal No. 46 of 1898, from a decree of Maulvi Saiyid Jafar Husain Khan, Subordinate Judge of Gorakhpur, dated 7th December 1897.

Dilla Kunwari had executed a deed of gift to recover possession of the rest of the property. The Court of First Instance decreed Jado Nath's claim for possession of all the property save eleven villages. As to these the decree declared that Dilla Kunwari would remain in possession for her lifetime without power of alienation. On appeal this Court reversed the decree of the first Court so far as it decreed to the plaintiff possession of any part of the property, and dismissed the suit, but with the declaration that any transfer or alienation made by Dilla Kunwari to Ram Manorath Lal was not to take effect against the reversioners. The defendant-appellant, in whose favour Dilla Kunwari [356] executed the second deed of gift which this suit seeks to invalidate, is the son of Ram Manorath Lal abovementioned. Jado Nath Kunwari died in 1879, and it is admitted that on her death her rights in the property in suit passed to her daughter Jagarnath Kunwari, who died on the 13th November 1896. The plaintiffs are the sons of Jagarnath Kunwari, and claim that the right to the property in suit devolved on them on their mother's death.

The lower Court decreed the plaintiff's claim, and against that decree the present appeal has been brought by defendant. For the appellant it is contended, in the first place, that the deed of gift executed by Hanuman Prasad and Dobi Sahai in favour of Jado Nath Kunwari, plaintiff's predecessor in title, is bad as being the gift of merely a contingent interest. We are of opinion that there is no force in this plea, as the succession of the donors opened upon the death of Basant Lal's widows, and their interest then ceased to be contingent. It is next contended that Musammat Dilla Kunwari, through whom the appellant claims, had acquired by adverse possession a complete title to the property. We are of opinion that in the face of the judgment of this Court, dated 19th April 1871, a judgment in a suit between the predecessors in title of the parties before us, and of the subsequent judgment of this Court dated 4th July 1883, also a judgment *inter partes*, in which the effect of the decree of 1871 was considered, this is a position which cannot successfully be maintained, it having been clearly held in these judgments that Musammat Dilla Kunwari had only a life-interest in the property.

A third and more formidable objection taken by the defendant is that the plaintiffs are not competent to maintain the suit.

It is admitted that the property in suit, having been conveyed by gift to the plaintiff's grandmother Jado Nath Kunwari, became her *stridhan*, and was inherited by her daughter Jagarnath Kunwari, mother of the plaintiffs. If it was *stridhan*, in the hands of Jagarnath Kunwari it is admitted that the plaintiff's suit cannot succeed, as the property would in that case pass on Jagarnath Kunwari's death, not to the plaintiffs but to the plaintiff's sisters, who, it is admitted, are alive. The question then, which [356] we have to consider, is whether the property in suit was Jagarnath's *stridhan*. This question, which is by no means free from difficulty, has been the subject of long and learned argument at the bar.

For the appellant the text of the Mitakshara, Chapter II, section 11 § 2, which includes amongst woman's property property which a woman has acquired by inheritance, is relied on.

If the plain meaning which the words bear is to be given to this passage, there is no doubt that the appellant is entitled to succeed.

On the part of the respondents, reliance is placed on a passage in McNaghten's Principles and Precedents of Hindu Law (p. 38, 3rd edition), to the effect that *stridhan* which has once devolved according to the law of succession which governs the descent of this peculiar species of property, ceases to be ranked as such, and is ever afterwards governed by the ordinary rules of in-

heritance and on certain decisions of the Calcutta and Madras High Courts in which this view has been adopted and given effect to.

The Mitakshara, however, is the paramount authority which governs such questions in these provinces, and we are unable to find in it any warrant for the opinion expressed by Sir William McNaghten, who does not cite any authority for the view which he expresses. It is true that he says that "in the Mitakshara whatever a woman may have acquired, whether by inheritance, purchase, partition, seizure or finding, is denominated woman's property, but it does not constitute her *peculium*." But, as Messrs. West and Bühler have demonstrated (Hindu Law, 3rd edition, p. 146, etc.), no such distinction between *stridhan* and what Sir W. McNaghten calls a woman's *peculium*, was present to the mind of the author of the Mitakshara. As to this see also Banerjee's Hindu Law of Marriage and Stridhana, 2nd edition, p. 276.

The doctrine that *stridhan* which has once passed by inheritance ceases to be *stridhan* is apparently derived from the Daya Krama Sangraha of Sri Krishna Tarkalankara. This work is described by Mayne as "very modern, its author having lived in the beginning of the last century." It, like the Daya Bhaga, is of high authority in the Bengal School, but it has [357] never, so far as we know, been recognized as of any authority in the Benares school.

Mayne, in his "Hindu Law and Usage," considers that the author of the Mitakshara included in the term *stridhanum* property which a woman has acquired in any way whatever. But he is of opinion that the special line of descent of such property set forth in section 11 of the Mitakshara does not apply to property which a woman has inherited from a male, that having already been treated of in earlier sections. He is also of opinion that there is no reason why the author of the Mitakshara should not have included in the property for which in section 11 he prescribes a special line of descent property inherited from a female.

The question whether, according to the Mitakshara, property inherited from a female should be subject to the special rules of descent governing *stridhan* has not formed the subject of judicial consideration, either in the Privy Council or in this Court. But, so far as can be gathered, the views of their Lordships of the Privy Council are quite consistent with the opinion expressed by Mayne. The cases of *Thakoor Deyhee v. Rai Baluk Ram*, (1866) 11 Moo., I.A., 139, and *Bhugwandeen Doobey v. Myna Baee*, (1867) 11 Moo., I. A., 487, dealt with property which a woman had inherited from her husband, and the case of *Chotay Lall v. Chunno Lall*, (1876) L. R., 6 I. A., 15, with property inherited by a daughter from a father. A case in this Court, *Phukar Singh v. Ranjit Singh*, (1878) I. L. R., 1 All., 661, had to do with property inherited by a grandmother from her grandson. In all these cases it was held that the woman took only a restricted interest, and that on her death the property passed to the heirs of the last male owner.

In the case *Muttu Vaduganadha Tevar v. Dora Singha Tevar*, (1881) I.L.R., 3 Mad., 290, it was contended that a zamindari property inherited by a daughter from her father was her *stridhan*, and passed to her heirs on her death; and reliance was placed on what is called the much-discussed passage in the Mitakshara, Chapter II, section 11 § 2. As to this their Lordships of the Privy Council remark at p. 301 of the judgment:—"It is not necessary now, to state in any detail how impossible it is, whether with regard to other commentators or to other passages of the Mitakshara itself, to [358] construe this passage as conferring upon a woman taking by inheritance from a male a *stridhan* estate transmissible to her own heirs." As the text in.

the Mitakshara refers to acquisitions by inheritance in general, the insertion by their Lordships of the words "from a male" in the passage above cited from their judgment is significant, and, as said above, is an indication that the views of the Privy Council are not inconsistent with the opinion expressed by Mr. Mayne.

In the Bombay Presidency, save in the case of a widow succeeding to her husband, it is held that property which a woman takes by inheritance is her *stridhan*, and passes to her heirs.

In this state of the authorities, and in the absence of any authority to the contrary, which is binding upon us, we arrive at the conclusion that the estate which the mother of the plaintiffs inherited from her mother was *stridhan*, governed by the special rules of devolution applicable to this species of property. The sisters of the plaintiffs therefore and not the plaintiffs are entitled to succeed to it. We accordingly sustain the first ground set forth in the memorandum of appeal, and holding that the plaintiffs are not competent to maintain the suit, set aside the decree of the lower Court and dismiss the suit with costs in both Courts.

Appeal decreed.

NOTES.

[This decision was reversed by the Privy Council in (1903) 25 All., 468.]

[22 All. 358]

The 21st May, 1900.

PRESENT :

MR. JUSTICE BANERJI.

Thakur Ram.....Decree-holder

versus

Katwaru Ram.....Judgment-debtor.*

Execution of decree—Limitation—Act No. XV of 1877—(Indian Limitation Act), Sch. II, art. 179 (4)—Application to take some step in aid of "execution—Payment of process fee.

The mere payment of process fee for the issue of notice for the purpose of an inquiry under s. 287 of the Code of Civil Procedure, or the payment of costs for the issue of a proclamation of sale, unaccompanied by any application, will not operate to give a fresh starting point for limitation within the meaning of art. 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Har Sahai v. Sham Lal*, Weekly Notes, 1900, p. 88, and *Dwarkanath Appaji v. Anandrao Ramchandra*, (1894) 1. L. R., 20 Bom., 179, followed. *Barmha Nand v. Sarbishwara Nand*, Weekly Notes, 1883, p. 247, distinguished. *Radha Prosad Singh v. Sundar Lall*, (1883) 1. L. R., 9 Cal., 644, dissented from.

[359] THE facts of this case sufficiently appear from the judgment of the Court.

Mr. Abdul Raoof and Maulvi Muhammad Ishaq, for the Appellant.

Pandit Madan Mohan Malaviya, for the Respondent.

* Second Appeal No. 772 of 1899, from a decree of Munshi Achal Behari, Officiating Additional Subordinate Judge of Ghazipur, dated the 23rd June 1899, reversing a decree of Chaudhri Sayid Abdul Husain, Munsif of Ghazipur, dated the 11th April 1899.

Banerji, J.—This appeal arises out of the execution of a decree passed under section 88 of the Transfer of Property Act on the 19th November 1890. An order absolute was made under section 89 on the 11th September 1894. The first application for execution was presented on the 29th November 1895. The present application was made on the 7th December 1898. The question is, whether the application last mentioned was within time. The Lower Appellate Court has held that it was barred by limitation, and it is contended that this decision is incorrect. The learned vakil for the appellant relies on the fact that on the 24th December 1895, process fee was deposited for the issue of a notice for the purpose of an inquiry under section 287 of the Code, and also upon the fact that on the 8th July 1896, costs for the issue of a proclamation of sale were deposited. He contends that limitation should be computed from these dates, and that as the present application was made within three years from both of these dates, it was not time-barred.

Under cl. 4 of art. 179 of the second schedule to the Indian Limitation Act, 1877, the three years' limitation must be computed from the date of applying in accordance with law for execution of the decree, or to take some step in aid of execution. It is clear that under that article a fresh start for the computation of limitation is allowed, not from the date of taking a step in aid of execution, but from the date of applying to take some step in aid of execution. The record of this case shows that no application, either oral or in writing, was made when the deposit of process fee and of costs of sale was made on the 24th December 1895, and the 8th July 1896. The mere fact of the making of the deposit cannot amount to the making of an application within the meaning of art. 179 (4). The learned vakil for the appellant relies on the ruling of this Court in *Barmha Nand v. Sarbishwara Nand*, Weekly Notes, 1883, p. 247. In that case what the learned Judge said was [360] that "the decree-holder applied within the period of limitation for steps to be taken in execution when he deposited the necessary fees for notices and advertisements of sale." From this statement it seems that some application was made in that case. In the recent case of *Har Sahai v. Sham Lal*, Weekly Notes, 1900, p. 88, it was held that payment into Court of postage for the purpose of getting a record forwarded to "another Court in a case where the transfer of a decree for execution had been ordered under section 223 of the Code of Civil Procedure did not amount to an application to the Court to take a step in aid of execution. In *Dwarkanath Appaji v. Anandrao Ramchandra*, (1894) I. L. R., 20 Bom., 179, it was held that the mere deposit of process fee for the service of notice was not an application within the meaning of art. 179, cl. (4), which could save the operation of limitation. The case of *Radha Prosad Singh v. Sunder Lal*, (1883) I. L. R., 9 Cal., 644, is no doubt an authority in favour of the appellant's contention, but in that case the learned Judges overlooked the fact that under cl. (4) of art. 179 there must be an application to take a step in aid of execution in order to save the operation of limitation, and that the mere fact of a step being taken in aid of execution cannot have that effect. I am therefore unable to agree with the ruling last mentioned. As in this case the decree-holder did not apply for execution or to take a step in aid of execution within three years before the date of his present application for execution, that application was time-barred, and this appeal must fail: it is dismissed with costs.

I may observe that the Lower Appellate Court was wrong in stating that notice under section 248 was issued on the 24th December 1895. If that date had been correct the present application might have been within time; but, as a matter of fact, the order for the issue of notice was made on the 30th Novem-

ber-1895, and the notice was actually issued on the second December 1895, and the present application was made beyond three years from both these dates.

Appeal dismissed.

NOTES.

[This was followed in (1908) 30 All., 179; (1911) 13 I. C., 189 (Cal.); (1905) 8 O. C., 161; (1911) 10 I. C., 182 (Oudh); see likewise (1911) 17 C. L. J., 422; (1913) 18 I. C., 455 (Cal.).]

[361] *The 25th May, 1900.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Nanku Ram.....Plaintiff

versus

The Indian Midland Railway Company.....Defendant.*

Act No. IX of 1890 (Indian Railways Act), sections 72, 76—Act No. IX of 1872 (Indian Contract Act), sections 151, 152, 161—Contract—Bailment—Liability of bailee—Burden of proof—Railway Company.

Where goods are delivered to a railway company for carriage not "at owner's risk," and such goods are lost or destroyed while in the custody of the company, it is not for the owner suing for compensation for such loss or destruction to prove negligence on the part of the company, but, when the owner has proved delivery to the company, it is for the company to prove that they have exercised the care required by the Indian Contract Act, 1872, of bailees for hire.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the Appellant.

The respondent was not represented.

Banerji and Aikman, JJ.—The facts which gave rise to the suit were these. The plaintiff's agent consigned to the defendant company 30 bales of cotton for conveyance to Bakhtiarpur, a station on the East Indian Railway. Twenty-eight of these bales were loaded in a wagon on the 3rd January 1896, and the wagon was attached to a mixed train which left the Kirwi station on the same day a little after 4 P.M. After the train had been in motion about 40 minutes, it was discovered that the wagon containing the cotton bales was on fire. It is admitted that all the cotton loaded in that wagon was destroyed. In the present suit the plaintiff claims damages for the loss sustained by him in consequence of the destruction of the cotton. The defendant Company did not dispute the amount claimed, but they claimed exemption from liability on three grounds: (1) that the plaintiff at the time of despatch elected to pay the owner's risk rate, (2) that the fire was the result of spontaneous combustion, and (3) that the fire was not the result of any negligence on the part of the company or its servants. On the first point the Court of First Instance found against the defendant company, and that finding was never questioned. It must therefore be taken the goods—so far as they were to be conveyed over the line of

* Second Appeal No. 857 of 1897, from a decree of G. Forbes, Esq., District Judge of Banda, dated the 16th August 1897, confirming a decree of Babu Sanwal Singh, Subordinate Judge of Banda, dated the 12th May 1897.

[362] the defendant company—were not at the risk of the owner. The Courts below have, however, dismissed the claim, holding that the defendant company was not liable. The Lower Appellate Court was of opinion that it was for the plaintiff to prove that the defendant company was guilty of negligence in respect of the bales of cotton consigned to it. The learned Judge says:—“The party damnified has no cause of action unless he alleges negligence: such an allegation must not be a general sweeping one, but must be such as to give notice to the defendants of the case they will have to meet.” The learned Judge further adds:—“Clearly a plaintiff must affirm some specific act of negligence, or suggest some such act: thus it was open to the plaintiff appellant in the present case to assert in his plaint that he believed the fire to have been caused either by sparks from the engine, or to have been caused by some fire left carelessly in the wagon before the bales were loaded into it, or by some person smoking while engaged in loading.” Being of that opinion the learned Judge held that the plaintiff had not proved that the defendant company were guilty of any act of negligence, and affirmed the decree dismissing the suit. We are unable to agree with the view of the law taken by the learned Judge. By section 72 of Act No. IX of 1890 the responsibility of a railway administration for the loss or destruction of goods delivered to it to be carried by railway is, subject to the other provision of the Act, that of a bailee under sections 151, 152 and 161 of the Indian Contract Act. Section 76 of the Act provides that in any suit against a railway administration for compensation for loss or destruction of goods delivered to it for carriage, it shall not be necessary for the plaintiff to prove how the loss or destruction was caused. The passages quoted from the learned Judge's judgment show that he overlooked the important provisions of section 76, which cast, not on the plaintiff, but on the railway company, the burden of establishing the circumstances which, under section 151 and 152 of the Indian Contract Act, would exonerate the bailee from liability. It was sufficient for the plaintiff to prove delivery of the goods to the railway company and the fact that the goods were destroyed whilst in the custody of the company. Those facts being admitted in this case, it was for the company to establish [363] the circumstances which would entitle them to be relieved from liability. This the defendant company in this case failed to do. The Court of First Instance says in its judgment that the fire must have been the result of spontaneous combustion. There is not a particle of evidence to show that this was so, and no such conclusion can be drawn from the evidence on the record. We may accept the evidence that the fire did not originate from a spark from the engine; but that alone does not lead to the conclusion that there was no other cause for the bales catching fire except the theory of spontaneous combustion. It appears from the note which the locomotive foreman recorded on the driver's report of the 25th January 1896, that, in his opinion, the wagon was on fire before it left Kirwi station. We may mention that the locomotive foreman happened to be travelling by the train to which the wagon was attached. If this was so, it was for the company to prove that the possibilities indicated by the learned Judge in his judgment as to the origin of the fire, namely, that of some fire having been left carelessly in the wagon before the bales were loaded into it, or of some person smoking whilst loading, did not exist, or that precautions were taken to prevent the originating of the fire in any of the ways indicated. It is true that the learned Judge in his judgment says that “upon the evidence on the record the lower Court's finding that the fire was due to spontaneous combustion and that the company's servants had not been guilty of negligence, was sound and proper.” We may observe that this opinion as to the absence of negligence on the part of the defendant company and their

servants is based on the erroneous view which the learned Judge entertained as to the burden of proof. We may further observe that the finding, to which we have referred above, is based on no evidence whatever on the record. The learned advocate for the appellant asked our leave to contend that there was no evidence whatever to justify the finding as to the fire being due to spontaneous combustion or as to the absence of negligence on the part of the defendants. We granted him the leave asked for, and we have gone carefully through the evidence. After having heard that evidence we can unhesitatingly say that there is no evidence to support the conclusion of the Courts below. The plaintiff was therefore entitled [364] to a decree for the amount claimed, the correctness of which was not disputed. We may mention that the railway company was not represented in the appeal before us, and that consequently the appeal has been heard *ex parte*. The result is, that we allow the appeal, and, setting aside the decrees of the Courts below, decree the claim as laid in the plaint with costs in all Courts and future interest. We direct that the future interest hereby awarded be calculated at the rate of 6 per cent. per annum from the date of suit till the date of realization.

Appeal decreed.

NOTES.

[The onus was similarly placed on the Company in (1906) 3 N. L. R., 94; (1911) 37 Bom., 1; (1913) 39 Bom., 191; (1899) 22 Mad., 524; *Plowden v. S. P. & D. Ry. Co.*, (Punjab), Indian Railway Cases, II Edn. 484.]

[22 All. 364]

The 25th May, 1900.

PRESENT :

MR. KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Himanchal Singh.....Judgment-debtor

versus

Jhamman Lal.....Decree-holder.*

Act No. XIX of 1873 (N-W. P. Land Revenue Act), section 205 B—Court of Wards—Contract entered into by disqualified proprietor whilst his property was under the charge of the Court of Wards.

Section 205B of Act No. XIX of 1873 does not cease to have effect when property to which it might apply is released from the custody of the Court of Wards. Such property cannot at any time be taken in execution of a decree obtained on a contract entered into by a ward of the Court at a time when his property was under the superintendence of the Court.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satya Chandar Mukerji) and Munshi Gulzari Lal, for the Appellant.

Munshi Gobind Prasad, for the Respondent.

Knox, Acting, C. J. and Blair, J.—The order passed by the learned Subordinate Judge is wrong. We do not know whether his attention was or was not drawn to section 205B of Act No. XIX of 1873. It is contended that the contracts out of which this decree issued were contracts entered into by the judgment-debtor while his property was under the superintendence of the Court of Wards. This contention was clearly placed before the learned

* First Appeal No. 222 of 1899, from a decree of Pandit Raj Nath, Subordinate Judge of Mainpuri, dated the 25th November 1899.

vakil for the respondent and was not contested by him. We take it therefore that the contracts abovementioned were entered into at a time when Himanchal Singh was a ward of Court. If gentlemen of the money-lending profession will [365] frustrate the object of the law by lending money to wards of Court, they have themselves to thank if they find that their money has been thrown away. Property while under the superintendence of the Court of Wards cannot, without the sanction of the Court, be in any way charged, nor can such property be taken in execution of a decree made in respect of contracts entered into by a ward of the Court while his property is under such superintendence. The contention that the restriction only remains in force so long as the property is under superintendence and is immediately removed the moment the superintendence ceases is not warranted by law.

To put it more clearly. Section 205B of Act No. XIX of 1873 in clear terms provides that no property which has been under the superintendence of the Court of Wards shall be liable to be taken in execution of a decree made in respect of any contract which was entered into by a disqualified person during the time while his property was under such superintendence. To limit the operation of the section to the exact moment when the property is released from the superintendence of the Court of Wards would defeat the manifest object of the Legislature. That intention was that persons whose property was under the superintendence of the Court should not be competent to create without the sanction of the Court any charge upon such property, and that, if they did execute any document purporting to create such charge, that document should at no time have any operation *quoad* the property supposed to be so charged. The whole aim and object of the Legislature would be frustrated if, while the Court of Wards was building up and nursing the estate, the disqualified proprietor should be left free to destroy the work of the Court.

The appeal is decreed, the judgment and decree of the lower Court are set aside, and the application for execution is dismissed with costs.

Appeal decreed.

NOTES.

[See also (1901) 24 All., 136.]

[366] *The 26th May, 1900.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Sher Singh and another.....Defendants

versus

Diwan Singh and others.....Plaintiffs.*

Civil Procedure Code, section 591—Appeal—Appeal from decree in suit, the grounds of appeal being solely directed against an interlocutory order in the suit.

Held, that no appeal would lie where, the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit. *Shao Nath Singh v. Ram Din Sing*, (1895) 1. L. R., 18 All., 19, followed.

* Second Appeal No. 960 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 17th September 1897, confirming a decree of Maulvi Muhammad Shafi, Munsif of Koil, dated 24th December 1896.

THE plaintiffs in this case brought their suit claiming two distinct reliefs. On objection by the defendants that the two reliefs claimed could not be joined in one suit, the Court of First Instance put the plaintiffs to their election and fixed a date upon which the plaintiffs were to appear and state which relief they wished to pursue in that suit. On the date fixed the plaintiffs did not appear, and the Court dismissed the suit as for default of appearance. Subsequently the plaintiffs applied for restoration of the suit, and their application was granted, the suit restored, and a decree ultimately passed in their favour. Against this decree the defendants appealed, both attacking the decree on the merits and questioning the procedure of the Munsif in restoring the case. The appeal was dismissed. The defendants thereupon appealed to the High Court; but in this appeal they attacked only the order of the Munsif, by which he restored the suit on the plaintiffs' application.

Pandit *Sundar Lal* and Pandit *Moti Lal* for the Appellants.

Mr. *W. K. Porter* and Babu *Satish Chandar Banerji* for the Respondents.

Banerji and Aikman, JJ.—We think that this appeal must be dismissed, and the preliminary objection taken by Mr. *Porter* must prevail.

The suit of the plaintiffs-respondents was dismissed by the Court of First Instance for default. That dismissal was subsequently set aside, and the case heard on the merits, and a decree made in favour of the plaintiffs. An appeal preferred from that decree [367] was dismissed by the Lower Appellate Court. The defendants have appealed to this Court, and the only ground upon which their appeal is based is that the dismissal of the suit was improperly set aside by the Court of First Instance. No objection has been taken to the decree of the Lower Appellate Court as regards the merits of the case.

This case is clearly governed by the concluding remarks in the judgment of this Court in *Sheo Nath Singh v. Ram Din Singh*, (1895) I. L. R., 18 All., 19, at p. 22. It was there said that "section 591 contemplates two things, there being a regular appeal about something else, and in that appeal the insertion of a ground of objection under section 591." It is conceded that in this case there is no appeal about anything else. The objections taken in the memorandum of appeal relate only to the order setting aside the dismissal of the suit.

Following the ruling referred to above, we sustain the objection urged on behalf of the respondents and dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This was not followed in other Courts :—(1910) 34 Mad., 228 ; (1906) 9 O.C., 80. See also (1908) 5 A. L. J., 644 ; (1900) 22 All., 430.]

[22 All. 367]

The 1st June, 1900.

PRESENT :

Mr. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Jafri Begam.....Opposite Party

versus

Saira Bibi.....Petitioner.*

Execution of decree—Civil Procedure Code, section 234—Successive deaths of judgment-debtor and his legal representative—Execution against legal representative of the legal representative.

The judgment-debtor under a simple money decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of the deceased judgment-debtor had come ; but before anything was recovered the legal representative, in turn, died. *Held*, that the decree-holder was entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession.

IN this case one Jafri Begam obtained a decree against Ezid Bakhsh in 1890. The decree was for Rs. 2,587. The judgment-debtor Ezid Bakhsh was a pensioned Government servant. He died before the whole of the decretal amount was realized. At his death there was a sum of Rs. 1,700 odd in deposit at the [368] Jabalpur treasury, arrears of pension which had not been drawn by Ezid Bakhsh. Execution of the decree was then sought as against Muhammad Ibrahim, son of Ezid Bakhsh. He contested the application, urging that Jafri Begam's decree being held in attachment by him was not capable of execution, and further pleading that he was not liable to be proceeded against as he had not realized any portion of the estate of his deceased father. It was ruled that the decree was capable of execution, but that Ibrahim was not liable in his own person or property for the amount due under the decree. Before any further steps were taken by the decree-holders Ibrahim died. It is admitted that previous to his death he had realized the Rs. 1,700 odd from the Jabalpur treasury. On the 26th February there was an application made for execution of the decree against Musammat Saira, widow of Ibrahim. She objected on certain grounds, amongst others, that she could not be proceeded against as she was not the legal representative of the judgment-debtor. The Court of First Instance (Subordinate Judge of Jaunpur) allowed the application for execution against Musammat Saira. On appeal the District Judge of Jaunpur set aside the order of the Subordinate Judge and disallowed the application for execution on the ground that such an application was not within the purview of section 234 of the Code of Civil Procedure, under which section it purported to have been made. The decree-holder thereupon appealed to the High Court.

Maulvi Karamat Husain, for the Appellant.

Mr. B. E. O'Connor, for the Respondent.

Banerji, J.—We are unable to agree with the learned Judge in holding that the decree-holder appellant was not entitled to take out execution of her decree against the respondent Saira Bibi. The appellant obtained a simple decree for money against one Ezid Bakhsh. Before the decree could be executed, Ezid Bakhsh died, and after his death execution was sought against Ibrahim,

* Second Appeal No. 43 of 1898, from a decree of B. Lindsay, Esq., District Judge of Jaunpur, dated the 18th November 1897, reversing an order of Rai Mata Prasad, Subordinate Judge of Jaunpur, dated the 8th May 1897.

the son of Ezid Bakhsh, on the allegation that Ibrahim had appropriated and not duly disposed of assets left by Ezid Bakhsh to the extent of Rs. 1,716. If Ibrahim did in fact appropriate the amount of assets alleged to have been received and not duly disposed of by him, he became personally liable to the [369] decree-holder to the extent of those assets, under section 234 of the Code of Civil Procedure. Ibrahim, therefore, in substance, took the place of the original judgment-debtor to the extent of those assets, and to that extent became, to all intents and purposes, the judgment-debtor to the decree. On his death his legal representative became liable to the extent of the assets appropriated by her, and the decree-holder was entitled to apply for execution against her. In this case it has been found that Ibrahim received Rs. 1,716 payable to Ezid Bakhsh, the original judgment-debtor. To the extent of that amount he became personally liable, and the decree-holder is entitled to execute his decree against the respondent, the legal representative of Ibrahim, for the realization of that amount. In this view the Lower Appellate Court erred in dismissing the application for execution. I do not deem it necessary to decide in this case the general question whether, in every instance when the legal representative of a deceased judgment-debtor dies before execution of the decree has been completely obtained, an application for execution may be made against the legal representative of such representative. Having regard to the facts of this particular case, I am of opinion that the application of the decree-holder as against the respondent ought to have been entertained, and that the Court below erred in dismissing it. I would allow the appeal with costs, set aside the order of the Lower Appellate Court with costs, and restore that of the Court of First Instance.

Aikman, J.—I agree. In my opinion the learned Subordinate Judge was right, and the learned District Judge took a wrong view of the provisions of section 234 of the Code of Civil Procedure. If the learned Judge's view were the sound one, much injustice might result. Supposing a judgment-debtor dies leaving property amply sufficient to pay his debts, and this property passes to an only son, who is brought on the record as the legal representative of the judgment-debtor. Then, according to the District Judge, if that son died before execution can be completed, his legal representative could not be proceeded against, although the original debtor's property might be in his hands. I do not think that could have been the intention of the law. We have been unable to find any case similar to the present one. It [370] appears to me, however, that when the son of the original judgment-debtor was brought on the record as his legal representative, and when it was found that that son had in his hand money of the deceased which had not been duly disposed of, the son, to all intents and purposes, became the judgment-debtor. Therefore, in my opinion, the legal representative of the son can under section 234 be proceeded against subject to the limitations therein set forth. I concur in the order proposed.

BY THE COURT.—The order of the Court is that this appeal is allowed with costs, the order of the Lower Appellate Court set aside with costs, and that of the Court of First Instance restored.

Appeal decreed.

[22 All. 370]

PRIVY COUNCIL.

The 15th February, and 24th March, 1900.

PRESENT :

LORDS HOBHOUSE, DAVEY, AND ROBERTSON, AND SIR RICHARD COUCH.

Sah Lal Chand.....Defendant-Appellant

versus

Indarjit.....Plaintiff-Respondent.

On appeal from the High Court for the North-Western Provinces at Allahabad.

Construction of the Indian Evidence Act, 1872, section 92—Evidence admitted to contradict a recital of receipt of consideration in a deed of sale—Oral agreement.

The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in section 92* of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence.

Where the consideration money had been acknowledged to have been paid by recital in the sale deed to that effect, *Held* that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration money remained with purchaser, in his hands for the purposes and under the conditions agreed upon between them.

APPEAL from a decree (2nd June 1896) of the High Court, (1895) *Indarjit v. Lalchand*, I. L. R., 18 All., 168, reversing a decree (13th June 1893) of the Subordinate Judge of Agra.

* [Sec. 92:—When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no

Exclusion of evidence of oral agreement. evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtracting from, its terms :

Proviso (1).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto ; such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, want or failure of consideration, or mistake in fact or law.

Proviso (2).—The existence of any separate oral agreement as to any matter on which a document is silent and which is not inconsistent with its terms, may be proved. In considering whether or not this proviso applies, the Court shall have regard to the decree of formality of the document.

Proviso (3).—The existence of any separate oral agreement constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents, not expressly mentioned in any contract, are usually annexed to contracts of that description, may be proved : Provided that, the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.]

[371] The respondent brought this suit on the 6th December 1892 against the appellant and a co-defendant, Musammat Kesar Kuar. The plaintiff obtained a decree in the High Court for Rs. 33,133, being the balance, with interest, of the consideration money for the sale of half of his estate in land, sold by the plaintiff to the defendants by sale-deed dated the 18th February 1888, in the proportion of six annas to the defendant Sah Lal Chand, and two annas to the other.

The main question now related to the effect on this case of section 92 of the Indian Evidence Act, I of 1872, and to whether or not the High Court had admitted oral evidence of facts which, if allowed, would have contradicted and varied, within the meaning of that section, the terms of a written instrument, the registered sale-deed. In that deed there was a recital that Indarjit had received the consideration Rs. 30,000. This payment was stated to have been made by his receiving Rs. 25,000, handed over to him in cash before the Sub-Registrar, Rs. 3,000 by a set-off against a previous debt due by Indarjit to Lalchand, and Rs. 2,000 by money paid to two vakils on his account.

Section 92 of the Evidence Act enacts that when the terms of a contract in writing have been proved no evidence of any oral agreement or statement shall be admitted, as between the parties thereto, for the purpose of contradicting, varying, adding to, or subtracting from, the written terms.

That the consideration agreed upon was Rs. 30,000 was common ground. The plaintiff alleged that to obtain an advance of money for the costs of a suit whereby Indarjit should obtain possession of his inheritance, then in the hands of strangers without title against him, he had executed the sale-deed of the 18th February 1888; that the present defendants were co-plaintiffs with him in his suit filed on the 21st February 1888; that a decree was made in their favour on the 10th December 1888, upheld on appeal on the 26th May 1891 and possession obtained; that during the suit all the expenses were defrayed by the Kothi of Sah Lal Chand, amounting to about Rs. 2,000. Beyond that the plaintiff had received no consideration money. The terms in which the sale-deed acknowledged receipt appear in their Lordships' judgment. "

[372] The defendants filed separate answers, averring payment of the entire sum. One of the issues was whether the plaintiff was precluded from giving oral evidence in contradiction of the deed of the 18th February 1888. Another raised the questions of fact, whether there had been payment, or whether there had been a real arrangement whereby the consideration money was left with Sah Lal Chand on the understanding that the plaintiff, at the end of the litigation about his inheritance, should receive that money subject to a deduction of his share of the costs of the suit of 1888.

The Subordinate Judge found that no part of the consideration money had been paid in the manner alleged in the recital of the deed of the 18th February 1888. But he dismissed the suit on the ground that the plaintiff had not proved an agreement that payment of the purchase-money should be deferred, and should follow upon the termination of Indarjit's suit of 1888.

The High Court found that the case for the plaintiff was proved.

The judgment of the Division Bench (BANERJI and AIKMAN, JJ.) is reported at length in I. L. R., 18 All., 168. They remanded the suit to the lower Court for the determination of the amount of the disbursements by the defendants on behalf of the plaintiff in the suit, which ended in the decree of the 26th May 1891. On return made, the High Court decreed in favour of the plaintiff Rs. 28,000, the balance of the consideration money, and

Rs. 5,133-5-0 interest, the amount disbursed having been (as was not any longer disputed) the Rs. 2,000 alleged by the plaintiff to have been spent on the suit.

The defendant Sah Lal Chand alone appealed.

Mr. C. E. A. Ross, for the Appellant, argued as to the question of the admission of evidence of an agreement, oral and contemporaneous, in variation of the written one evidenced by the sale-deed, that such evidence was disallowed by section 92. The principle there enacted would exclude the contradiction of the recital, and the addition of the collateral agreement asserted by the plaintiff. Besides this, the evidence, if admissible, was insufficient to outweigh that for the defence. On the facts the [373] suit had been rightly dismissed by the first Court, and that judgment should be restored.

Mr. Herbert Cowell, for the Respondent, contended that the evidence admitted in this suit was not in variation, or contradiction, of the terms of an agreement in writing. The admission of evidence to contradict the misrecital of a fact, such as payment of the consideration for a sale in a sale-deed, was not within the rule enacted in section 92. On the contrary it had been clearly established as law that a recital of the payment of the consideration, contrary to fact, was not conclusively binding, but could be contradicted by proof of the actual transaction that had taken place. He referred to *Hukumchand v. Hiralal*, (1876) I. L. R., 3 Bom., 159; *Lala Himmat Sahai Singh v. Llewhellen*, (1885) I. L. R., 11 Cal., 486. As showing that the Evidence Act provided for the reception of such evidence, reference was made to explanation 3, under section 91, relating to the proof of facts; and to explanations 1 and 2 under section 92, the first expressly referring to want, or failure, of consideration, and the second permitting proof of the existence of any separate oral agreement not inconsistent with the terms of the one contained in the written instrument.

Mr. C. E. A. Ross replied.

Afterwards on the 24th March their Lordships' judgment was delivered by Lord Davey.

In this case the respondent sued the appellant and another person for a sum of Rs. 33,133-5-3 alleged to be due to the respondent as the balance of the consideration for a certain sale-deed dated 18th February 1888.

The first Court dismissed the suit, but on appeal the High Court of Allahabad, by its decree dated the 2nd of June 1896, reversed the decree of the Subordinate Judge and gave judgment for the respondent with costs.

By the sale-deed in question, after recitals that the respondent became entitled on the death of his maternal grandmother to the estate of his maternal grandfather, Jiwa Ram, but strangers had had got possession of the estate, and the respondent had not the necessary means of prosecuting a suit against them, and that he had therefore sold a moiety of the property for Rs. 30,000, as to [374] 6 annas to Sah Lal Chand, and as to 2 annas to Musammatt Kesar Kuar, and that he had received the entire consideration with reference to the share of each vendee in the manner detailed below, it was agreed that the vendees should institute a claim in the Court of the Subordinate Judge of Agra District jointly with the respondent to recover possession and enter into possession of the property decreed jointly with him, and take mesne profits of their share. And the respondent agreed that after the institution of the suit he would not make any settlement with respect to the subject-matter of the claim, or withdraw the claim, or get the case settled by arbitration without the consent of the vendees. If the decision of the Court should be unfavourable the Respondent was to bear the costs of the opposite party and repay the consideration and be responsible for the costs incurred.

The consideration money of Rs. 30,000 was stated to have been received from the vendees in the following manner :—

| | Rs. |
|--|--------|
| Received in cash at time of registration... | 25,000 |
| By set-off against a previous debt due in respect of five rukkas ... | 3,000 |
| Caused to be paid Chandi Parshad and Jagan Parshad | 2,000 |
| Total ... | 30,000 |

In May 1888 the respondent brought a suit for the recovery of Jiwa Ram's property jointly with the appellant and Kesar Kuar, and a decree was made in their favour by the Judge of first instance which was affirmed by the High Court on the 26th of May 1891. They subsequently executed the decree and obtained possession of the property.

By his plaint in the present suit which was filed on the 6th of December 1892 the respondent alleged that the three items in which the consideration of the sale-deed was said to have been paid were fictitious and that the money which was produced at the time of registration went back to Sah Lal Chand, and no item was due from the respondent under old accounts, nor was anything paid on respondent's behalf to Chandi Parshad and Jagan Parshad. And the respondent alleged that the sale [375] consideration was left with the vendees subject to the condition that the vendees should bear half the costs of the proposed suit and defray the other half (*i.e.*, the respondent's share) out of the consideration money, and after obtaining a decree in the first or the appellate Court pay the respondent the balance (if any). The respondent named the expiry of the time allowed for an appeal to Her Majesty on the 15th January 1892 as the date of accrual of cause of action.

The appellant by his written statement denied the facts alleged by the respondent and pleaded that the claim was barred by time.

Both Courts have agreed that no part of the consideration money was paid to or on account of the respondent, and their Lordships need not say more on that subject than that they agree with the finding. The Subordinate Judge, however, held that the respondent had not made out by evidence the agreement alleged by him and his suit must therefore fail. The High Court on the other hand held that the respondent's story was in accordance with the probabilities of the case and was sufficiently proved by the evidence adduced by him. In this case no question of limitation arises.

The learned Judges have very fully and carefully stated and commented on the evidence of the respondent and his witnesses. Their Lordships agree with the conclusions of the learned Judges on the question of fact and with the reasons which they have given for accepting the respondent's story as true.

The point which was chiefly pressed on their Lordships by the learned Counsel for the appellant was also raised in the High Court and considered by the learned Judges, *viz.*, that no evidence should have been received of the agreement alleged by the respondent because it varied or contradicted the written contract, and was therefore inadmissible under section 92 of the Evidence Act. Their Lordships, agreeing with the High Court, regard it as settled law that, notwithstanding an admission in a sale-deed that the consideration has been received, it is open to the vendor to prove that no consideration has been actually paid. If it was not so facilities would be afforded for the grossest frauds. The Evidence Act does not say that no statement of fact in a written

[376] instrument may be contradicted by oral evidence, but that the terms of the contract may not be varied, &c. The contract was to sell for Rs. 30,000 which was erroneously stated to have been paid, and it was competent for the respondent without infringing any provision of the Act to prove a collateral agreement that the purchase-money should remain in the appellant's hands for the purposes and subject to the conditions stated by the respondent. This objection therefore fails.

Their Lordships will humbly advise Her Majesty that this appeal be dismissed. The appellant will pay the costs of it.

Appeal dismissed.

Solicitors for the Appellant:—Messrs. *Pyke and Parrott.*

Solicitors for the Respondent:—Messrs. *Barrow and Rogers.*

NOTES.

[The payment or the non-payment or variation in the mode of payment may be proved, by other evidence, notwithstanding recitals in the deed:—(1901) 25 Mad., 7; 55; (1907) 4 A. L. J., 441; (1907) A. W. N., 181; (1914) 36 All., 537; (1909) 10 C. L. J., 27; (1909) 2 L. C., 13; (1911) 11 I. C., 713 (Cal.); (1913) 38 Mad., 226;

But this rule does not allow a document of one character to be proved to be of another character:—(1913) 25 M. L. J., 290; (1905) 27 All., 612; nor allows the consideration amount to be varied:—(1913) 18 C. W. N., 66; (1913) 38 Mad., 514; contra (1914) 12 A. L. J., 969. These rules do not affect third parties, (1905) 2 C. L. J., 338, nor do they prevent proof of later terms not inconsistent with the deed:—(1909) 11 C. L. J., 39.]

[22 All. 376]

APPELLATE CIVIL.

The 10th February, 1900.

PRESENT :

MR. JUSTICE BLAIR.

Lalman Das.....Defendant

versus

Jagan Nath Singh and others.....Plaintiffs.

Civil Procedure Code, section 244—Plaint in a suit treated as an application under section 244—Limitation Act No. XV of 1877 (Indian Limitation Act), Sch. II, Art. 178.

Where a suit is filed under circumstances in which the proper remedy is an application under s. 244 of the Code of Civil Procedure, and the Court in the exercise of its discretion treats the plaint in the suit as an application under s. 244, the rule of limitation applicable will be that appropriate to applications under s. 244, namely, that prescribed by art. 178 of the second schedule to the Indian Limitation Act, 1877. *Jhamman Lal v. Kewal Ram*, Weekly Notes, 1899, p. 219, and *Biru Mahata v. Shyama Churn Khawas*, (1895) 1 L. R., 22 Cal., 483, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gokul Prasad, for the Appellant.

Maulvi Ghulam Mujtaba, for the Respondents.

Blair, J.—It seems to me that this appeal must succeed. At an auction sale held in execution of a mortgage decree a 16-biswansis share was sold instead of a 15-biswansis share, which was all that under the decree should have been brought to sale. [377] The purchaser is a stranger, and for some

*Second Appeal No. 629 of 1899, from a decree of Babu Nihal Chunder, Subordinate Judge of Shahjahanpur, dated the 31st July 1899, confirming a decree of Babu Deoki Nandan Lal Sahai, Munsif of West Budaon, dated the 20th December 1898.

11 years has been in undisturbed possession of the share. The Court below in a somewhat vague manner has apparently treated this proceeding, not as a suit but as an application under section 244 of the Code of Civil Procedure, and following therein a decision of this Court in *Jhamman Lal v. Kewal Ram*, Weekly Notes, 1899, p. 219, in which a Bench of this Court approved of the ruling in the case *Biru Mahata v. Shyama Churn Khawas*, (1895) I. L. R., 22 Cal., 483, decreed the claim of the plaintiffs. Mr. Gokul Prasad argues for the appellant that this proceeding having been treated by the Court below as a proceeding under section 244, the application of the plaintiff is barred by the operation of art. 178 of sch. ii of the Indian Limitation Act. If that article is applicable, it is clear that the three years' limitation has long expired. Mr. Mujtaba for the respondents has suggested that no article of limitation is applicable to such an application as this. The case which he has cited to me is altogether of a different kind, and I see no reason to doubt the propriety of the application of art. 178. For this reason I allow the appeal, set aside the decrees of the Courts below, and dismiss the plaintiff's suit with costs.

Appeal decreed.

NOTES.

[See on the general question, when the defect is owing to stamps etc., the C. P. C., 1908, sec. 149.]

[22 All. 377]

The 7th June, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Kaunsilla.....Defendant

versus

Chandar Sen.....Plaintiff.*

*Execution of decree—Sale in execution—Title of auction-purchaser—
Purchaser not bound to inquire into the validity of the order
under which the sale takes place.*

Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan v. Kazim Husain*, (1891) I. L. R., 13 All., 432, distinguished, *Rewa Mahton v. Ram Kishen Singh*, (1886) I. L. R., 14 Cal., 18, and *Mukhoda Dassi v. Gopal Chunder Dutta*, (1899) I. L. R., 26 Cal., 734, referred to.

[378] THE facts of this case sufficiently appear from the judgment of the Court.

Pandit Sundar Lal, for the Appellant.

Pandit Moti Lal (for whom *Maulvi Ghulam Mujtaba*), for the Respondent.

Burkitt and Henderson, JJ.—On the 19th June 1872, one Jagannath mortgaged 11½ biswas in a particular mahal to Tulshi Ram. This mortgage was a simple mortgage, but it appears that subsequently the mortgagee was let into possession (it is not shown how), and from that time the mortgage was treated as if it had been a usufructuary mortgage. Jagannath died leaving

* Second Appeal No. 29 of 1898, from a decree of Babu Madho Das, Subordinate Judge of Bareilly, dated the 10th December 1897, reversing a decree of Pandit Bishambar Nath, Munsif of Aonla, Faridpur, dated the 19th April 1897.

three sons, Raghunath Das, Narain Das and Mulchand, who may be described as Mulchand No. 1.

On the 29th October 1881, Raghunath and Narain Das sold their two-third shares in the $11\frac{1}{4}$ biswas (or $7\frac{1}{2}$ biswas) to Tulshi Ram, who thus became the owner of the $7\frac{1}{2}$ biswas, and continued to be the mortgagee of the $3\frac{3}{4}$ biswas of Mulchand No. 1. The share of Mulchand No. 1 remained unaffected. Tulshi Ram, who owned another 5 biswas in the same mahal, died, leaving a son Mulchand No. 2. Mulchand No. 2, who was in possession of the $11\frac{1}{4}$ biswas and his 5 biswas, on the 3rd January 1887, executed a mortgage purporting, as full owner, to mortgage the entire $16\frac{1}{4}$ biswas to Musammatt Kaunsilla and Bishan Lal. The mortgagees, Musammatt Kaunsilla and Bishan Lal, brought a suit upon their mortgage against Mulchand No. 2 only, and obtained a decree for sale, and under that decree the property was sold on 20th June 1895, and purchased by Musammatt Kaunsilla for Rs. 7,000 odd. This sale was confirmed, and she obtained possession on the 24th September 1895.

On the 22nd February 1897, the plaintiff-respondent Chandar Sen, who had previously, on the 24th May 1897, purchased Mulchand No. 1's $3\frac{3}{4}$ biswas, sued to eject the defendant Musammatt Kaunsilla. He was given an opportunity of redeeming, but he declined to accept it. The Lower Appellate Court has given the plaintiff a decree for his claim as made.

It has been contended that, having regard to the Full Bench decision in the case of *Matadin Kasodhan v. Kazim Husain*, (1891) I. L. R., 13 All., 432, [379] Kaunsilla took nothing under her purchase. That case has no reference to a sale which has actually taken place and been confirmed, as in the case before us. It merely deals with the right of the mortgagee who has not made prior or subsequent mortgagees parties to his suit to bring the property to sale. That case, in our opinion, therefore, has no application to the circumstances of the present case. It has been contended that Kaunsilla and Bishan Chand being subsequent mortgagees in respect to the one-third share of Mulchand No. 1 were not entitled to bring the mortgaged property to sale under the decree which they obtained in their suit. But, as a matter of fact, the property has been sold under that decree, and the sale has been confirmed and possession given. It is not necessary, as has been held by the Privy Council, for an intending purchaser at a sale under a decree to go behind the decree, to see whether the decree has been rightly made. In *Rewa Mahton v. Ram Kishen Singh*, (1886) I. L. R., 14 Cal., 18, their Lordships of the Privy Council say:—"To hold that a purchaser at a sale in execution is bound to inquire into such matters would throw a great impediment in the way of purchasers under executions. If the Court has jurisdiction, a purchaser is no more bound to inquire into the correctness of an order for execution than he is as to the correctness of the judgment upon which the execution issues." There seems to be no real distinction between a sale which takes place under a decree which directs a sale, as in the case of a mortgage, and a sale in execution held under an order made after a decree for money. See *Mukhoda Dasi v. Gopal Chander Dutta*, (1899) I. L. R., 20 Cal., 734, at p. 737. We have also been referred to two cases, one *Hargu Lal Singh v. Gobind Rai*, (1897) I. L. R., 19 All., 541, and the other an unreported case in Second Appeal No. 637 of 1897 recently decided by a Bench of this Court. Neither of these cases deals with the case of a sale which has actually taken place, and they are therefore not in point. The plaintiff in this case is the representative of the mortgagor, and we are unable to see how, under the circumstances of this case, he can be entitled to get possession without redeeming an admittedly existing lien on the property held by the defendants.

[380] We therefore allow the appeal, set aside the judgment of the Lower Appellate Court and restore that of the Court of First Instance, dismissing the claim with costs in all Courts.

Appeal decreed.

NOTES.

[This was overruled in (1902) 25 All., 214, F. B.]

[22 All. 380]

The 7th June, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Moti Ram and another.....Defendants

versus

Kundan Lal and others.....Plaintiffs.*

Civil Procedure Code, sections 372, 588—Assignment pending suit—Application by Assignees to be allowed to appeal against the decree—Order rejecting application—Appeal.

A defendant, pending the suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* to the detriment of the assignees. The assignees filed a memorandum of appeal claiming that they were entitled to file an appeal under the circumstances set forth in their memorandum. The Court, apparently treating this memorandum as an application under section 372 of the Code of Civil Procedure, dismissed it. *Held* that an appeal would lie from this order of dismissal as from a decree. *Indo Mati v. Gaya Prasad*, (1896) I. L. R., 19 All., 142, followed.

THE facts of this case sufficiently appear from the judgment of the Court, Pandit Moti Lal and Babu Durga Charan Banerji, for the Appellants.

Babu Jogindro Nath Chaudhri (for whom Munshi Gulzar Lal), for the Respondent.

Burkitt and Henderson, JJ.—This is an appeal from a decree of the District Judge of Meerut, which in words directs the appeal before him to be dismissed. The case was one in which in a pending suit the present appellants purchased the interest of one Dalip; they made this purchase on the 5th July 1897. No application was made by the assignees or assignor to have the assignees brought on the record, and the suit was decided *ex parte* on the 13th July. The decree given in that suit was injurious to the present appellants, in that it debarred them from redeeming the mortgage. Thereupon the present appellants put in a memorandum of appeal before the Judge, and in that [381] memorandum claimed distinctly that they were entitled to file an appeal under the circumstances set forth in their memorandum. This application was supported by the assignor who disclaimed all interest in the subject of the suit. The District Judge treated the application for leave to appeal as if it were an application properly made under section 372 of the Code of Civil

* Second Appeal No. 966 of 1897, from a decree of H. G. Pearse, Esq., District Judge of Meerut, dated 13th September 1897, confirming a decree of Babu Jai Lal, Officiating Subordinate Judge of Meerut, dated the 13th July 1897.

Procedure, and adopted the procedure prescribed by that section. Eventually the District Judge in his final order, after setting forth the facts, records that these appellants applied to be allowed to appeal under no section whatever. And because they had taken no steps to have their names entered (apparently before decree was passed) the learned Judge held "they have no *locus standi* now." Having come to this conclusion the District Judge dismissed the appeal. This order is evidently a clerical blunder, and what the learned Judge meant no doubt was that the application for leave to appeal was rejected.

In our opinion the District Judge was wrong in refusing the application. Section 372 clearly does apply to such a case. The assignment here was an assignment which took place pending the suit, in the sense in which the word suit has been interpreted in many cases in the Privy Council. There was a suit pending when the assignment took place, and that being so, we think section 372 is applicable, even though no application to have the assignees brought on the record was made till after the decree.

It is then contended that no appeal lies. Clearly section 588 does not give an appeal, as the appeal given by that section is an appeal against an order disallowing objections raised under section 372. Here objections were raised and they were allowed; consequently sub-section 21 does not apply. But it was held in the case of *Indo Mati v. Gaya Prasad*, (1896) I. L. R., 19 All., 142, in which an application to be brought on the record under section 372 had been refused, that the order rejecting the application was an adjudication on the representative right claimed by the applicant, and therefore amounted to a decree as that word is defined in section 2 of the Code. Applying that case, it appears to us that an appeal does lie to us, and we are of opinion that that appeal should be allowed. The facts are perfectly clear. There can be no doubt that the [382] assignment did take place, and, as we held above, the application to have the assignees brought on the record was made, and properly made, under section 372 of the Code.

We therefore set aside that which we conceive to be the order of the Court below, *i.e.*, the dismissal of the appellants' application to be brought on the record. We direct that the appellants be now brought on the record, and we remand the record to the Court of the District Judge with orders to decide whether the memorandum of appeal dated the 23rd August 1897, should or should not be admitted; and if admitted, to hear and decide the appeal according to law. Costs of this appeal will follow the event.

Appeal decreed.

NOTES.

[As regards the right of appeal, this was overruled in (1902) 24 All., 532. See also (1902) 24 All., 342; (1903) P. R., 57; (1915) 27 I. C., 704, Cal., (applicability to defendants).]

[22 All. 383]

The 12th June, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Chhiddu Singh and others.....Plaintiffs

versus

Durga Dei and others.....Defendants.*

Hindu law—Hindu widow—Reversioners entitled to succeed successively on death of Hindu widow—Suit by some of such reversioners to set aside alienations made by widow in possession—Res judicata.

Where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners seeking to set aside alienations made by the female in possession will not necessarily constitute *res judicata* in respect of a similar suit brought by other reversioners. *Bhagwanta v. Sukhi* (1899) I. L. R., 22 All., 33, *Jumoon Dassya Chowdhrahi v. Bamasoondarai Dassya Chowdhrahi*, (1876) I. L. R. 3 I. A., 72, and *Isri Dut Koer v. Mussamat Hansbutti Koerain*, (1883) L. R., 10 I. A., 150, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satish Chandar Banerji) for the Appellants.

Pandit Sundar Lal (for whom Pandit Baldeo Ram Dave) for the Respondents.

Henderson, J. (Burkitt, J., concurring).—In this case the plaintiffs, who were the nephews of one Balu Singh, sued the defendants to recover possession of certain property which [383] had been transferred to them or their predecessors in title by Rukmin Kunwar, the widow of Balu Singh. Balu Singh died in 1856, and Rukmin Kunwar died in 1890. It appears that in 1865, some of the brothers and nephews of Balu Singh brought a suit claiming as reversioners to set aside certain alienations, including the alienations now the subject of the present suit, on the ground that they were not made for legal necessity. This suit was heard by the Munsif of Gorakhpur. He decided as to a portion of the claim that the alienations were invalid. As to the alienations now the subject of this suit, he found that they were good, and this decision was upheld in appeal. In the present case the decision of the Munsif in the suit to which we have referred was relied on as being *res judicata* on the question whether the alienations were good or bad. It has been held by a Full Bench of this Court in *Bhagwanta v. Sukhi*, (1899) I. L. R., 22 All., 33, that where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one of such reversioners can be held to claim through or derive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. Now in the present case the plaintiffs are the now reversioners of Balu Singh, being nephews of Balu Singh, other than the nephews who joined in the previous suit, and in our opinion they are not bound by the decision in the previous suit. In *Jumoon Dassya Chowdhrahi v. Bamasoondarai Dassya Chowdhrahi*, (1876) I. L. R., 3 I. A., 72, their Lordships of the Privy Council doubted whether a decree

* Second Appeal No. 912 of 1897, from a decree of D. F. Addis, Esq., District Judge of Shahjahanpur, dated the 8th September 1897, reversing a decree of Rai Banwari Lal, Subordinate Judge of Shahjahanpur, dated the 27th August 1894.

in favour of an adoption passed in a suit by a reversioner to set aside the adoption is binding on any reversioner except the plaintiff, and whether a decision in such a suit adverse to the adoption would bind the adoptive son as between himself and any other than the plaintiff. In a later case, *Isri Dut Koer v. Musammatt Hansbutti Koerain*, (1883) L.R., 10 I. A., 150, their Lordships expressed a strong opinion that such a decision would not be binding as *res judicata* in the case of a new reversioner. Having regard to these expressions of opinion by their Lordships of the Privy Council and to the decision of the Full Bench of this Court, we are of opinion that the Judge [384] was wrong in dismissing the suit on the plea of *res judicata*. We therefore reverse his finding on that point, and setting aside his decree, remand the case under section 562 of the Code of Civil Procedure to the Lower Appellate Court to be restored to the file of pending appeals and disposed of according to law. Costs of this appeal will follow the event.

Appeal decreed and cause remanded.

NOTES.

[See the notes to 22 All., 33 *supra*. The recent Privy Council decision in (1915) 38 Mad., 406 treating the reversioner's suit as a representative one does not deal with the question of *res judicata*.]

[22 All. 384]

The 12th June, 1900.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Pirya Das..Plaintiff
versus

Vilayat Khan and others.....Defendants.*

Execution of decree—Civil Procedure Code, section 335—Suit by unsuccessful auction-purchaser for a declaration of right and for possession—

Court-fee—Act No. VII of 1870 (Court-fees Act), section 7.

A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the owner in possession of the property. An application made by the auction-purchaser under section 335 of the Code of Civil Procedure was rejected, and the auction-purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. *Held*, that such a suit was one for a declaratory decree and consequential relief and Court-fee was payable under Clause IV (c) of section 7 of the Court-fees Act. *Dhondo Sakharan Kulkarni v. Govind Babaji Kulkarni*, (1884) I. L. R., 9 Bom., 20 referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gokul Prasad and Munshi Haribans Sahai for the Appellants.

Maulvi Ghulam Muftaba for the Respondents.

Banerji and Aikman, JJ.—We are of opinion that the Lower Appellate Court improperly dismissed the appeal before it. The plaintiff was the auction-purchaser of certain property, of which formal possession was delivered to him

* Second Appeal No. 923 of 1897, from a decree of Maulvi Saiyid Akbar Husain, Judge of Small Causes exercising the powers of a Subordinate Judge of Agra, dated the 31st August 1897, confirming a decree of Pandit Bishan Lal Sarma, Munsif of Agra, dated the 4th June 1897.

by the officer of the Court. The defendant No. 1 complained that the plaintiff was not entitled to possession, and that he, the defendant, had been improperly dispossessed. An inquiry was held, and an order was made by the Court under section 335 of the Code of Civil Procedure, declaring the defendant to be entitled to possession, and ordering [385] him to be restored to possession. The plaintiff thereupon brought the present suit on the allegation that Miran Sakka, whose rights he had purchased at auction, was the owner of the property in question, and that he the plaintiff was consequently entitled to the possession of it. He prayed that his right to the property should be declared, and that possession should be restored to him. He also included in his prayer for relief a prayer to have the order under section 335 set aside. He valued the relief sought by him at Rs. 62, but paid a Court-fee of Rs. 10 as in a suit for a declaratory decree only. The defendant objected to the amount of the Court-fee paid as insufficient. That objection was overruled by the Court of First Instance which, however, dismissed the suit on the merits. The plaintiff appealed and paid on his memorandum of appeal a Court-fee of Rs. 10. The officer of the Court reported that the memorandum of appeal and the plaint were insufficiently stamped, and on that report the learned District Judge made the following order:—"Appellant to make good the deficiency in both Courts within four days or show cause." The learned Subordinate Judge, who decided the appeal in this case, says in his judgment that the appellant neither paid the required amount nor showed any cause. But this statement is clearly wrong. It appears that within the time allowed by the Court the appellant's pleader appeared to show cause, and did show cause apparently to the satisfaction of the District Judge, because we find that on the 16th July 1897, the District Judge ordered the appeal to be admitted subject to any objection as to Court-fees that might be raised at the hearing. At the hearing the objection was renewed on behalf of the respondents. The learned Judge of the Lower Appellate Court, without assigning any reasons for his opinion, held that the amount of Court-fees was insufficient, and thereupon dismissed the appeal. Even if it be assumed that the Court-fees paid on the plaint and the memorandum of appeal were insufficient, the Court was wrong in dismissing the appeal without giving the appellant an opportunity to make good the deficiency. Further, we are of opinion that there was no deficiency of Court-fee on the plaint in this case or on the memorandum of appeal. If the suit be treated as a suit for a declaration of the plaintiff's right to present possession of the property, within [386] the meaning of the last paragraph of section 335 of the Code of Civil Procedure, it was properly stamped with a Court-fee of Rs. 10, and this was the view taken by the Bombay High Court in *Dhondo Sakharan Kulkarni v. Gobind Babaji Kulkarni*, (1884) I. L. R., 9 Bom., 20. In that case there was a distinct prayer for possession, and the Bombay Court held that, notwithstanding such prayer, the amount of Court-fee paid, i.e., Rs. 10, was sufficient. We are, however, not called upon to decide this point, because if the suit be treated as a suit for possession, the plaint was properly stamped under clause V, section 7 of the Court-fees Act. Further, as the claim sought not only a declaration of right but possession also, there was a prayer for a declaratory decree and consequential relief, and therefore the Court-fee was payable under clause IV (c) of section 7 of the Court-fees Act. In any aspect of the case the amount of Court-fee paid was sufficient or more than sufficient. The fact of the plaintiff asking for a declaration of his title and also to have the order passed under section 335 set aside was not asking for several declarations or reliefs, inasmuch as the order sought to be set aside negatived his right, and the effect of the declaration of his right would necessarily be the setting aside of that order. We think that the Subordinate Judge was wrong in dismissing

the appeal. We set aside his decree and remand the case under section 562 of the Code of Civil Procedure to the Lower Appellate Court with directions to try the appeal before it on the merits. The appellant will have his costs of this appeal. Other costs will abide the event.

Appeal decreed and cause remanded.

NOTES.

[See the Privy Council decision in (1907) 35 Cal., 202.]

[22 All. 386]

The 12th June, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Chajju.....Defendant

versus

Umrao Singh and others.....Plaintiffs.*

Civil Procedure Code, section 13—Res judicata—Under what circumstances a decision may be res judicata as between defendants—

Civil Procedure Code, section 544.

Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this [387] effect to arise there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim made against them as a group. *Ramchandra Narayan v. Narayan Mahadev*, (1886) I.L.R., 11 Bom., 216; *Ahmad Ali v. Najabat Khan*, (1895) I.L.R., 18 All., 65, and *Madhavi v. Kelu*, (1892) I. L. R., 15 Mad., 264, followed. *Bishnath Singh v. Bisheshar Singh*, Weekly Notes, 1891, p. 34, referred to.

Section 544 of the Code of Civil Procedure does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants and to reverse the decree of the Court below in favour of all the defendants. *Puran Mal v. Krant Singh*, (1897) I. L. R., 20 All., 8, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Sundar Lal*, for the Appellants.

Babu *Jogindro Nath Chaudhri* (for whom Babu *Satish Chandar Banerji*), for the Respondents.

Henderson, J.—In 1870 one Sheo Singh died leaving a widow, Musammat Golab and two grandsons, by a deceased daughter, named Ganga and Jamna. In 1875 his widow died. It was alleged that Sheo Singh at the time of his death was possessed of a portion of a house in which he, and after him his widow, resided.

In 1877 his nephews, the sons of a deceased brother, instituted a suit in which they alleged that they had been joint with Sheo Singh and claimed

* Second Appeal No. 854 of 1897, from a decree of Babu Jai Lal, Additional Subordinate Judge of Meerut, dated 31st July 1897, confirming a decree of Babu Udit Narain Singh, Additional Munsif of Meerut, dated the 26th November 1895.

to eject Chajju, the appellant before us, from the portion of the house said to have been Sheo Singh's. Chajju was the brother of Musammat Golab, and the plaintiffs in that suit, while admitting that he was in possession, averred that he had merely been allowed out of grace by Sheo Singh and Musammat Golab to live in the house.

Chajju, in his written statement, in the first place, pleaded that the plaintiffs had no right to sue, as the two grandsons, and not the plaintiffs, were the heirs of Sheo Singh. He further pleaded that the property in suit was his ancestral property, and that it had been in the possession of himself and his predecessors in title for upwards of a hundred years.

[388] Upon that written statement being filed Ganga and Jamna were added as defendants. They in their written statement alleged (1) that they, and not the plaintiffs, were entitled to the property in suit as the heirs of Sheo Singh, as Sheo Singh had never been joint with the plaintiffs; and (2) that the property in suit belonged to Sheo Singh. They also stated that when the suit was instituted they had themselves been about to take proceedings against their co-defendant to obtain possession of the property.

Having regard to the manner in which Chajju put forward his defence and to the fact that he was the brother of the grandmother of his co-defendants, it is difficult to avoid the suggestion that he was really colluding with them to defeat the plaintiffs' suit, and that his claim to the property in suit was put forward to meet the plaintiffs' case if the other ground should fail.

The defendant Chajju being in possession, the only real and substantial issues were whether the plaintiffs had a title better than that of the defendants, and if so, whether they had been in possession within 12 years from the institution of the suit.

The Munsif on the 24th November 1877, gave the plaintiffs a decree having by his judgment found (1) that the plaintiffs had been joint with Sheo Singh and were therefore entitled to the property in suit in preference to his grandsons, (2) that the property in suit belonged to Sheo Singh, and (3) that Chajju's possession had been merely permissive. Against that decree Ganga and Jamna appealed, but, pending the hearing, Jamna withdrew from the appeal. Chajju did not appeal and was not made a party to the appeal preferred by his co-defendants.

The appeal was decided on the 20th May 1878, when the appellate Court, being of opinion that the plaintiffs had never been joint with Sheo Singh and were therefore not entitled as against Ganga and Jamna to the property of Sheo Singh, set aside the decree of the Munsif and dismissed the suit.

On the 20th February 1895, Ganga and Jamna having in the meantime died without leaving issue, the present plaintiffs-respondents who are the representatives of a deceased brother of the father of Ganga and Jamna, instituted the present suit against Chajju to recover possession of the property which had been the subject-matter of the previous suit on the ground that it [389] belonged to Sheo Singh, whose heirs they claimed to be. A description of the portion of the house claimed is given in the prayer of their plaint. The plaint alleged that Chajju had continued to remain in permissive possession or occupation until a short time before the institution of the suit, when the plaintiffs called upon him to give up possession and he refused to do so.

Chajju set up the defence that the property was his ancestral property and had been in his possession for more than 12 years adversely to the plaintiffs.

In the lower Courts various issues were raised, but not determined, as both Courts were of opinion that Chajju not having appealed against the decree of the 24th November 1877, in the previous suit, was not bound by the decree of the 20th May 1878, which, setting aside that decree, dismissed the suit. They considered that Chajju was still bound by the decree of the 24th November 1877, against which he had not appealed, and that as between Chajju and his co-defendants Ganga and Jamna, and through them the plaintiffs-respondents, the findings (1) that the property in suit belonged to Sheo Singh and not to Chajju, and (2) that Chajju had merely been in permissive possession were *res adjudicata*. The first Court accordingly made a decree dismissing the suit and the Lower Appellate Court confirmed that decree.

In my opinion the lower Courts were wrong in treating these as *res adjudicata*.

We were referred to a Full Bench decision of this Court in S. A. 830 of 1886, in which it was broadly laid down by EDGE, C. J., that there can be no *res adjudicata* as between co-defendants. For the purposes of that case it was unnecessary to lay down any principle in terms so very general. It was sufficient for the Court to have held that in the case before it the plea of *res adjudicata* was a bad plea, and I am not disposed to accept the broad proposition laid down by the Full Bench. Moreover, I find in a later case *Bishnath Singh v. Bisheshar Singh*, Weekly Notes, 1891, p. 31, EDGE, C. J., admitted that in exceptional cases there might be *res adjudicata* between co-defendants. We are therefore not precluded by the Full Bench decision from considering the only [390] question raised before us, namely, whether the appellant Chajju was precluded from going into the defence raised by him by reason of section 13 of the Code of Civil Procedure.

In *Ramchandra Narayan v. Narayan Mahadev*, (1886) I. L. R., 11 Bom., 216, the rule as to *res adjudicata* between co-defendants was thus stated :— "Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise, there must be a conflict of interests between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity, a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim to a share made against them as a group" (p. 220). The rule so laid down was accepted by this Court in a recent case - *Ahmad Ali v. Najabat Khan*, (1895) I. L. R., 18 All., 65, and by the Madras Court in the case *Madhavi v. Kelu*, (1892) I. L. R., 15 Mad., 264.

It has been contended that that rule applies in the present case. It is said that in the former suit there was a conflict of interests between Chajju and his co-defendants, and that it was necessary for the adjudication of the plaintiffs' rights to adjudicate upon the rights and interests of the defendants *inter se*. Now it must be borne in mind that Ganga and Jamna were added as defendants in consequence of the first plea raised by Chajju himself to the effect that they were the real heirs of Sheo Singh, and not the plaintiffs. It was therefore common ground with all the defendants that if the property in suit belonged to Sheo Singh, Ganga and Jamna, and not the plaintiffs were entitled to it. The plaintiffs were admittedly out of possession, and the defendants who challenged their title were entitled to remain quiet and put them to proof of that title. It is true that the Munsif found, not only that the plaintiffs had proved their title to the property, but also that Chajju had merely been in permissive possession or occupation. The former finding was a complex-

finding amounting to a finding that the plaintiffs were heirs of Sheo Singh and [391] that the property belonged to Sheo Singh, and no doubt it involved the further finding that the claim set up by Chajju that the property was his ancestral property failed, but the finding as to Chajju having been in permissive possession or occupation was only necessary when the further question, namely, whether Chajju, as alleged by him, has been in adverse possession for upwards of 12 years had to be considered. That question in a sense was only material when the plaintiffs' title to the property had been ascertained, inas-much as an answer in the affirmative to the question would have afforded a complete defence to the plaintiffs' suit. Now the moment it appeared that the plaintiffs, and not Ganga and Jamna, were the heirs of Sheo Singh and it was necessary to go into Chajju's defence, Ganga and Jamna were no longer interested in the adjudication of the issue whether the property was Sheo Singh's or Chajju's, or whether the latter had or had not been in adverse possession for upwards of 12 years. The Munsif having come to the conclusion that Ganga and Jamna had no interest in the property in suit, I am unable to see how it was necessary to adjudicate upon the rights and interests of the defend-ants *inter se*. I would therefore hold that the decree of the Munsif is no bar to Chajju, the defendant in the present case, pleading and being allowed to prove, that the property in suit is his ancestral property, and has been in his possession for upwards of 12 years adversely to the plaintiffs-respondents.

Apart from these considerations, it has also been contended that the decree of the Munsif of the 24th November 1877, in the former suit no longer exists, and doubtless as between the plaintiffs in that suit and the plaintiffs in the present suit it certainly does not exist, as the former and the predecessor in title of the latter were all parties to the decree which set it aside.

Chajju did not appeal, but the appeal preferred by his co-defendants was based upon a ground common to all the defendants, namely, that assuming the property in suit to have been Sheo Singh's, the plaintiffs were not entitled to succeed. The appeal prevailed upon that ground, and had Chajju joined in, or been made a party to, the appeal, it is impossible to conceive that the finding of the appellate Court could have been otherwise than it was. The appellate Court finding that the plaintiffs had [392] failed upon a ground common, not only to the defendants who appealed, but also to the other defendant who had not appealed, set aside the decree of the Munsif entirely and dismissed the suit. It has been urged that, having regard to the terms of section 544 of the Code of Civil Procedure, the Court ought not to have dismissed the suit. That section applies where the decree against several defendants proceeds on any ground common to all the defendants and only some of such defendants appeal. It does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants, and to reverse the decree of the Court below in favour of all the defendants—see *Puran Mal v. Krant Singh*, (1897) I. L. R., 20 All., 8. We must see, therefore, whether the decree of the Munsif proceeded upon a ground common to all the defendants. That decree in so far as it proceeded upon the ground that the plaintiffs in the former suit were entitled to the property of Sheo Singh, proceeded upon a ground common to all the defend-ants, because it was the case of all the defendants that if the property was Sheo Singh's the plaintiffs were not entitled to succeed. But it is said that the decree necessarily proceeded also upon the further ground, namely, that the property was Sheo Singh's, and not Chajju's as claimed by him. That seems to be so, and that ground is one which certainly was not common to both sets of defendants,

and I am therefore inclined to think that section 544 of the Code of Civil Procedure was not applicable to the case, though, having regard to the first plea of Chajju in the lower Court, it is not easy to see how the appellate Court, when it found that the plaintiffs were not the heirs of Sheo Singh, could logically do otherwise than dismiss the suit. The point is not free from difficulty, but it is not necessary for the purposes of this judgment that I should decide the point, as I have already come to the conclusion that even if the decree of the 24th November 1877 be treated as subsisting *quoad* the defendant Chajju, it cannot be put forward as a bar to the defence pleaded by him.

[393] In dealing with the question of *res adjudicata* the lower Courts, as I have already shown, have treated the decree of the 24th November 1877, as *res adjudicata*, not only as to the property in suit being Sheo Singh's, but as to the possession of the defendant Chajju being permissive, and they have not allowed the question of adverse possession to be gone into. They have held that that decree shows that the possession of Chajju was permissive, and inasmuch as they considered nothing had been proved to show that that possession had since become adverse, they held that this suit was not barred by limitation.

Both Courts seem to have lost sight of the fact that in the former suit in 1877 Chajju in his written statement distinctly put forward an adverse claim to the property now in suit, claiming it as his ancestral property, and that Ganga and Jamna in their written statement stated that owing to an adverse claim made by Chajju they had been about to bring a suit against him for possession when the former suit was instituted. Both of these written statements have been put in evidence in the present case, and in the face of them it would be hard to say that Chajju's possession, if it has continued since 1877, was not adverse to Ganga and Jamna and to those who now claim through them.

Under these circumstances I would set aside the decree appealed against and remand the case to the first Court to try the case generally on its merits.

Burkitt, J.—I concur. The appeal is allowed and the record is remanded under section 562 of the Code of Civil Procedure through the Lower Appellate Court to the Court of First Instance to be placed on the file of pending suits and decided according to law. The costs of the two lower Courts and of the appeal in this Court will abide the event.

Appeal decreed and cause remanded.

NOTES.

[Similar tests for *res judicata* as between parties arrayed on the same side were laid down in :—(1911) 36 Bom., 207; (1914) 38 Bom., 438; (1904) 31 Cal., 95; 1909) 36 Cal., 193; (1906) 29 Mad., 515; (1907) 30 Mad., 447.]

[394] *The 12th June, 1900.*

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Lachhman Das.....Plaintiff

versus

Dallu and others.....Defendants.*

Hindu Law—Joint Hindu family—Joint family property sold in execution of a decree on a mortgage against the father alone—Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.

A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs. 59, satisfied the mortgage debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage debt proportionate to the share in the joint family property owned by them. *Held*, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, referred to. *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301, followed.

THE facts of this case sufficiently appear from the judgment of HENDERSON, J.

Mr. Sinha and Munshi Gobind Prasad, for the Appellant.

Pandit Baldeo Ram Dave, for the Respondents.

Burkitt, J.— It is unnecessary for me to state the facts in the case. They have been fully dealt with in the judgment about to be pronounced by my brother HENDERSON, which I have had an opportunity of perusing. I concur in holding, as was done in the case of *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301, that the lien can be enforced by sale of the respondents' interest in the mortgaged property by reason of the pious duty incumbent on them of paying their father's lawful debts.

The amount for which they are liable is Rs. 275, with interest as set forth by my brother HENDERSON. I concur in the order proposed by him. A decree will be drawn up accordingly, giving the respondents six months from to-day, within which they can avoid sale by paying the sum now decreed against them. The appellant is entitled to proportionate costs in all Courts.

[395] Henderson, J.— On the 5th January 1877, one Data Ram, the father of a Mitakshara joint family, executed a mortgage in respect of 114 bighas in mauza Pular, in favour of the plaintiff-appellant to secure the sum of Rs. 99-8 with interest. That sum, it was stated by the plaintiff in his plaint in the present suit, was required for the purpose of paying Government revenue, and this statement, though not admitted, was not denied in the written statements of the defendants.

* Second Appeal No. 864 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 15th September 1897, reversing a decree of Rai Anant Ram, Subordinate Judge of Aligarh, dated the 31st March 1897.

On the 16th August 1887, the plaintiff, in a suit brought by him on the mortgage against Data Ram alone, obtained a decree for sale of the mortgaged property, and on the 22nd November 1888, after the death of Data Ram, the property was sold under the decree and purchased by the plaintiff himself for Rs. 1,100, and the sale was confirmed on the 8th January 1889.

It is important to note that the decree of the 16th August 1887 was for Rs. 1,129, including costs, to which was added interest at 6 per cent. per annum on Rs. 1,000 for six months, as ordered by the decree, making a total of Rs. 1,159. It has been found in the present suit, that after giving credit for the Rs. 1,100, the price fetched by the mortgaged property when sold, the balance of Rs. 59 was actually paid off. The decree of the 16th August 1887 was therefore satisfied, as has been found by the Lower Appellate Court.

On the 28th July 1896, however, the defendants-respondents, who are the sons of Data Ram, brought a suit against the plaintiff-appellant, alleging that as they were not parties to the decree of the 16th August 1887, they were not bound by that decree, nor was their one-fourth share in the mortgaged property affected by the sale under that decree, and on the 15th September 1896 they obtained a decree for possession of their one-fourth share on the sole ground that they were not parties to, and therefore not bound by, the decree of the 16th August 1887.

It appears that the sale of the mortgaged property on the 22nd November 1888 was made in proceedings in execution had against the respondents, Data Ram having died in the meantime, and that in such proceedings they did not object that the mortgage debt was one for which they were not liable, or that they were not bound by the decree, but, in my opinion, an objection [396] of this nature could not have been entertained by the Court executing the decree, as the duty of that Court was confined to giving effect to the decree as it stood, and did not justify it in taking into consideration the question whether it was valid or binding upon the sons of the judgment-debtor or affected their interests in the property directed to be sold.

The decree of the 15th September 1896 was one of many decrees obtained under somewhat similar circumstances in this Province on the strength, it is said, of a decision of a Full Bench of this Court in the case of *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, in which it was held that a mortgage decree in a suit upon a mortgage against a mortgagor who is the father of sons in an undivided family governed by the Mitakshara, is not binding upon the sons, of whose existence and interest the plaintiff mortgagee had notice, unless joined as parties to the suit, and that the sons if not made parties may sue for a declaration that the decree-holder is not entitled to sell, in execution of his decree for sale, the interest of the sons in the property comprised in the mortgage, although the sole ground of their suit is that they were not parties to the suit by the mortgagee. The decision in that case turned mainly, if not entirely, upon the interpretation which the Full Bench put upon section 85 of the Transfer of Property Act.

As in the case of *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, it was not alleged in this suit or in the suit brought by the respondents against the appellant that the debt of the father was tainted with immorality or impiety. Before the passing of the Transfer of Property Act a decree upon a mortgage against a Hindu father passed in the absence of his sons was a good and valid decree, and it was always considered, and by some of the High Courts in India it is still considered, that a sale under such decree was so far good against the sons that it could only be impeached in a suit brought by them if it could be shown that the debt did not exist or had been incurred.

for immoral or impious purposes. According to the decision in the case of *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 537, the sons may sue to have it declared that their interests were not affected by the decree, and in the present case, where the property was sold and purchased by [397] the decree-holder himself, the sons have obtained a decree for possession of their shares of the mortgaged property.

The decree of the 15th September 1896 has never been impeached, and apart altogether from the fact that this Court is bound by the decision of the Full Bench so far as it goes, it must be taken to have been rightly made.

The present suit, which is a suit by the mortgagee against the sons of Data Ram, was instituted on the 24th September 1896, and, except for the fact that the plaint recites the former suits and proceedings to which I have referred, the suit in form is an ordinary mortgage suit against the sons of Data Ram upon the original mortgage. Notwithstanding the decree obtained by him upon the mortgage and the proceeding and sales had thereon, the plaintiff treats the mortgage as still subsisting and claims that there is due upon an account being taken on the mortgage in the usual way the sum of Rs. 7,777. Against that sum he gives credit for the sum of Rs. 1,100 paid by him for the property when sold under his decree, and he claims to be entitled in consequence of his having been deprived of one-fourth of the property purchased by him to a one-fourth share of the balance, or Rs. 1,669 after giving credit for Rs. 150, the amount of profits which he admits having realized while the defendant's one-fourth share was in his possession. He, however, relinquishes a small sum, and the actual amount which he now claims is Rs. 1,500, and he seeks to enforce the payment of this sum by the sale of the one-fourth share of the defendants.

I have already drawn attention to the finding that previous to the suit by the respondents, the mortgage decree had been fully satisfied, and it is only because the plaintiff has since been deprived of a one-fourth share of the mortgaged property which he himself purchased for Rs. 1,100, that he is now able to say that any portion of the debt has not been discharged. In my opinion the original mortgage no longer exists, and if there is still outstanding a portion of the debt due upon the decree against Data Ram, then the respondents as sons of Data Ram are liable to that extent for the debt of their father, as they do not allege that the debt was one from which they could claim to be relieved. It is clear, I think, that but for the whole mortgaged property, including the [398] interests of the respondents, having been sold, the mortgage decree could not be taken to have been satisfied. It would not be unfair to deduct one-fourth from the Rs. 1,100 which was paid for the whole property and take the balance Rs. 825 as the amount for which credit should have been given, leaving Rs. 275 still outstanding as a debt, for which the respondents are still liable. The plaintiff is not entitled, as he has sought to do, to treat the mortgage as if it were still subsisting, and to take the account upon it from the beginning and after giving credit for the Rs. 1,100 paid by him on the 22nd November 1888, and the sum of Rs. 150, the profits alleged to have been realized by him from the share of the defendants while it was in his possession, to say that the balance found upon the account on the footing of the mortgage as if subsisting is still due.

The sum of Rs. 275 became an outstanding debt as from the date of the respondents' decree declaring them entitled to possession of their one-fourth share, and it will carry such interest, if any, as was allowed on the principal amount of the mortgage decree. For this amount the respondents are undoubtedly liable to the plaintiff. Their father had full power to charge their interest

in the mortgaged property for the debt, and nothing has taken place to discharge their interest from the mortgage lien.

The only point which remains to be determined is whether in this suit the lien can be enforced, and on this point we have been referred to the case of *Dharam Singh v. Angan Lal*, (1899) I. L. R., 21 All., 301, where such a lien was enforced. The facts of the case are not distinguishable from those of the present case, but the point now before us did not directly arise, as no objection was raised as to the form of the decree of the Lower Appellate Court which directed the property of the defendants to be sold to meet the claim. This appears from the following observations in the judgment of the Court:—"The plaintiffs are therefore entitled to claim the amount decreed to them. No objection was taken in argument to the form of the decree in the Court below." There is nothing in the decision of the Full Bench which prevents a mortgagee who has sued a Hindu father in the absence of his sons from subsequently bringing a suit to enforce his mortgage against the interests of the [399] sons in the ancestral property, and I am unable to see why the plaintiff here should not be entitled to enforce the lien against the respondents' interest in the mortgaged property on the ground of their pious obligation to pay their father's debts.

The decree of the Lower Appellate Court dismissing the plaintiff's claim ought, I think, to be set aside, and there ought to be a decree in favour of the plaintiff for Rs. 275, with such interest, if any, thereon, as may have been given by the decree of the 16th August 1887, from the 15th September 1896, and in default of the respondents paying the same by a day to be fixed, their one-fourth share in the mortgaged property should be sold in satisfaction of the claim.

Appeal decreed.

NOTES.

[This was followed in (1902) 25 All., 162. See also (1903) 7 O. C., 137 ; (1907) 11 C. W. N., 403 ; 5 C. L. J., 315 ; (1907) 6 C. L. J., 612 : 12 C. W. N., 107.]

[22 All. 399]

The 15th June, 1900.

PRESENT :

MR. JUSTICE KNOX, ACTING C. J., AND MR. JUSTICE BLAIR.

Dalel Singh and others.....Judgment-debtors

versus

Umrao Singh and others.....Decree-holders.*

Civil Procedure Code, section 294—Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act No. XV of 1877 (Indian Limitation Act), Sch. ii, Art. 179 (4)—Execution of decree.

Held, that an application for leave to bid at a sale in execution under section 294 of the Code of Civil Procedure is an application to take some step in aid of the execution of the decree within the meaning of art. 179 (4) of the second schedule of the Indian Limitation Act, 1877. *Bansi v. Sikree Mal*, (1890) I. L. R., 13 All., 211, followed. *Raghu Gundun Misser v. Kally Dut Misser*, (1896) I. L. R., 23 Cal., 690, dissented from.

THE facts of this case sufficiently appear from the judgment of the Court.

Babu Harendra Krishna for the Appellant.

Mr. W. M. Colvin for the Respondent.

* First Appeal No. 18 of 1900, from a decree of Mr. A. Rahman, Subordinate Judge of Meerut, dated the 6th January 1900.

Knox, Acting C.J., and Blair, J.—The sole point with which we have to deal in this appeal is, whether the application for execution which was passed on the 19th November 1889, is or is not barred by limitation. The Court below taking in aid an application by the judgment-creditor, dated the 8th January 1896, has decided that it was not so barred. The contention [400] before us on behalf of the appellant is that the application just named is not an application which saves the running of time against the decree-holder. The application was one made by the decree-holder asking for permission under section 294 of the Code of Civil Procedure to bid for or purchase the property put up for sale. This Court has already held in the case of *Bansi v. Sikree Mal*, (1890) I. L. R., 13 All., 211, that the making of such an application is a step in aid of execution within the meaning of clause 4, No. 179, sch. ii of Limitation Act No. XV of 1877. The Lower Appellate Court acted therefore perfectly rightly, and was bound to follow that precedent. The learned vakil for the appellant asks us to lay down the opposite of this ruling on the ground, firstly, that this decision is the decision of a single Judge which he alleges has not been followed; secondly, on the ground that the Calcutta High Court in the case of *Raghunundun Misser v. Kally Dut Misser*, (1896) I. L. R., 23 Cal., 690, have ruled otherwise. There is no authority for the allegation that the ruling of this Court in I. L. R., 13 All., 211, has not been followed; the presumption is the other way. It is undoubtedly a matter to be regretted that different views should be taken on this point by different High Courts, but the question we have to decide is whether an application put in under section 294 of the Code of Civil Procedure is or is not an application in accordance with law to the proper Court to take some step in aid of execution of the decree. With the utmost respect for the learned Judges who have held otherwise, we fail to see how such an application can be held to lie outside the words we have just quoted. The fact that a decree-holder is prepared to bid for property and is anxious to purchase is, in the absence of a fraud which cannot be presumed, distinctly an act which modifies the conditions of the sale to the obvious benefit both of the decree-holder and the judgment-debtor, and brings the decree within nearer distance of complete execution and satisfaction. In many cases it does make the difference between complete satisfaction and partial satisfaction. There are indeed three steps. There is the step of the application which the decree-holder makes; there is the step taken by the Court of granting permission, and there is the [401] further step which the decree-holder again takes of availing himself of such permission by bidding at the sale.

The application before us was an application in accordance with law to the proper Court to take the step of granting permission, which step, in ordinary circumstances, would be a distinct step taken forward in aid of execution of the decree. For these reasons we give our approval, and adhere to the view which has hitherto been the view of this Court. We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[Application for leave to bid was treated as a step-in-aid of execution in (1900) 22 All., 399; (1897) 21 Bom., 331; (1905) 8 O. C., 161, but not in (1905) 30 Cal., 761; (1912) P. R., 60. See also (1908) 12 C. W. N., 621; (1914) 16 M. L. T., 103.]

[22 All. 401]

* The 28th June, 1900.

PRESENT :

MR. JUSTICE KNOX, ACTING C. J., AND MR. JUSTICE BLAIR.

Pahalwan Singh and others.....Judgment-debtors

versus

Narain Das...Decree-holder.*

Execution of decree—Civil Procedure Code, section 230—Decree for payment of money—Hypothecation decree—Construction of document.

A decree was passed on the 5th March 1884, based on a compromise between the parties. The decree was for the payment of certain sums of money by instalments, and further went on to declare that "The property in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants, the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction." *Held*, that this was not a simple decree for the payment of money such as would come within the purview of section 230 of the Code of Civil Procedure. *Janki Prasad v. Baldeo Narain*, (1876) I. L. R., 3 All., 216, distinguished. *Chundra Nath Dey v. Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813, and *Lal Behary Singh v. Habibur Rahman*, (1898) I. L. R., 26 Cal., 166, referred to.

THE respondents in this appeal held a decree against the appellants, dated the 5th March 1884. The decree had been passed on a compromise, and was, in the first instance, a decree for the payment of certain sums of money by instalments; but it further contained a provision, quoted *verbatim* in the judgment of the Court, as to the maintenance of a lien on certain property and a power to the decree-holder to sell the hypothecated property by auction. On the 5th December 1896, an application for execution was made, which proved infructuous, and was struck off on [402] the 1st April 1897. The present application for execution was made on the 30th November 1899, and was resisted on the ground that execution of the decree was barred by limitation, regard being had to section 230 of the Code of Civil Procedure. The lower Court disallowed the objection and ordered execution to proceed. The judgment-debtors appealed to the High Court.

M^r. Lashi Gobind Prasad for the Appellants.

Babu Sital Prasad for the Respondent.

Knox, Acting C.J., and Blair, J.—The sole question which we have to consider is whether the decree, which was under execution in the Court below, is a simple money decree, or whether provision is made in it for something more. The appellant relies upon a Full Bench ruling of this Court, *Janki Prasad v. Baldeo Narain*, (1876) I. L. R., 3 All., 216, and contends that it is a simple money decree and no more. The circumstances under which the decree was obtained in *Janki Prasad v. Baldeo Narain*, (1876) I. L. R., 3 All., 216, and others and the case before us are very similar. In both cases the plaintiff had sued for a decree for sale. In both cases the dispute between them terminated in a compromise. In this case it was agreed that the plaintiff should realize his debt from his debtors by payment of a special sum within a special period and of the remainder by instalments. It further provided that if, after the

* First Appeal No. 82 of 1900, from a decree of Pandit Rai Inder Narain, Subordinate Judge of Farrukhabad, dated the 20th January 1900.

payment of the first sum within the specified period, two successive instalments should remain in default, the plaintiff would be entitled to take out execution of the decree in a lump sum. After this follow the words which have given rise to this dispute and which we therefore quote here *verbatim* :—"The property hypothecated in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction." If this decree be compared with the decree which was before this Court in *Janki Prasad v. Baldeo Narain*, (1876) I. L. R., 3 All., 216, it will be found that the terms hardly differ, and do not differ in any material point, beyond this, perhaps, that the decree before us is [403] a little more positive in granting the right to enforce execution by sale. There is however, this very important difference between the present case and the case of *Janki Prasad v. Baldeo Narain*, (1876) I. L. R., 3 All., 216, that while in the latter the terms of compromise were not embodied in the decree, and all that the decree did was to refer back to it and provide for payment by instalments only, in the present case the terms of compromise have been incorporated into the decree and made part and parcel of it. In *Janki Prasad v. Baldeo Narain*, (1876) I. L. R., 3 All., 216, the learned Judges held themselves constrained by the terms of the decree and refused to look at what they considered might well have been the intention of the parties. In the present case we are under no such constraint. The terms of the decree before us undoubtedly go beyond the terms of an ordinary simple money decree and provide for sale under certain contingencies. It is true that the decree differs from a decree formally drawn up under section 88 of the Transfer of Property Act. But we are satisfied that it was the intention of the parties and of the Court that if default was made in payment of instalments, or if any other contingency mentioned in the decree arise, the decree-holder should be entitled to proceed to sell upon the decree as it stands. Reference was made to the case of *Chundra Nath Dey v. Burroda Shoondury Ghose*, (1895) I. L. R., 22 Cal., 813. That case has been distinguished in *Lal Bekary Singh v. Habibur Rahman*, (1898) I. L. R., 26 Cal., 166. We do not agree with the Court below in the view it took of the Allahabad case cited before it. We are, however, of opinion that in spite of this the Court below came to a right conclusion.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[See now C. P. C., 1908, O. 21, r. 20.]

[404] *The 29th June, 1900.*

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Badri Das.....Decree-holder

versus

Inayat Khan and another.....Opposite Parties.*

Act No. IV of 1882 (Transfer of Property Act), Section 90—Execution of decree—Decree for sale on a mortgage—Mortgaged property sold in execution of a decree held by a different mortgagee—section 90 not applicable.

In order to make the remedy provided by section 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under section 90. Section 90 does not apply where the mortgaged property has been sold under a decree held by some other person. *Muhammad Akbar v. Munshi Ram*, Weekly Notes, 1899, p. 208, followed.

THE facts of this case sufficiently appear from the judgment of the Court.

Pandit *Moti Lal Nehru* (for whom Pandit *Mohan Lal Nehru*), for the Appellant.

Pandit *Sundar Lal*, for the Respondents.

Banerji and Aikman, JJ.—This appeal arises out of an application for a decree under section 90 of the Transfer of Property Act, which has been refused by the Court below. The appellant obtained a decree under section 88 of the Transfer of Property Act for the sale of certain houses and zamindari property. He has caused the houses to be sold by auction, but not the zamindari property. He alleges that the zamindari property has been sold in execution of a decree obtained by another mortgagee upon a prior mortgage, and on this ground he asks for a decree under section 90. This case, in our opinion, is fully governed by the ruling of this Court in *Muhammad Akbar v. Munshi Ram*, Weekly Notes, 1899, p. 208. As was pointed out in that case, a condition precedent to an application under section 90 is that the mortgaged property has been sold, that the proceeds of the sale are insufficient to discharge the mortgage and that there is a balance due to the mortgagee. Here the mortgaged property, by which we must understand the whole of the mortgaged property, has not been sold at the instance of the decree-holder, and therefore he is not entitled to obtain a decree under section 90. It is not enough [405] that a prior mortgagee has caused the zamindari property to be sold by auction. That such a sale has taken place is apparently due to the fault of the appellant himself. If he was a party to the suit in which the prior mortgagee obtained his decree, he ought to have redeemed the prior mortgage so as to make the mortgaged property available for the realization of the amount of his own mortgage. If, on the other hand, he was not made a party to the prior mortgagee's suit, it is still open to him to redeem that mortgage, and having done so, he would be entitled to bring the zamindari property to sale for the realization of his own money. In any case, as the appellant has not caused the whole of the property mortgaged to him to be sold, he cannot apply

* Second Appeal No. 353 of 1898, from a decree of Kunwar Jwala Prasad, Additional Judge of Aligarh, dated the 4th February 1898, confirming a decree of Munshi Ganga Prasad, Munsif of Bulandshahr, dated the 26th June 1897.

for a decree under section 90 of the Transfer of Property Act. This appeal must fail and is dismissed with costs.

Appeal dismissed.

NOTES.

[See, likewise, (1909) 31 All., 373 ; (1906) 33 Cal., 891 ; (1913) 18 C.L.J., 133 ; (1918) 17 C.W.N., 1039 ; (1909) 9 I. C., 403 (Oudh) ; (1913) 21 I. C., 283 (Oudh) ; (1906) 28 All., 660 (portion of the property sold in England) ; in (1903) 26 All., 25, this was distinguished.]*

[22 All. 406]

The 14th June, 1900.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Hafiz Abdul Rahim Khan.....Applicant

versus

Raja Hari Raj Singh.....Opposite Party.*

Scheduled Districts Act (No. XIV of 1874), section 6—Rule 17 of the Kumaun Rules, 1894—Code of Civil Procedure, sections 562, 564—Right of appeal against order under section 562—Order of remand where decision of first Court was not confined to preliminary point.

Where the Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, but at the same time also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under section 562 of the Code of Civil Procedure.

Held, that under Government Notification No. ⁶²⁸ VII-569 B, dated 27th June 1894, Rule 17, an appeal lies from such an order of remand. *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi*, (1894) I. L. R., 17 All., 112, referred to.

Held further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under sections 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under section 562.

THE facts appear sufficiently from the judgment of the Court.

[406] Pandit *Sundar Lal*, for the Applicant.

The Government Advocate (Mr. *E. Chamier*) as *amicus curiæ*.

Knox, Acting C.J., and Blair, J.—The Government on the application of Hafiz Abdul Rahim Khan, a party to the suit—*Raja Hari Raj Singh v. Hafiz Abdul Rahim Khan*—has referred to this Court for report and opinion an order passed by the Commissioner of Kumaun on the 25th October 1897, on the ground that it seems open to objection. The objection is thus stated :—" The judgment of the Commissioner, dated the 25th October 1897, after deciding various points in the plaintiff's favour, remanded the case under section 562 of the Code of Civil Procedure." "The Government is advised that this is a most material irregularity." Upon the reference coming up for hearing it was brought to our notice that Raja Hari Raj Singh, the opposite party, had long been dead and that no one had been substituted on the record of the case. Under these circumstances we directed the Registrar to ascertain from the Government whether they still require any report and opinion. As the Government still requires a report and opinion, we have no alternative but to furnish

*Miscellaneous Reference, No. 302 of 1899.

it : no doubt the legal advisers of the Government will certify to the Government how far our opinion and report under these circumstances can form the basis of any effective order.. With that we are not concerned and we express no opinion. We have heard the counsel for Hafiz Abdul Rahim Khan ; we have heard the learned Government Advocate who has kindly appeared as *amicus curiæ* in the case. The suit between the parties is described in the Court of First Instance as a suit for cancellation of so much of a sale-deed as injuriously affected the plaintiff and for possession over one acre of land. In the Deputy Commissioner's judgment the pleadings are set out, and five issues are framed. One of those issues, namely, the third, raises the issue of law as to whether the suit was or was not time-barred. The decision of the Deputy Commissioner was to the effect that the suit was time-barred. The remaining issues in this case were, however, considered, and a definite decision pronounced upon each one of them. In appeal the learned Commissioner dealt with the case in what was certainly a rather extraordinary way. He called for further information, and [407] himself inspected the area in dispute. After this he remanded the case under section 562 of the Code of Civil Procedure, evidently setting aside the judgment of the lower Court upon the preliminary point as to whether the suit was or was not time-barred. It is from this order under section 562 of the Code of Civil Procedure that the present reference is made. Two questions arise for decision. The first as to whether it was the intention of the Government in the rules made by them in exercise of the provisions of section 6, Scheduled Districts Act, that an appeal should lie from an order of

this description. Government Notification No. 628—, dated 27th June 1894, Rule 17, in its language is wide enough to include such an order as this. Any final decree which may seem open to objection may be referred, and we have the authority of the Privy Council in the case of *Saiyid Muzhar Hossein v. Mussamat Bodha Bibi and another*, (1894) I. L. R., 17 All., 112, for holding that a remand order comprising the decision of a Court upon a cardinal issue of the suit, that issue being one which goes to the foundation of the case and which can never, while the decision stands, be disputed again, is a final decree. The next question is whether the decision of the Deputy Commissioner was one only upon a preliminary point, or whether it decided the other matters in issue. After reading the decision we have no doubt left. The suit between the parties was not confined by the Deputy Commissioner to the preliminary point of law, judgment was given on all the issues, and under these circumstances, looking to the language of section 562 and the imperative language of section 564, it was not open to the Commissioner to make the order he did under section 562 of the Code of Civil Procedure. Our opinion is that that order was a bad one, and under ordinary circumstances should have been set aside. If we had been dealing with the case as an appeal before us, it would have been so set aside, and the case would have been returned for disposal by the Court corresponding to that of the Commissioner for disposal according to law.

Appeal decreed.

[408] *The 27th June, 1900.*

PRESENT:

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Hari Ram.....Defendant

versus

Bishnath Singh.....Plaintiff.*

Hindu law—Liability of member of joint family though not made a party to the suit—"Personal" decree, meaning of.

Where a decree provided for the sale of specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally: *Held* that a junior member of the joint family, who was liable for his share of the debt sued on, but who was not made a party to the suit, could not successfully plead that the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. *Beni Modho v. Basdeo Patak*, (1890) I. L. R., 12 All., 99, and *Bhawani Prasad v. Kallu*, (1895) I. L. R., 17 All., 581, referred to.

THE facts appear sufficiently from the judgment of the Court.

Babu Jogindro Nath Chaudhri (for whom Babu Satya Chandra Mukerji), for the Appellant.

Munshi Jwala Prasad (for whom Munshi Kalindi Prasad), for the Respondent.

Burkitt and Henderson, JJ.—In this case the plaintiff-respondent before us, sought to have it declared that he was entitled to a one-fourth share of the ancestral property of the family, and further to have it declared that his one-fourth share in certain property which had been attached and advertised for sale was not liable to be sold.

It appears that in 1885 a decree was obtained by the defendant-respondent upon a bond by which two houses of the joint family had been hypothecated. This bond was executed by the plaintiff's father and uncle and other younger members of the family, not including the plaintiff, who was very young at the time, to secure a debt which had been incurred many years before by the plaintiff's deceased grandfather, and a small sum advanced at the time of the execution of the bond. In a suit upon the bond to which the plaintiff was not made a party, a decree was given for Rs. 1,363, for principal and interest and costs, and it directed that this amount should be realized in the first instance by the sale of the two houses hypothecated, and that, in the event of the proceeds of sale not being sufficient to satisfy the [409] amount of the decree, the balance should be realized from the defendants personally.

The two houses were sold, and, after the application of the sale proceeds towards payment of the decree, there remained a considerable balance. To recover that balance certain property of the joint family has been attached. The plaintiff objected to the attachment, but his objection having been disallowed, he filed the present suit, claiming that his one-fourth share in the property attached was not liable to be sold. The Lower Appellate Court has found that the original debt was contracted for the benefit of the family, and not for immoral purposes, and that according to Hindu law the plaintiff was under a

* Second Appeal No. 230 of 1898, from a decree of R. Greeven, Esq., District Judge of Benares, dated the 17th December 1897, reversing a decree of Babu Nilmadhab Roy, Subordinate Judge of Benares, dated the 4th August 1897.

pious obligation to pay the same. Having so found, the learned District Judge after referring to the case of *Beni Madho v. Basdeo Patak*, (1890) I. L. R., 12 All., 99, in his judgment, goes on to say : — "If, therefore, I had to decide this matter upon principles of Hindu common law, I should dismiss this appeal without hesitation. In perusing the terms of the decree under section 90 (of the Transfer of Property Act), however, I notice that the relief granted in the event of non-realization by sale of the hypothecated property is specifically worded as *personal* against the then existing defendants. It is perfectly true that by reference to the plaint and the language of section 90 there does not appear to be sufficient reason for the limitation of the decree to a purely personal relief against the defendants ;" and again he says : — "This case is limited to the enforcement of a specific decree against the defendants, and I am compelled to hold that under its explicit wording it cannot be enforced against them." In our opinion the District Judge in his interpretation of the effect of a *personal* decree is wrong. The decree, so far as it provides for the recovery of the balance after the sale of the property hypothecated, is a personal decree as distinguished from a decree which directs that the amount decreed is to be realized by the sale of specific property. Under such a decree any property of the judgment-debtors may be attached and sold.

The Lower Appellate Court rightly held, as a matter of law, that to be liable for the original debt it was not necessary that the plaintiff should have been a party to the suit in which the [410] decree was made ; but taking an erroneous view of the effect of the personal decree, it held that the plaintiff's one-fourth share was not liable to be attached and sold. Having regard to the finding, however, that the original debt was not contracted for immoral purposes, and to the fact that the decree for the balance due after the sale of the hypothecated property, though a personal decree, might have been enforced against other property of the joint family belonging to the judgment-debtors, we think that the plaintiff's one-fourth share in the property attached is liable, with the shares of the other members of the joint family, to be sold in execution of the decree.

Another question was raised in the Lower Appellate Court based upon the decision in the case of *Bhawani Prasad v. Kallu*, (1895) I.L.R., 17 All., 537. That case has no application to the circumstances of the present case. It was not alleged that plaintiff in the original suit upon his bond had any notice of the existence or interest of the plaintiff who, at the time when the suit was instituted, could not have been more than one or two years old.

We set aside the decree of the Lower Appellate Court and restore that of the Court of First Instance. The appellant before us will have his costs in all Courts.

Appeal decreed.

NOTES.

[See now to the same effect the Privy Council decision in (1914) 36 All., 383.]

[22 All. 410]

The 29th June, 1900.

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

The Muir Mills Company, Limited, of Cawnpore.....Opposite Party
versus

T. H. Condon and A. Butterworth.....Applicants.*

Act VI of 1882 (Indian Companies Act), sections 29, 58, 92—Application to compel registration of transfers of shares—Discretionary power of Directors to refuse registration—Articles of Association—Interference of the Courts.

Where the Directors of a Company (the Muir Mills) refused to register the transfer of shares and relied on Article 21 of the Articles of Association which empowered the Directors to "decline to register any transfer of shares to any person of whom they may for any reason disapprove."—

(1) *Held*, that it is not necessary under section 58 for the applicants to join their vendors in their applications. *Ex parte Penney*, (1872) L. R., 8 Ch., 446, distinguished; *Skinner v. City of London Marine Insurance Company*, (1885) 14 Q. B. D., 882; *London Founders' Association v. Clarke*, (1888) 20 Q. B. D., 576; *Paine v. Hutchinson*, (1868) L. R., 3 Ch., 388; *Ex parte Gilbert*, (1892) I. L. R., 16 Bom., 398, referred to. *Ex parte Shaw*, (1877) 2 Q. B. D., 463, followed.

(2) Where it was found that there was a defect in the constitution of the Board of Directors, which was not cured by the Articles of Association: *Held*, that the Court was not bound to dismiss the application under section 58 on the ground of its being premature, there having been no refusal to register by a properly constituted Board, but might treat the defence set up as a refusal, and deal with the application on the merits.

(3) Where it was found that the real objections entertained by the Directors to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert (the Managing Director of the Cawnpore Woollen Mills) and the personal animosity existing between Johnson (the Managing Director of the Muir Mills) and McRobert, and (2) the desire of the Directors (of the Muir Mills) that McRobert should not add to his voting power at the meetings of the Company, and (3) that therefore the objections were not personal to the applicants themselves. *Held*, that where the Articles of Association give a discretionary power to the Directors to refuse to register a transfer, and it appears that the Directors have *bona fide* considered the matter, the Courts will not compel them to disclose their reasons, but if they do disclose their reasons, or evidence is produced as to their reasons, the Courts will consider whether those reasons proceeded on a right or wrong principle. *Held* further, applying the principles of English cases, that objections not personal to the transferees do not constitute legitimate reasons. *Poole v. Middleton*, (1861) 29 Beav., 646, p. 650; *In re Bell Bros*, 7 Law Times Reports, 689; *Ex parte Penney*, (1872) L. R., 8 Ch., 446; *Moffat v. Farquhar*, (1877) L. R., 7 Ch. D., 591, *Kaikhasro v. Coorla Spinning and Weaving Co.*, (1891) I. L. R., 16 Bom., 80; *In re Coalport China Co.*, (1895) L. R., 2 Ch., 404, referred to.

THIS and five other similar appeals arose out of six applications under section 58 of the Indian Companies Act to compel the registration of the applicants as members of a Company.

The facts appear fully from the judgment of HENDERSON, J.

Messrs. T. Conlan and Arindell, for the Appellant.

* First Appeal from Order No. 88 of 1899, from an order of J. Sanders, Esq., District Judge of Cawnpore, dated the 18th July 1899.

Pandit *Moti Lal Nehru* and Babu *Durga Charan Banerji*, for the Respondents.

Burkitt, J.—In this case I have had an opportunity of perusing the judgment which is about to be delivered by my brother HENDERSON. I fully concur in it, and have but little to add.

As to the preliminary points, in discussing which so much time was, I think unnecessarily, spent at the hearing of these [412] appeals, I fail to see why they should have been raised at all by the applicants in the Court below (respondents here), where most of them were incidentally raised during the hearing of the applications. Though the proceedings before the lower Court were in form applications under section 58 of the Indian Companies Act, they were tried most elaborately as regular suits. Regular pleadings were filed on both sides and issues joined on them. By their pleadings the Muir Mills Company admitted that the respondents had formally applied to have the shares registered in their names, and that the Company had refused to allow registration. The applicants in fact said that the Company had improperly refused to register the transfers. The Company, in reply, admitted the refusals, and justified their action by relying on Article 21 of their Articles of Association. It is difficult to understand why on such pleadings the applicants should during the hearing below have endeavoured to prove that in some of the cases there had not been any refusal to register owing to a legal defect in the constitution of the Board by which the refusals in those cases purported to have been made. In those cases if the contention of the applicants had been sustained they would have succeeded in showing that they had come into Court without any substantial cause of action. But anyhow as to all these preliminary matters I think my learned brother has come to a right conclusion.

On the merits it is abundantly clear that, though the appellant Company was not by law bound to disclose the reasons which actuated the Directors in declining to register the transfers which form the subject of these appeals, those reasons have been very fully disclosed. The question we have to consider is, whether those reasons are legitimate or are arbitrary and unjustifiable. Those reasons succinctly put are that the Directors of the Muir Mills Company knew the transferees, the applicants, to be employes of Mr. McRobert of the Woollen Mills; that Mr. McRobert had not long previously been a Director of the Muir Mills; that he quarrelled with Mr. Johnson, the Managing Director of the Muir Mills, saying he "distrusted the management"; that he had prosecuted one of the other Directors for a technical offence under the Companies Act, and refused to seek [413] re-election as a Director; and that the Directors of the Muir Mills Company therefore feared that these transferees being his employes would support him by their votes as shareholders at shareholders' meetings of the Muir Mills Company, that they would be "litigious and cantankerous," and would "harass the management," the meaning of which phrase no doubt is that they would support Mr. McRobert's views as to the advisability of making a change in the management. There was evidence given to show that the Managing Director, Johnson, threatened to resign if McRobert had anything to do with the management, and that the Directors believed that the loss of Johnson's services would be injurious to the interests of the Company. Shortly put, the Directors were apprehensive that any increase in McRobert's voting power would assist him in enforcing his views as to the management, and as the transferees were McRobert's subordinates in another Mill the Muir Mill Directors refused to register the transfers to them. It should be mentioned here (1) that McRobert was, at the time when these transfers were made, the largest shareholder in the Muir Mills Company; (2) that he

did not, for the purpose of increasing his own voting power, transfer any of his own shares to his subordinates as his nominees, but on the contrary assisted them in purchasing the shares in open market; (3) that the Cawnpore Woollen Mills Company is in no way a rival in business to the Muir Mills Company which is a Cotton Mill; and (4) that admittedly there is no personal objection to any of the transferees; they are acknowledged to be perfectly proper persons to become members of the appellant Company, and to be unobjectionable in all respects except in that they are subordinates of McRobert at the Woollen Mills.

The principles of law applicable to a case of this kind will be found most exhaustively laid down by Mr. Justice CHITTY in the case of *In re Bell Brothers, Ltd., ex parte Hodgson*, 7 Law Times Reports, 689, where that learned Judge cites as his authority a large number of reported cases, most of which were referred to in the argument before us. In that case Arts. 18 and 34 of the Articles of Association of Bell Brothers, Ltd., somewhat resembled Art. 21 of the Articles of Association in the present case, but conferred on the Directors the [414] power of disapproving and rejecting intending shareholders in stronger language than that used in Art. 21 of the appellant company here. *

The learned Judge held that the right of transfer conferred on every shareholder was subject to the discretionary power conferred on the Directors by Arts. 18 and 34. So in the present case a right to transfer is assumed by Art. 19 to belong to every holder of shares in the Company, subject to the discretionary power given to the Directors by Art. 21 of declining to register any transfer of shares to any person of whom they may for any reason disapprove.

As to the manner in which that discretionary power is to be exercised, the learned Judge says that it is of "a fiduciary nature and must be exercised in good faith, *i. e.*, legitimately, for the purpose for which it is conferred. It must not be exercised corruptly or fraudulently or arbitrarily or capriciously or wantonly. It may not be exercised for a collateral purpose. In exercising it the Directors must act in good faith in the interests of the Company, and they must fairly consider the question of the transferee's fitness at a Board Meeting." Then as to the power of the Court to interfere with the Directors' decision, the judgment lays down that the Court will not review the Directors' decision when they have in good faith "rejected a transfer on the ground that the transferee is not a fit person to become a member of the Company"; that the Court will not draw unfavourable inferences against the Directors merely because the latter have declined to assign their reason for disallowing the transfers, but that if the Directors do disclose their reasons, "the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not, or in other words, to ascertain whether the Directors have proceeded on a right or a wrong principle." The judgment then states that the Court will not overrule the Directors' decision merely because the Court itself would not have come to the same conclusion, and then follows this most important passage:—"But if they" (*i. e.* the reasons assigned by the Directors) "are not legitimate, as for instance, if the Directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his shares by splitting them up among [415] his nominees, the Court would hold that the power had not been duly exercised. So also if the reason assigned is that the transferee's name is Smith and is not Bell."

Now in applying the above principles to these appeals, I find in the voluminous evidence adduced on both sides that the reason, and the only reason, which actuated the Directors in disallowing the respondents' transfers is because the latter were subordinates of McRobert, and the Directors believed that these transferees would at shareholders' meetings vote with McRobert in

opposing the directorate, and especially the Managing Director Johnson ; that they would "harass the management." Can such a reason be considered to be a legitimate reason for refusing to allow the respondents to become members of the Muir Mills Company. The Directors say their action was taken in good faith in the interests of the Company. They say that if McRobert was able to interfere in the management of the Mills the Managing Director Johnson would resign, and that, they say, would injure the Company. The Directors consider Johnson to be a good man of business, an opinion which Johnson also shares, but it is quite open to McRobert honestly to hold a different opinion, and from his saying that he "distrusted the management," he apparently does not concur with the Directors. Even if McRobert's object in procuring shares for his subordinates was with their assistance to enforce his views on and so interfere with the management, and even if he transferred some of his own shares to his nominees for that purpose, it is not intelligible how such action on his part should be considered to be injurious to the interests of the Muir Mills Company, though no doubt it would be unpleasant to the existing Board of Directors. I can see no pretence for supposing that the acquisition by McRobert of an increased voting power could be injurious to the Company, in which he is the largest shareholder, but in which under Art. 55 of the Articles of Association his voting power is not commensurate with his holding.

It seems to me that all through these cases the interests of the Muir Mills Company have been too much mixed up with the personal interests of the Directors. The Directors may well think that unless they continue on the Board the Company will [416] suffer. Other shareholders may legitimately entertain a different opinion, and may, like McRobert, "distrust the management," and desire to make a change in the Board of Directors. Can then that Board legitimately refuse to pass transfers made to persons who, the Board believe, will act in conjunction with a prominent shareholder who "distrusts the management." On the authority of the passages from the judgment cited above, I am of opinion that such a reason is not legitimate. It practically amounts to this, that the Board will not admit any new shareholder who, they believe, will not support or will oppose their management. It is impossible, in my opinion, to regard such an exercise of the Directors' fiduciary discretionary power as being other than one of the most arbitrary and unjustifiable nature, exercised for a collateral purpose, namely, to safeguard the Directors' personal interests against McRobert, and not in the interest of the Company as such. The transfers were refused, not in good faith in the interests of the Company, but to prevent McRobert having at his disposal an increased voting power which the Directors apprehended he might use to "harass" their management. For that reason the Directors' objections, though to that extent personal to the transferees, are not legitimate objections. The constitution of the Company is not such as would justify the Directors in excluding from membership all persons who, they feared, would oppose their management.

For the above reasons I am of opinion that the District Judge was right in allowing the applications and in directing the registration of the shares purchased by the applicants respondents.

Therefore, in concurrence with my learned brother, I direct that these appeals be dismissed.

Henderson, J.—These appeals have arisen out of six applications which were made under section 58 of the Indian Companies Act, to compel the registration of the applicants as members of the Muir Mills Company, Ltd. There were five applicants claiming to be registered, but one of these, Butterworth, sought to have his name registered in respect of two sets of

shares purchased by him at different times, and he made a separate application in respect of each set. In his first application his [417] vendor, Dr. Condon, joined. The other applicants were James Scott, the dyeing master; W. Vickers, the accountant; P. Scott, the weaving master; and H. Thomson, the engineer of the Cawnpore Woollen Mills, and none of them joined in their applications the persons from whom they had purchased the shares in respect of which they sought to be registered. Butterworth was the Mill Manager of the Cawnpore Woollen Mills. One Mr. McRobert was then, and now is, the Managing Director of those Mills.

The following particulars with regard to the purchases of the various shares and the refusal to register may here be conveniently noted:—

(1) Butterworth purchased three shares from Dr. Condon, the transfer deed was dated the 3rd April 1897, and application for registration was made on the 20th April 1897. On the 23rd April 1897, the application was refused by the Directors, the Directors being Newcomen, Smith, and Arindell.

(2) James Scott purchased three shares from Mrs. Wilson; payment being made on the 17th June and the deed of transfer, dated 23rd June 1897. Application was made for registration of the transfer on the 16th July 1897, and refused by the same Directors on the 11th August 1897.

(3) W. Vickers purchased five shares from one Gillespie, payment being made on the 31st August 1897, and the transfer deed dated 14th September 1897. Application was made for registration on the 14th September 1897, and refused by the same Directors, on the 15th September 1897.

(4) P. Scott purchased three shares from Gillespie, payment being made on the 31st August 1897, and the transfer deed dated the 1st November 1897. Application was made for registration on the 2nd November 1897, and refused by the Directors, Beer and Newcomen, on the 5th November 1897.

(5) H. Thompson purchased five shares from Gillespie, payment being made on the 31st August 1897, and the deed of transfer dated 1st November 1897. Application for registration was made on the 15th November 1897, and refused by the Directors, Beer, Newcomen, and Johnson, on the 18th November 1897.

[418] (6) Butterworth purchased five shares from Gillespie, payment being made on the 31st August 1897, and the transfer deed dated 1st November 1897. Application for registration was made on the 15th November 1897, and refused on the 18th November 1897, by Beer, Newcomen, and Johnson.

It should be mentioned that on the 5th January 1898, Butterworth made a second application for registration of the two sets of shares purchased by him, and this application was refused by the Directors Beer, Newcomen, and Johnson on the 28th January 1898.

In refusing to register the various transfers the Directors acted under Art. 21 of the Articles of Association of the Company. That article is as follows:—“The Directors may decline to register any transfer of shares to any person of whom they may for any reason disapprove, or of any share upon which the Company has a lien”; and in refusing to register the transfers, except in the case of Butterworth, they gave no reasons for their refusal except that they did so under Art. 21 of the Articles of Association. In Butterworth's case certain correspondence took place on the subject. In that correspondence the reason first given was that the Directors acted under Art. 21 of the Articles of Association. In a letter of the 27th May 1897, to Butterworth, it was alleged that the reason for the Directors' refusal to register was that they did not consider it would be in the interests of the Company to register Butterworth as a member; and in a letter of the 28th May 1897; to Dr. Condon, in reply to

a letter from him, they stated that they were "taking every precaution to avoid having any shareholders who are, in their opinion, likely to prove ill-disposed" towards the management of the Company, or of a litigious or cantankerous disposition."

In the applications under section 58 of the Indian Companies Act, it was alleged, as the ground upon which such applications were based, that the Directors had acted arbitrarily and without sufficient cause, and in a wrongful exercise of their powers in refusing to register the different applications for registration. The Company in answer to the several applications filed written statements, in which it contended that it was not necessary for the Directors in refusing under Art. 21 of the Articles of Association [419] to register transfers of shares, to give any reasons, and alleged that the refusals to register had been made *bond fide* in the interest of the Company, after due consideration and for reasons which were legitimate and sufficient. Upon this the following issue was framed, *viz.*—Whether the Company had arbitrarily and without sufficient cause refused to register the transfers.

By consent all the applications were heard together.

Before proceeding to deal with the main contentions raised in these appeals it will be well to dispose of certain questions which were raised during the argument. The first question was as to the competency of the applicants who had not joined their vendors in their applications to apply under section 58 of the Indian Companies Act. It was contended that they had no *locus standi* as they were not, and could not be, members of the Company until the transfers to them had been registered. *Ex parte Penney*, (1872) L. R., 8 Ch., 446, was relied upon as showing that the transferor, should make the application, or at all events join in it. In that case the application was made by both transferor and intended transferee, but a reference to the Articles of Association of the Company concerned makes it clear that there could be no *transfer* without the approval of the Directors. The articles provided that "no person not already a shareholder shall be entitled to become the transferee of any share unless approved of by the Board." In the cases before us Art. 21 deals merely with the right of the Directors to decline to register any transfer of shares already made, if they disapprove for any reason of the transferee. The transfers were otherwise complete as between the transferors and the transferees, the purchase money had been paid, and the transfer deeds in each case executed by both transferor and transferee. On a sale of shares the seller contracts to execute a valid transfer and to hand the same to the transferee. *Skinner v. City of London Marine Insurance Co.*, (1885) 14 Q. B. D., 882. He does not contract that the Company will register the transfer. *London Founders Association v. Clarke*, (1888) 20 Q. B. D., 576. It is the duty of the transferee to get himself registered. *Paine v. Hutchinson*, (1868) L. R., 3 Ch., 388. Section 29 of the Indian Companies Act, which corresponds *verbatim* with section [420] 26 of the English Companies Act, 1867, assumes the right of the transferee to apply for registration and enables the transferor, where the transferee fails to do so, to apply to get the transfer registered. In *ex parte Shaw*, (1877) 2 Q. B. D., 463, an application by the transferee alone under section 35 of the English Companies Act, 1862, was allowed on the ground that the transfer was complete. The reasoning in that case was accepted by FARRAN, J., in *ex parte Gilbert*, (1892) I. L. R., 16 Bom., 398. In my opinion *ex parte Shaw* is an authority for our holding that it is not necessary in the present cases for the transferors to join in the applications.

No question was raised as to whether the summary procedure apparently intended by section 58 of the Indian Companies Act was the proper procedure

here. It is sufficient to say that these applications have not been tried summarily. They have practically in all respects been treated as if the parties had proceeded by suit.

The second question, which it will be convenient to deal with before discussing the main grounds of appeal, turns upon the constitution of the Board of Directors which refused the applications for registration made by James Scott, Vickers and P. Scott.

[His Lordship having pointed out in regard to the applications of James Scott and Vickers that the proper forms had not been complied with in the appointment of Arindell and Smith to act for Cooper and Beer, and that, if the appointments of the two former were to be held valid, there would have been six Directors instead of a maximum of four allowed by the Articles of Association, held that the defect was cured by Article 86 of the Articles of Association which ran as follows :—

“ All acts done by any meeting of Directors * * * or by any person acting as a Director, shall be valid and effectual notwithstanding that it be afterwards discovered that there was some defect in their appointment or qualifications respectively.”

His Lordship then continued :—]

In the case of P. Scott the position is somewhat different. There the Board which rejected the application for registration consisted of Beer and Newcomen ; who were both qualified [421] Directors, but they formed less than a quorum as required by Art. 67 of the Articles of Association. Under that article “ the number of Directors to form a quorum for the transaction of business shall be three, including the Managing Director, or such substitute as may be acting for him.” It seems to me that the action of a Board so constituted is not validated by Art. 86, and that P. Scott is entitled now to say that their action was not binding upon him. What then is the result ? His application is in all respects the same as the other applications under section 58 of the Indian Companies Act. He has treated their refusal as an improper refusal, and has alleged that it was made arbitrarily and without sufficient cause, and the answer to the application by the Company, as in the other cases, was that the Directors had *bond fide* after due consideration and for sufficient reason refused to register, and the matter has been tried out on that basis. Either there has been no refusal in law and his application, which is based solely and entirely on the allegation that there has been an improper refusal, is premature, or it may be taken that the defence set up on the application under section 58 of the Indian Companies Act is a refusal, and the matter dealt with on its merits. I think it is open to us to adopt the latter course rather than dismiss the application as premature. This disposes of the questions which have been raised, other than the questions which go to the merits of the application.

I have already referred to the issue raised by the lower Court. Evidence was adduced by both sides upon that issue. Of the applicants, Butterworth was the only one who was examined on their behalf in support of the applications under section 58 of the Companies Act. They, however, called one Cave who had been in the service of the Muir Mills Company when the registrations had been refused, but who had since left, Beer, one of the Directors already mentioned of the Company, and Dr. Condon. Butterworth admitted that the first 3 shares purchased by him were offered to him by McRobert, the Manager of the Cawnpore Woollen Mills, that he did not inquire if he had money to pay for shares ; that his account with the mills was at debit ; that he asked McRobert for permission to further overdraw, and that permission was given ;

that McRobert directed [422] the accountant to make out a cheque for the shares on the Mussoorie Bank in favour of Dr. Condon to pay for the shares; that he (Butterworth) eventually paid back the purchase money by instalments, and that his debit was still from Rs. 2,000 to Rs. 3,000; that most probably McRobert wrote for the shares and sent them to him; that when the transfer deed came McRobert sent it back for alterations to Dr. Condon; that on receipt of the letter intimating that the Directors declined to register he consulted McRobert, who advised him in his correspondence with regard to the refusal. As to the second lot of 5 shares he admitted that they had been paid for on the 31st August 1897; that McRobert had caused his account to be debited with Rs. 1,300, the price; that he could not say why two months had elapsed between the date of his being so debited and the date of the transfer deed; that he had nothing to do with the seller; that he was not sure whether McRobert or he himself had applied for registration; that it was possible that the scrip remained with McRobert up to the time of the application to the Court. He then went on to say that he could not swear that the Directors had not *bond fide* considered his application for registration. He also said that he knew that McRobert's relations with the Company (The Muir Mills Co.) were not amicable.

Cave who had left the Company's service because he had been superseded by another employè, stated that the refusal to register the transfer to Butterworth was because he was employed in the Woollen Mills. The reasons he said were contained in the letter of the 28th May 1897, to Dr. Condon, to which reference has been made. It was thought that a gentleman in the Cawnpore Woollen Mills might be influenced by McRobert to the detriment of the Company. Cave had been present at the meetings at which the different applications had been considered, and he referred to the minutes of such meetings which showed that all the applications had been considered, and in some instances remitted to subsequent meetings for further consideration. "I certainly swear," he said, "that the Directors gave *bond fide* consideration to the question of registration," and again "whether they acted in an arbitrary manner is a matter of opinion. I think they had some grounds for what they did. In my opinion they did not act in an [423] arbitrary manner." Cave was apparently called with a view to proving that the refusal to register the transfers was solely on account of Johnson, the Managing Director, and at his instance. This I think he failed to do. Examined on this point by the counsel for the applicants, he said: "I am not aware that Johnson had any voice in the refusal to register Butterworth's and the other shares."

Beer who was present at the meetings of Directors which refused to register the transfers to P. Scott, Thompson, and Butterworth, was examined as to the reasons which guided the Directors in their refusals. From his evidence it is clear that the reason was the fear that the transferees being employès of the Mills of which McRobert was Manager, would be under his influence, and would vote just as he wished them to. He stated that while McRobert had been a Director of the Muir Mills, there had been various stormy meetings, and he had evinced hostility on more occasions than one to Johnson, the Managing Director, who had threatened to resign, and start a mill of his own. He said that he believed that McRobert was at the bottom of the transfers; that he would use the transferees for his own ends, and that they would do what he told them; that he (Beer) had been a Director of the Cawnpore Woollen Mills, where there was always a preponderance of votes amongst the staff of that Mill, and he wanted to prevent a similar preponderance of votes on McRobert's part in the Muir Mills. "I considered," he said, "if,

McRobert gained that preponderance, Johnson (the Managing Director) would sever his connection with the Muir Mills, and it was thus that I considered it was not to the interest of the Company that the shares should be registered. I considered that McRobert evidently wanted to gain that preponderance * * * I don't think McRobert would hesitate to harass the management in order to gain his point. I considered harassment to the management would harm the Company."

The evidence of Dr. Condon, the only other witness called by the applicants, is not important. He speaks of a conversation with Johnson, which is denied by the latter.

Now although Butterworth was the only one of the applicants who gave evidence in support of their case, the counsel for the [424] Company called the others apparently with a view to show that in purchasing their respective shares they were acting on the suggestion of and through McRobert. None of them had previously purchased shares in the Muir Mills Company, and with one exception all were at the time indebted to the Cawnpore Woollen Mills, but were allowed to further overdraw their accounts to meet the purchase money, and 7% was charged on the over-drafts. In each case the shares were offered to the purchaser by McRobert, were purchased by him, and paid for through him. Except in the case of Vicker's, application for registration was made by McRobert, who was advising them throughout. Each of them stated that he was not prepared to say that the Directors did not fairly and properly consider the matter of their fitness to become members of the Company, but Thompson went so far as to say that while he believed they had not fairly and properly considered his application, he was not prepared to swear to it. In the case of Thompson his shares were purchased during his absence in England for him by McRobert, who without consulting him, had caused his account to be debited with the purchase money. Vickers in his evidence stated that he knew that there was great antagonism between Johnson and McRobert, and that before he bought his shares he was aware of their hatred.

These matters which I have just mentioned, or most of them, only came to light in the course of this litigation, and therefore cannot be said to have influenced the Directors in their refusal to register the transfers. To my mind, however, they show almost conclusively that McRobert was taking much more than an impersonal interest in getting his employes to purchase shares in the Muir Mills Company. What his real object was there is nothing to show, though it may be that the view said to have been taken by the Directors as to his object was correct. It may be noted here that Beer was unable to specify, except in the vaguest terms, in what way McRobert was likely to be able to harass the management of the Company. It is admitted that at the time he was the largest shareholder in the Company, and it is to be presumed therefore that he would be the last person to do anything which would be likely to injure the interests of the shareholders. He had been a Director of the Company, but in February 1897, he [425] ceased to be a Director, and though he was proposed and seconded for re-election as a Director at the Annual General Meeting of shareholders on the 27th February 1897, he declined to submit himself for re-election. It is difficult to see how, as an ordinary shareholder, he could have interfered with or harassed the management, and he could not have submitted himself again for election as a Director until the next Annual General Meeting. Having regard to the constitution and views of the Board, and temporary Board, it was not likely that had a casual vacancy occurred on the Board, he would have been asked to join the Board in the meantime.

In his cross-examination Beer referred to a prosecution which had been instituted against him as a Director of the Company under section 55 of the Indian Companies Act, 1882, this being done apparently with a view to show how in one respect McRobert had harassed the management. The prosecution was instituted under the following circumstances. After an Extraordinary General Meeting of the shareholders which took place in March 1897, it appears McRobert asked to see the register of shareholders, and was told by Beer, who was the Chairman of the Meeting, that he could not be allowed to see it then, as it was required at once at an adjourned meeting of the Directors, but that he could see it the next day. McRobert thereupon left the meeting, but in the course of half an hour was informed that the register was available for his inspection. Notwithstanding this information McRobert instituted the prosecution referred to, alleging that he had been refused inspection of the register. The Magistrate who tried the case acquitted Beer. McRobert thereupon first directly, and then through the Chamber of Commerce, of which he was President, moved the Local Government to appeal to the High Court against the acquittal, which it did. In the result Beer was fined 8 annas, the High Court being of opinion that technically an offence had been committed.

The only other evidence which is material is that of Johnson, the Managing Director. He referred to various meetings which he described as stormy meetings at which there had been a difference of opinion between him and McRobert, when the latter was a Director, and especially to a particular meeting when McRobert [426] had expressed distrust of the management of the Company. He also referred to the prosecution of Beer. As to the reasons for the refusals to register the transfers he said there was a belief that the transferees would in all probability prove themselves cantankerous and litigious, just as their employer (McRobert) had proved himself to be. It was considered that as they were his employes, he could rely on them to do whatever he wished them to do; that they would therefore act in any manner he wished or directed because of the ill-will he bore against him (Johnson) personally; and that the Directors wished to guard against anything of this sort. He further said "after that (the criminal prosecution against Beer) all these applications came in. It appeared to me they could only mean one thing, namely, that McRobert was determined to follow up these different incidents by bringing in as shareholders his own nominees to work in whatever way circumstances might direct."

The evidence of Johnson leaves no doubt in my mind that the real objections to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert, and the personal animosity existing between Johnson and McRobert, and (2) the desire of the Directors that McRobert should not add to his voting power at the meetings of the Company. It was very candidly admitted by Mr. *Moti Lal Nehru* who appeared for the applicants that they were under the influence of McRobert, but he denied that they would necessarily vote as he might direct them.

The objections, it is to be observed, were not personal to the applicants themselves, and we have to see whether, under the circumstances, they were legitimate objections.

In the absence of any such provisions as Art. 21 of the Articles of Association in this case, Directors have no discretionary power of refusing to register a transfer of shares—See *Poole v. Middleton*, (1861) 29 Beav. 646, p. 650, but where the power of rejecting proposed transferees is reserved to the Directors of the Company, they must exercise it reasonably and in good faith, and with due regard to the interests of the Company and to the right of a

shareholder to transfer his shares, and the question of the fitness of the [427] transferees must be fairly considered at a meeting of the Board. The principles to be gathered from the cases in England are summed up in *In re Bell Bros.*: 7 Law Times Reports, 689. In that case CHITTY, J., said:—"According to the constitution of this Company, every shareholder is entitled to transfer his shares to any person not being infant, lunatic, married woman or under any legal disability. This right, which is a right of property, is subject to the discretionary power conferred on the Directors by Arts. 18 and 34, of approving of the persons to whom the transfer is made, and of rejecting the transfer on the ground that they do not approve of the transferee. The discretionary power is of a fiduciary nature and must be exercised in good faith, that is, legitimately for the purpose for which it is conferred. It must not be exercised corruptly or fraudulently or arbitrarily or capriciously or wantonly. It may not be exercised for a collateral purpose. In exercising it the Directors must act in good faith in the interest of the Company and with due regard to the shareholder's right to transfer his shares, and they must fairly consider the question of the transferee's fitness at a Board meeting. When the Court once arrives at the conclusion that the Directors have in good faith rejected a transfer on the ground that the transferee is not a fit person to become a member of the Company, it will not review the Director's decision. The Directors are not bound out of Court to assign their reasons for disapproving. If they decline to do so, or if their decision is challenged in Court and they refrain from giving evidence, upon which a cross-examination may take place as to their reasons, or if, giving such evidence, they refrain from stating their reasons, the Court will not, merely on that account, draw an unfavourable inference against them. In these articles there is an express provision protecting the Directors against any liability to disclose their reasons. They are, however, at liberty, if they think fit, to disclose them, and if they do, the Court must consider the reasons assigned with a view to ascertain whether they are legitimate or not, or, in other words, to ascertain whether the Directors have proceeded on a right or a wrong principle. If the reasons assigned are legitimate, the Court will not overrule the Directors' decision merely because the Court itself would not have [428] come to the same conclusion. But if they are not legitimate, as, for instance, if the Directors state that they rejected the transfer because the transferor's object was to increase the voting power in respect of his share by splitting them among his nominees, the Court would hold that the power had not been duly exercised. So, also, if the reason assigned is that the transferee's name is Smith, or is not Bell. Where the Directors do not assign any reason it is still competent for those who seek to have the transfer registered to show affirmatively, if they can, by proper evidence, that the Directors have not duly exercised their power." In the same judgment, CHITTY, J., said:—"In my opinion, the power conferred on the Directors by the articles of this Company does not justify them in rejecting a transfer on the ground that the transferee, against whom they entertained no objection, is the nominee of some person whom they consider objectionable."

In *Ex parte Penney* (1872) L. R., 8 Ch., 446, where the Articles of Association provided *inter alia* that "no person not already a shareholder shall be entitled to become the transferee of any share unless approved by the Board," it was said that the Directors were not bound to disclose their reasons for rejecting a transferee, provided they had fairly considered the question at a meeting of the Board, and that in the absence of evidence to the contrary, the Court would take it for granted that they had acted reasonably and *bona fide*. But if there was evidence to show that the Directors had exercised their

power capriciously or unfairly, the Court would interfere; and MELLISH, L. J., pointed out that it would be an abuse of their power to object to register a transfer on any ground not applying personally to the transferee.

In *Moffat v. Farquhar*, (1877) L. R., 7 Ch. D., 591, the Articles of Association provided:—"No share in the Company shall be transferred by any proprietor to any person who has not been first approved of by the Board of Directors of the Committee of Directors appointed as aforesaid; and if any transfer of any share or shares shall be made or attempted to be made to any person who has not been approved, the same shall be void." There was a difference of opinion amongst the shareholders as to the mode in which the Company should be managed, and the plaintiff, who was a large [429] shareholder, transferred shares to his own nominees to strengthen his voting powers. The Directors refused to approve the transferees, not from any personal objection to them, but on the ground that the transfers were colourable and were intended to increase the plaintiff's voting power. It was held the Directors had no power to refuse to allow the transfers except upon objections personal to the transferees. That case was followed by FARRAN, J., in *Kaikhosro v. Coorla Spinning and Weaving Co.*, (1891) I. L. R., 16 Bom., 80.

In the applications before us, the lower Court has found and in that finding I agree, that due consideration was given by the Directors to the matter of the various transfers, but I am prepared to hold further that in rejecting the applications for registration they acted *bond fide* and as they believed in what they considered to be the interest of the Company. On the authorities quoted they were not bound on rejecting the applications to give their reasons, and as I have said, except in one case, they did not give their reasons. Evidence, however, has been gone into, and it now appears that the reasons upon which they acted were not personal to the applicants. It was in fact admitted that there was no objection to them personally, apart from their connection with McRobert. The objection was to McRobert, who, it was feared, would, from his position in the Cawnpore Woollen Mills Company, be likely to influence them to vote as he might wish. It should be here mentioned that the Muir Mills and the Cawnpore Woollen Mills were in no way rivals in trade, the one being a Cotton and the other a Woollen Mill. McRobert was not transferring his shares to his own nominees with a view to increasing his voting power in the Company, which, apparently on the authorities, he might have been justified in doing. He was merely influencing his subordinates to take shares which were being offered in the market. As the Directors have now disclosed their reasons, we are entitled to consider those reasons with a view to ascertain whether the Directors have proceeded on a right or wrong principle. The objections, as I have said, were not personal to the applicants, and applying the principles of the English cases, I think we must hold that the reasons now given for refusing to [430] register the transfers were not legitimate. If their reasons had been legitimate, we should not be justified in sitting "as a Court of appeal" to use the words of JAMES, L. J., in *Ex parte Penney*, (1872) L. R., 8 Ch., 446, at p. 449, from the deliberate decision of the Board of Directors to whom by the constitution of the Company the question of the determining the eligibility or non-eligibility of new members is committed."

In *In re Coal-port China Co.*, (1895) L. R., 2 Ch., 404, where the Court refused to interfere, there was no evidence to show that the Directors had exercised their power improperly or with want of *bond fides*.

Although, as I have said, I consider that the Directors of the Muir Mills Company duly considered the applications before them and in rejecting the

applications for registration acted *bona fide*, and as they believed in the interests of the Company, yet the reasons upon which they based their refusal not being legitimate reasons, the Court has power to interfere, and I therefore think that the Court below was right in directing the Company to register the names of the applicants.

I would accordingly affirm the decrees of the Court below with costs in this Court in each case.

Appeal dismissed.

NOTES.

[See also 23 Bom., 685.]

[22 All. 430]

The 5th July, 1900.

PRESENT:

MR. JUSTICE HENDERSON.

Hem Kunwar and another.....Plaintiffs

versus

Amba Prasad and another.....Defendants.*

Civil Procedure, Code, sections 368, 582, 591--Abatement of appeal—Order or decree—Order as to abatement of appeal embodied in the judgment and decree—Rules of the Court, Rule 9.

Where one of four respondents (plaintiffs) in the Lower Appellate Court died, and no application was made within six months to put the legal representative on the record and in the application that eventually was made the wrong person was named as legal representative : *Held*, the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died. Under the circumstances section 368 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate : *Held* further, that where the order of the lower Court as to abatement was embodied in the judgment and decree, [431] objection was properly taken thereto by way of second appeal against the decree. *Sneo Nath Singh v. Ram Din Singh*, (1895) ; I. L. R., 18 All., 19, *Sher Singh v. Diwan Singh*, Weekly Notes, 1900, p. 109 ; *Dhari Upadhia v. Raushan Chaudhri*, Weekly Notes, 1899, p. 136 ; *Sant Lal v. Sri Kishen*, (1892) I. L. R., 14 All., 221 ; *Chandarsang v. Khimabhai*, (1899) I. L. R., 22 Bom., 718, referred to.

THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Gokul Prasad and Pandit Madan Mohan Malaviya, for the Appellants.

Munshi Haribans Sahai, for the Respondents.

Henderson, J.—In this case four plaintiffs, Raj Bahadur, Musammat Mohni, Musammat Lachha Kunwar, and Hem Kunwar, sued the defendants to recover possession of certain property to which they claimed to be jointly entitled. The Court of First Instance gave the plaintiffs a decree from which the defendants appealed, making all four plaintiffs respondents.

* Second Appeal No. 40 of 1900, from a decree of Syed Muhammad Tajammul Husain, Subordinate Judge of Aligarh, dated the 26th September 1899, modifying a decree of Munshi Anant Prasad, Munsif of Etah, dated the 6th January 1898.

Before the appeal came on for hearing, the appellants alleged that Musammat Mohni and Musammat Lachha Kunwar were dead, and upon their application Hem Kunwar was added a respondent, as the legal representative of the two respondents said to have died. When the appeal came on for hearing, Hem Kunwar satisfied the Court that Musammat Mohni was alive, and that he was not the legal representative of Musammat Lachha; and further, that the application to place him as their representative on the record was made more than 6 months after the death of the latter. No notice of the appeal had been served on Musammat Mohni, and upon that ground the Lower Appellate Court held that as against her the appeal could not proceed. With regard to Musammat Lachha, he set aside the order, which was an *ex-parte* order, by which Hem Kunwar had wrongly been placed on the record as legal representative of Musammat Lachha, and went on to say :—"The result is that under section 368 read with section 582 of the Code of Civil Procedure, the appellants' appeal as against Lachha Kunwar, the deceased respondent, will fail." Thereupon, in the same judgment, he proceeded to deal with the appeal on the merits, and in the result made the following decree, namely, "that the appeal of the defendants-appellants be decreed as against the [432] plaintiffs-respondents, Raj Bahadur and Hem Kunwar only, and the Munsif's decree so far as it concerns them be set aside, and in place thereof it is decreed that the claim of the plaintiffs-respondents, Raj Bahadur and Hem Kunwar, be dismissed with costs, that the appeal of the defendants-appellants be dismissed with costs as against the plaintiffs-respondents Nos. 2 and 3 (i.e., Musammat Mohni and Musammat Lachha Kunwar), and the Munsif's decree so far as it concerns them be upheld as it is." There was a further order as to costs which is immaterial in this case.

Against the decree of the Lower Appellate Court, Raj Bahadur and Hem Kunwar appealed on the following grounds, namey— (1) because the appeal should have abated as the representatives of the deceased respondent Lachha Kunwar were not brought upon the record within the period of six months allowed by the Statute, (2) because the trial of the appeal was contrary to the express provisions of section 368 of the Code of Civil Procedure. A preliminary objection was taken that these grounds were not directed against the decree of the Lower Appellate Court, and that the appeal was really an appeal against an order of the Lower Appellate Court under section 368, in effect, if not in terms, directing that the appeal should abate so far as Musammat Lachha Kunwar was concerned and not against the decree. I think there is no ground for this objection. The appeal, in my opinion, was against the decree. There was no separate judgment upon the matter of the death of one of the respondents who died. That matter and the merits of the appeal were dealt with in the same judgment, and the finding of the Court as to both was embodied in the decree. In substance the appellants before the Court impugned the decree on the ground that the trial of the appeal upon the merits was contrary to the provisions of section 368 read with section 582 of the Code of Civil Procedure, and that the decree made was therefore bad.

I think section 591 of the Code applies to this case. The decree of the lower Court was appealed against. This Court was asked to set aside the decree of the Lower Appellate Court on the ground that the trial on the merits was contrary to law; but even if the order that, by reason of the death of Lachha Kunwar, the [433] appeal against her failed, be treated as an order in the suit separate from the findings upon which the decree is based (which I do not think it is), then there is an objection which is taken and set forth as in the memorandum of appeal, that the appeal to the Lower Appellate Court ought to have abated altogether and not partially.

My attention has been drawn to the following cases:—*Sheo Nath Singh v. Ram Din Singh*, (1895) I. L. R., 18 All., 19; *Sher Singh v. Diwan Singh*, Weekly Notes, 1900, p. 109; *Dhari Upadhyay v. Raushan Chaudhri*, Weekly Notes, 1899, p. 136; and to a Full Bench decision referred to in the first of these cases; but in the view I take of the present case I do not think that any of these cases apply, as I consider that in the present case there is an appeal directed against the decree of the Lower Appellate Court. Here no application was made within the time limited to place the legal representatives of Lachha Kunwar, the deceased respondent, on the record. The appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died, and under these circumstances, section 368 read with section 582 of the Code applied, and the proper order was to have directed the suit to abate.

In any case, in my opinion, there is no substance in the preliminary objection. Under the Rules of the Court (Rule 9) every memorandum of appeal must be headed "First Appeal," or "Second Appeal," as the case may be, and it was contended that this appeal, though headed "Second Appeal" as being an appeal from the decree of the Lower Appellate Court, dated the 26th September 1899, was in reality a first appeal from an order made on the same date and embodied in the decree. I see no reason why, if that contention were right, the memorandum of appeal should not be amended. The misdescription was not one which could have taken the respondents by surprise, or otherwise prejudiced them. The stamp on the appeal, as a second appeal, is more than that required in an appeal from order. Moreover, I find I am supported in this view by a case reported in *Sant Lal v. Sri Kishen*, (1892) I. L. R., 14 All., 221. In the view which I take, however, it is not [434] necessary to amend the memorandum of appeal, as in my opinion the preliminary objection fails.

It was not suggested that if the decree of the Lower Appellate Court should be set aside, an opportunity should be given to the appellants in that Court to bring the representatives of the deceased respondent on the record, as was suggested by the Court in *Chandarsang v. Khimabhai*, (1898) I. L. R., 22 Bom., 718. They had, it was found, by a mistake put a person on the record as representative, who was not in fact the legal representative of the deceased respondent, but even then the application to amend the record was made too late.

For the reasons which I have given, I think the proper order for the Lower Appellate Court to have made was to have directed the appeal to abate. I therefore allow this appeal and set aside the decree of the Lower Appellate Court. The result will be that the decree of the first Court will be restored. The appellants are entitled to their costs in this Court and the Lower Appellate Court.

Appeal decreed

NOTES.

[In Mulla's Civil Procedure Code, 1908 (VI Edn. 1916) p. 589, it is pointed out that the words, 'as against the deceased defendant,' added to O. 22, r. 4 do not *ipso facto* alter the distinction previously observed between cases where the appeal abated as a whole (as in (1904) 31 Cal., 487; (1909) 22 All., 430; (1910) 32 All., 301; (1907, 11 C. W.N., 504) and those where it abated as regards some of the parties only (as in (1902) 26 Bom., 203; (1906) 33 Cal., 580; (1907) 34 Cal., 1020; (1902) 25 All., 206; (1906) 30 Mad., 67; (1912) 34 All., 604).]

[22 All. 434]

The 7th July, 1900.

PRESENT:

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Ganga Baksh and others.....Plaintiffs

versus

Rudar Singh.....Defendant.*

Civil Procedure Code, sections 294, 317—Indian Trusts Act (No. II of 1882), sections 82, 88—Purchase by alleged agent of decree-holder at sale in execution.

Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance the decree-holders sued for a declaration that they were the real purchasers and for possession of the property.

[435] *Held*, that under such circumstances the second paragraph of section 317 of the Code of Civil Procedure did not exclude the application of the first paragraph of that section.

Held further, that sections 82, 88† of the Indian Trusts Act (No. II of 1882) did not apply.

Sankunni Nayar v. Narayan Nambudri, (1893) I. L. R., 17 Mad., 282, and *Kumbalinga Pillai v. Ariaputra Padiachi*, (1895) I. L. R., 18 Mad., 436, distinguished. *Monappa v. Surappa*, (1887) I. L. R., 11 Mad., 234, referred to.

THE facts are fully set forth in the judgment of Mr. Justice BANERJI.

Babu Jogendro Nath Chaudhri and S. C. Banerji, for the Appellants.

Pandit Sundar Lal and Pandit Madan Mohan Malaviya, for the Respondent.

Banerji, J.—Sujan Singh, the father of the plaintiffs, held a decree against Hira Singh and Sahib Singh, which the plaintiffs put in execution. It is alleged by the plaintiffs, but denied by the defendant, that the defendant Rudar Singh was the agent and general attorney of the plaintiffs for the purpose of supervising the proceedings connected with the execution of the decree. It is further alleged that an application was made on behalf of the decree-holders under section 294 of the Code of Civil Procedure, for permission to purchase the property which was advertised for sale in execution of the decree, and that the application was refused on the ground that other decree-holders had taken out execution against the same property. This allegation is not traversed on behalf of the defendant. The plaintiffs further state in their plaint that after the refusal of the Court to grant them leave to bid at the sale, the defendant purchased the property in his own name, and made the deposit

* Second Appeal No. 997 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 22nd September 1897, reversing a decree of Babu Bipin Behari Mukerji, Subordinate Judge of Aligarh, dated the 30th June 1896.

† [Sec. 88 :—Where a trustee, executor, partner, agent, director of a company, legal adviser, or other person bound in a fiduciary character to protect

Advantage gained by the interests of another person, by availing himself of his fiduciary character, gains for himself any pecuniary advantage, or where any person so bound enters into any dealings under circumstances in which his own interests are, or may be, adverse to those of such other person and thereby gains for himself a pecuniary advantage, he must hold for the benefit of such other person the advantage so gained.]

required by section 306 of the Code of Civil Procedure by raising money on the plaintiffs' credit; that subsequently the plaintiffs paid that money and the remainder of the purchase-money, and that the defendant agreed to convey the property to them after the confirmation of the sale. Objections were taken to the sale on behalf of the judgment-debtors but they were overruled, and the sale was confirmed, and a certificate of sale was granted to the defendant under section 316 of the Code of Civil Procedure. The sale took place on the [436] 20th August 1891. It was confirmed on the 5th March 1892, and the certificate of sale was granted to the defendant on the 11th March 1892. The plaintiffs state that after the confirmation of the sale the defendant was asked to execute a sale deed, but he refused to do so, and that in April 1895, he applied for partition of the property. It is thus clear that between the date of confirmation of sale and the date of the suit the defendant was admittedly in possession. In the 9th paragraph of the plaint the plaintiffs assert that they were the real purchasers of the property, and that the name of the defendant was entered as purchaser "*furzi*," that is, nominally. Upon these allegations the plaintiffs ask for a declaration that they are the real purchasers and that the defendant has without their permission got his name entered as purchaser, and they pray to be put into possession. The defendant denied that the purchase had been made by him on the plaintiffs' behalf and with the plaintiffs' money. He also pleaded the bar of section 317 of the Code of Civil Procedure. The Court of First Instance granted the plaintiffs a decree, but the Lower Appellate Court has dismissed the suit on the ground that section 317 precluded the plaintiffs from maintaining it. The question we have to determine in this appeal is whether section 317 is a bar to the maintenance of the suit.

It is admitted that the defendant is the certified purchaser, but it is alleged that the plaintiffs are the real purchasers, and that the purchase by the defendant was made on their behalf. If that is so, the case clearly comes within the first paragraph of section 317, and by reason of the provisions of that paragraph the plaintiffs are precluded from maintaining the suit. It is contended on the plaintiffs' behalf that this is a case to which the second paragraph of section 317 applies, and for this contention reliance is placed on the words used in the prayer for relief, where the plaintiffs ask the Court to declare that the defendant has got his name entered in the sale certificate without the permission of the plaintiffs. No doubt in the prayer in the plaint the plaintiffs do ask the Court to make the declaration referred to above, but the case set out by them in the plaint is wholly inconsistent with the allegation that the name of the defendant was entered without [437] the plaintiffs' consent. As has already been stated, I take the plaintiffs to assert that the purchase by the defendant was made without reference to them, that subsequently when the plaintiffs were informed of the purchase, they supplied the purchase-money, ratified what the defendant had done, and consented to take a conveyance of the property from the defendant after the sale had been confirmed in his name. They do not say in the plaint that when the defendant's name was entered in the sale certificate it was entered without their consent. On the contrary, they assert that it was entered nominally, that is, as *benamidar* for them. Upon such allegations it is not open to the plaintiffs to contend that the second paragraph of section 317 applies to the case. As they had been refused permission to bid, they could not possibly have said that their own name should have been entered in the sale certificate.

It is next contended on behalf of the plaintiffs-appellants that this is not a case of a *benami* purchase at all, and therefore section 317 has no application. This contention is not borne out by any of the allegations contained in the plaint,

but is, on the contrary, opposed to what is stated in the 9th paragraph of the plaint. It is, however, urged that the plaintiffs have stated all the facts in the plaint, and that upon those facts the case which arises is that the defendant is the plaintiffs' agent, and has purchased the property as such with the plaintiffs' money, that this is therefore a case of a constructive trust, and that the plaintiffs are entitled to the benefit of the purchase made by the defendant, and must be deemed to be the purchasers of the property. Reliance is placed upon the provisions of section 88 of the Indian Trusts Act, 1882. That section contemplates the case of a person clothed with a fiduciary character, who by availing himself of his position, gains an advantage for himself. The foundation for the rule laid down in that section is that a person should not place himself in such a position that his duty may conflict with his interest. It is not asserted that the defendant was employed for the purpose of purchasing the property in question on behalf of the plaintiffs, and it is not alleged that it was within the general scope of his duty to make such a purchase. According to the plaintiffs, the defendant was employed as their agent for supervising the execution [438] proceedings. In the performance of his duties as such agent, he was competent to purchase property on behalf of the plaintiffs in execution of that particular decree. But this he could not do unless the leave of the Court to bid and purchase had been obtained under section 294 of the Code of Civil Procedure. In this case leave was refused, and therefore neither the plaintiffs themselves nor the defendant as their agent could buy the property. It could not be said that it was the duty of the defendant to purchase the property in violation of the specific provisions of section 294, which forbids a purchase by the decree-holder without the express permission of the Court. When, therefore, the defendant purchased the property, no conflict could arise between his duty and his interest. He was in no different position from any other purchaser. Section 88, therefore, has no application. If the plaintiff's allegation be true that the money with which the purchase was made was their money, section 82 would have applied but for the proviso appended to that section. That proviso saves the operation of section 317 of the Code of Civil Procedure. Although, therefore, the plaintiffs may have paid the money with which the sale consideration was paid, since the certified purchaser was the defendant, it was not open to the plaintiffs to sue the defendant on the allegation that they were the real purchasers, and that the defendant had purchased the property on their behalf. It is a suit of this description which is contemplated by section 317, and it is the policy of that section to preclude the institution of such a suit. The analogy of a purchase by one member of a joint Hindu family in his own name on behalf of the other members of the family does not, in my opinion, apply in this case. In the case of a joint Hindu family the purchase itself is made by all the members of the family, including the person in whose name the purchase is made, and it is not a case of a purchase by a person who is not the real purchaser. The learned vakil for the appellants relied upon the ruling of the Madras High Court in *Sankunni Nayar v. Narayan Nambudri*, (1893) I. L. R., 17 Mad., 282. With what was said by Mr. Justice BEST in his judgment in that case it is not easy to agree; but Mr. Justice MUTTUSWAMI AIYAR based his judgment upon the ground that the [439] purchaser in that case was the agent of the plaintiffs, and had been employed as agent for the purpose of making the purchase on behalf of the plaintiffs. That was not a case in which the real purchaser was the decree-holder himself who had not obtained the permission of the Court to buy, and consequently would have infringed the provisions of the law if he had bid at the sale and purchased the property. That case is therefore clearly distinguishable from the present. Section 88 of the Trusts Act might be

applicable to the case which was before the Madras High Court. The case of *Kumbalinga Pillai v. Ariaputra Padiachi*, (1895) I. L. R., 18 Mad., 436, is also distinguishable. That was a suit for the specific performance of a contract by the auction-purchaser to convey the property to the plaintiff. Had this suit been a suit for the specific performance of the contract which the plaintiffs alleged the defendant had made with them to convey the property to them after confirmation of the sale, that ruling might possibly have been applicable. Even if the suit had been one for the specific performance of the alleged contract, it would still have been a matter for consideration whether such a suit would not be a suit the object of which was to defeat the provisions of law. But we need not consider the point, as the present suit is not one for the specific performance of a contract. The ruling in *Monappa v. Surappa*, (1887) I. L. R., 11 Mad., 234, has no bearing on the present case. In that suit the auction purchaser had delivered possession to the real purchaser, and had subsequently dispossessed him, and it was held that there was a waiver of right, and that the delivery of possession might amount to a transfer of title. For the above reasons the decree of the Lower Appellate Court is, in my opinion, right. I would dismiss the appeal with costs.

Aikman, J.—I am entirely of the same opinion. The plaintiffs, who were decree-holders, had tried to obtain permission of the Court to bid for the property advertised for sale in execution of their decree. That permission was refused. The property was then, it is said, purchased by the defendant as agent of the plaintiffs, and the sale was confirmed in his name. He therefore became a certified purchaser. The plaintiffs come into Court, alleging that the purchase was made with their funds, that they are the [440] real purchasers, and that the defendant's name was entered in the sale certificate fictitiously. It follows from this statement that the plaintiffs' suit is one which section 317 of the Code of Civil Procedure declares not to be maintainable unless the entry of the name of the certified purchaser was made fraudulently or without the consent of the real purchaser. In this case no allegation of fraud is made. In the relief the plaintiffs, it is true, ask for a declaration that the defendant's name was entered in the certificate without their consent; but in the body of the plaint they lay no foundation for such a case. In fact, the statement in paragraph 6 of the plaint is quite opposed to the theory that the entry of the defendant's name in the sale certificate was made without the consent of the real purchasers, for in that paragraph the plaintiffs state that the agreement between them and the defendant was that after the sale had been confirmed in his name, he would execute a sale-deed of the property to them. In the face of this allegation it is impossible for the plaintiffs to maintain that the entry of the defendant's name was made without their consent. Further, such a contention on their behalf would at once have been met by a reference to the first paragraph of section 249 of the Code of Civil Procedure, which precludes a decree-holder from bidding for or purchasing a property sold in execution of the decree without the express permission of the Court. I entirely agree also with my learned brother in holding that the provisions of section 88 of the Indian Trusts Act, No. 11 of 1882, will not help the plaintiffs. It cannot be said that there is any fiduciary duty on an agent towards his principal to assist him in evading the provisions of the law. It is, in my opinion, clear that the Legislature in framing the Trusts Act were careful that it should not in any way enable the provisions of section 317 of the Code of Civil Procedure to be evaded. This appears from section 4 and section 82 of that Act. I agree in the order proposed.

. Appeal dismissed.

NOTES.

[See also (1903) 26 All., 82 ; (1913) 35 All., 138.]

[441] CRIMINAL REFERENCE.*The 13th July, 1900.*

PRESENT :

MR. JUSTICE BLAIR.

In the matter of Madho Pershad.*

*Act No. XII of 1896 (Excise Act), section 49—License to sell spirits
retail—Death of licensee before expiration of period of license—
Right of his heir and partner in business to continue sale—
Personal nature of licence.*

* *Held*, that a licence for the retail sale of liquor under the Excise Act, No. XII of 1896, granted in the name of one man, does not on his death before the expiration of the period of the licence descend to his heir and partner in business so as to justify the said heir and partner in business in continuing to sell during the unexpired portion of the period named in the licence.

Where an order had been made for the sale of the liquor, part of which was, as above ruled illegally sold by the accused : *Held*, that if the said liquor had by devolution or otherwise become the property of the accused, there was no reason why it should not be attached and sold.

THE facts of the case sufficiently appear from the judgment of the Court.

No one appeared.

Blair, J.—The District Magistrate of Mirzapur refers to this Court this conviction and sentence by a Magistrate, inflicted under section 49 of Act No. XII of 1896. He doubts the soundness of the conviction in point of law, and in the alternative suggests that as the offence is a purely technical one, the conviction and sentence should be set aside. I may add that an order has been made for the sale of the liquor, part of which has been held to be improperly retailed. The facts are that one Hira Lal, the uncle, as I understand, of the person convicted, whose name is Madho Pershad, held a licence for sale by retail of European spirits, which licence would be in force up to some time in September of the present year. Hira Lal died in the month of April, and it was after his death that Madho Pershad having no licence himself, made the illegal sale or sales of which he has been convicted. It is said, I know not with what truth, that Madho Pershad is Hira Lal's heir, and was his partner during his life. I do not think there is any doubt as to the technical soundness of the conviction. A licence is a personal grant, largely made for personal reasons, [442] and it certainly does not, after the death of the licensee, attach itself in any way to his property or devolve upon his heirs. I do not think Madho Pershad or any man of ripe years who had any connection with the traffic, could have sold the liquor without, at all events, grave doubt as to whether such sale was in violation of the law. I do not think that a fine of Rs. 50 inflicted upon a substantial man can be anything but a very small sentence for an offence which is punishable by four months' imprisonment or fine of one thousand rupees, or with both. I set aside the order of the Magistrate for the sale of the confiscated liquor, and instruct him to reconsider that ques-

* Criminal Reference No. 357 of 1900.

tion with a view to his arriving at a conclusion whether the liquor confiscated and ordered to be sold is the property of Madho Pershad. In that case I see no reason why he should not order attachment and sale of such liquor. If it is not by devolution or otherwise the property of Madho Pershad, it ought not to be confiscated and sold. Let the papers be returned.

[22 All. 442]

APPELLATE CIVIL.

The 13th July, 1900.

PRESENT :

MR. JUSTICE KNOX, ACTING CHIEF JUSTICE, AND MR. JUSTICE BLAIR.

Ram Chander.....Defendant

versus

Kondo and others.....Plaintiffs.*

Civil Procedure Code, sections 13, 244—Transfer of Property Act (No. IV of 1882), sections 88, 89—Decree not in accordance with judgment—Interpretation of decree.

Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed and this fact was apparently overlooked by the defendant who defended the suit, and where, while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in the plaint,"

Held, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither section 13 nor section 244 of the Code of Civil Procedure concluded the defendant from subsequently suing to recover the property wrongly included in the plaint. THE facts of this case sufficiently appear from the judgment of the Court.

Munshi Ram Prasad and Pandit Sundar Lal, for the Appellants.

[443] Pandit Moti Lal Nehru, for the Respondents.

Knox, Acting C. J., and Blair, J.—The suit out of which this appeal arises has reference to a certain share of property which will in this judgment be referred to hereafter as share A. This share A is a share in mauza Gumma-wala, which belonged to Sri Ram, one of three brothers.

Sri Ram's brother, Nagar Mal, held a second share, which will be hereafter styled share B. A third brother, Sohan Lal, held a share, which will be described as ($\frac{c}{1}$ plus $\frac{c}{2}$).

Sohan Lal was succeeded by his son, Shankar Lal. Nagar Mal and Shankar Lal borrowed monies from one Bansi Lal, and as security mortgaged in his favour share B and ($\frac{c}{1}$ plus $\frac{c}{2}$).

Shankar Lal died and his property passed by succession thus:— $\frac{c}{1}$ to Sri Ram, $\frac{c}{2}$ to Nagar Mal. In execution of a decree against Nagar Mal, $\frac{c}{2}$ was sold and purchased by Kondo Mal, one of the respondents to this appeal. Kondo Mal is heir to Sri Ram, and thus held both the shares A and ($\frac{c}{2}$ plus $\frac{c}{1}$).

* First Appeal from Order No. 112 of 1899, from an order of Babu Prag Dass, Subordinate Judge of Saharanpur, dated the 10th July 1899.

Bansi Lal, however, brought a suit upon his bond and impleaded only Kondo Mal as the representative of his original mortgagors. Kondo Mal defended the suit, but apparently overlooked the fact that share A, or a portion of it, was included among the property sued for. Share A is not, and never was, included in the bond upon which Bansi Lal sued, and was not therefore property over which the bond held by Bansi Lal and upon which he sued created any charge or lien of any kind.

The judgment which was given in favour of Bansi Lal ran thus in its concluding clause: "that a decree be given to the plaintiff for Rs. 10,349-4-6 against the hypothecated estate, except that portion of it which is in the hands of Murli Lal and Lachmi Chand—i.e., share B." From the concluding words of the judgment and from other passages in it, it is evident that the intention of the Court was to grant a decree over the balance of the property hypothecated, and only that, viz., $\frac{c}{1}$ plus $\frac{c}{2}$ share B being expressly excepted by name.

In the decree the property affected is described as the property specified in the plaint and as modified, to wit, by the [444] exception of share B. Bansi Lal died and was succeeded by Ram Chander, the present appellant. He applied for an order absolute, and into this order absolute came the order for sale of share A, or a portion of it, as well as of share $\frac{c}{1}$ plus $\frac{c}{2}$. Ram Chander purchased.

Kondo Mal then instituted the suit out of which this appeal has arisen to recover the portion of share A which has been sold, on the ground that as it was never hypothecated, it could not have been included in the decree and could not have been sold.

The Court of First Instance dismissed the suit on the ground that it was barred by section 13 of the Code of Civil Procedure. Kondo Mal should, in the judgment of the learned Munsif, have raised as part of his defence to the suit that no part of share A was ever hypothecated.

The learned Subordinate Judge overruling this decision, has remanded the case for a decision upon the merits, and it is from this order that the present appeal has been brought.

We agree with the learned Subordinate Judge that the Court which heard the first suit never intended to give a decree over any property other than that hypothecated, and that where the decree says "the property specified in the plaint" is meant, and must be held to mean, the hypothecated property mentioned in the plaint. The order absolute under section 89 could not run against any property over and above that against which the decree under section 88 ran. The present suit is concluded neither by section 13 or section 244 of the Code of Civil Procedure. To hold otherwise would not only be an act of injustice, but it would be permitting the plaintiff to take advantage of what he must know to be a piece of sharp practice, more than that, of fraud.

We dismiss this appeal with costs.

Appeal dismissed.

NOTES.

[This was applied in (1909) 7 M. L. T., 191.]

[446] APPELLATE CRIMINAL.*The 7th July, 1900.*

PRESENT :

MR. JUSTICE BLAIR AND MR. JUSTICE HENDERSON.

Queen-Empress
versus
Nirmal Das and others.*

*Criminal Procedure Code, section 288—Previous statement to committing
Magistrate retracted in Sessions Court—Use of such statement by
Sessions Court as substantive evidence—Act No. I of 1872
(Indian Evidence Act), section 30—Confession of co-
accused—"Taking into consideration"—Finding
of arms and stolen property in joint family
house—Evidence—Act No. XLV of 1860
(Penal Code), section 412.*

Where a witness who has made a statement before the committing Magistrate subsequently resiles from that statement in the Court of Session, the statement made before the committing Magistrate can be used under section 288 of the Code of Criminal Procedure to contradict the witness; but the use of such statement as substantial evidence of the facts alleged by the witness on the prior occasion is fraught with the gravest peril, and could never have been the intention of the Legislature.

The words "take into consideration" in section 30 of the Indian Evidence Act, 1872, do not mean that the confession referred to in the section is to have the force of sworn evidence. *Queen-Empress v. Khandia*, (1890) I. L. R., 15 Bom., 66, referred to.

The bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.

ONLY so much of the judgment is reported as is necessary to the points referred to in the head-note.

The Government Advocate (for whom Mr. W. K. Porter), for the Crown.

Blair and Henderson, JJ.—After setting forth the facts of an ordinary dacoity, continued as follows :—

The police do not appear to have obtained any clue for nearly a fortnight. They then began to make arrests, and upon the 12th February last and the succeeding days confessions were made by three of the present appellants—Nathu, Bhola (of Nagla Gulal) and Darola (of Ratu). The police also, on or before the date mentioned, had got into communication with one Genda, who afterwards appeared under a tender of pardon, and came before the Magistrate to give evidence for the prosecution. Three persons, other than those here as appellants, were committed, and upon trial were acquitted by the Sessions Judge. Upon the hearing in the Sessions Court, Genda, who had appeared before the **[446]** Magistrate and given evidence for the prosecution, was called for the prosecution. He then said that he knew nothing about the dacoity, that the Collector did not offer him a pardon, and that he had heard nothing about it. The statement made before the Magistrate was put before him, and he admitted making it, but he said that it was all false, and that he was forced to make it.

* Criminal Appeal No. 409 of 1900.

Upon the hearing in the Sessions Court, the evidence given by him before the Magistrate, which was put in to contradict the statement that he knew nothing about the dacoity, was used as substantive evidence against the appellants here. Against many of them there is no sworn evidence delivered in the Sessions Court at all. * * *

The cases of those appellants who have been convicted mainly upon what Genda swore before the Magistrate stand upon an altogether different footing, and the weight to be attached to the evidence of Genda requires careful consideration. He is the person who was called and accredited by the prosecution before the Magistrate. Upon being again called for the prosecution in the Sessions Court he flatly denied that he knew anything about the dacoity, and that he took any part in it. The Sessions Judge then confronted him with the statement he had made before the Magistrate, and he was compelled to admit that he had made such a statement, and alleged that he had done it under compulsion. It is that evidence before the Magistrate so repudiated by him that the prosecution has put forward as evidence to be believed and acted upon in the Sessions Court, and upon that evidence the Sessions Judge has thought it fair to act. As to the admissibility of that evidence to contradict his allegation that he knew nothing whatever about the dacoity, there can be no question; but the use of the allegations made by him before the Magistrate as substantial evidence of the facts alleged by him seems to us fraught with the gravest peril. The terms indeed of section 288 of the Code of Criminal Procedure, which render the evidence of a witness taken before the committing Magistrate capable of being treated as evidence in the discretion of the presiding Judge, are couched in the widest possible language; but we entertain the strongest opinion, in common with Mr. Justice STRAIGHT, that it never was the intention of the Legislature that the substance of such a [447] statement before the Magistrate, when retracted and repudiated, should be used by the prosecution as substantial evidence of the allegations made in it. It is difficult to conceive that any responsible tribunal should permit the conviction of a person upon such evidence if it stood by itself; and indeed as far as what is properly called evidence is concerned, Genda's repudiated statement is all that there is on the record to justify the conviction in several of the cases before us. Taken with this confession upon oath are the confessions made by certain of the appellants which it is our duty not to treat as evidence but to "take into consideration." It is not perhaps necessary or easy to define precisely what is meant by these words "taking into consideration." This, at all events, it must mean, that they are not to have the force of sworn evidence. Indeed it has been most definitely ruled in the Bombay High Court in *Queen-Empress v. Khandia*, (1890) I, L. R., 15 Bom., 66, that a conviction resting on such a confession alone cannot be maintained. In our opinion, therefore, no conviction in these cases can be sustained, which rests only upon the repudiated evidence of Genda and the statements made by the co-accused. Among the persons who have been convicted on such evidence are:—Nirmal Das, Darola (of Nagla Gulal) and Sanwalia.

We allow the appeals of these three appellants. We set aside their convictions and order them to be released.

The case against Ram Chandar, Bhao Singh and Jhamman, in so far as it rests upon the statement of Genda, has, in our opinion, no secure foundation, and the discovery of property and arms in the house jointly occupied by them together with Nathu falls, in our opinion, short of evidence of possession. There is nothing to show that they took or dealt in any way with any part of the stolen property, and we think that the bare finding of the property in the

house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction. We may add that their brother Nathu has taken upon himself all the responsibility for the possession of the stolen articles; it was he who upon his own admission, took an active part in the dacoity and [448] brought the articles there: he expressly denied that his brothers had anything to do with the dacoity, and stated that the things found were his own share of the loot. We do not attach much importance to a statement of this kind, which would tend to exculpate his brothers, but we think that, apart from it, there is no evidence which would justify a conviction.

The Government have appealed against the acquittal of Narayan, the brother of Ram Chandar and Bhao Singh. Inasmuch as the evidence against him is limited to the discovery of property and arms in the family house, it is, in our opinion, impossible to support the appeal.

The appeal therefore against the acquittal of Narayan is dismissed, and the appeals of Ram Chandar, Jhamman and Bhao Singh are allowed. They will be at once discharged.

[With reference to section 288 of the Code of Criminal Procedure see further *Queen-Empress v Soneju*, (1898) I. L. R., 21 All., 175, and *Queen-Empress v. Jeochi*, (1898) I. L. R., 21 All., 111, and as to section 30 of the Evidence Act, *Empress v. Sundra*, Weekly Notes, 1884, p. 38, *Empress v. Piria*, Weekly Notes, 1885, p. 320, and an unreported case—Criminal Appeal No. 158 of 1900, decided on the 30th of April 1900—the material portions of the judgment in which are printed below.*—Ed.]

NOTES.

[See also 28 All., 683 ; (1913) 38 Bom., 156 at 168.]

* This case has been submitted by the Sessions Court of Aligarh for confirmation of the sentence of death upon Dammar. There is also an appeal by Dammar. There are further appeals by Salig, Shiboharan, Behari and Param Sukh, who have been convicted of an offence under section 302 of the Indian Penal Code, but sentenced to transportation for life. Dammar is not represented before us. The other four appear by counsel.

On the 30th of September 1899, Dan Sahai, mahajan, was undoubtedly murdered. The place where the murder happened was a mile distant from the village Lametha, where he lived. The medical evidence is that there were two wounds, one in front of the neck, the other on the back of the neck. Both wounds were caused by some heavy sharp-edged instrument, and could have been inflicted by the chopper produced in Court. There were two other wounds on the right side of the head. The Civil Surgeon states positively that there was no wound on the head, by which we understand on the skull. The police arrived on the spot on the 1st of October, and they lost no time in the investigation. The promptness with which the police action was taken in this case deserves commendation, and adds considerably to the value of the evidence which is the outcome of this investigation. One of the persons whom the police arrested was the convict Dammar. He made a long and detailed statement, which was duly recorded by the Magistrate on the 4th of October. From that statement he afterwards resiled and said that it was brought about by malpractices on the part of the police. Of any such malpractices there is no evidence whatever, and we do not believe the allegation. The statement is in full detail. We have studied it more than once, and each time that we study it we rise from it with a conviction that it is in the main, if not wholly, an accurate account of what took place. In addition to this statement there is evidence on the record which presses strongly against both the accused Dammar and Salig. There is further evidence which, as far as it goes, tends to the conviction of the other three appellants, but so far falls short of proof that it is insufficient to prove participation in the act of murder. We shall shortly allude to this evidence. * * * * It is at this point that we take into consideration the confession made by Dammar. The learned

[449] APPELLATE CIVIL.

The 13th July, 1900.

PRESENT:

MR. JUSTICE KNOX, ACTING C. J., AND MR. JUSTICE BLAIR.

Darab Kuar and others.....Appellants

versus

Gomti Kuar.....Respondent.*

Civil Procedure Code, section 493—Temporary injunction—"Other injury."

Held, that words "or other injury" in section 493 of the Code of Civil Procedure do not include acts of trespass upon property.

THE application of the present appellant in the lower Court was headed "Application under section 493, Civil Procedure Code," and concluded with the following prayer:—

"Therefore it is prayed that by an *ad interim* injunction under section 493 of the Code of Civil Procedure the defendant be prohibited from realizing the amount of decree of rent of the villages in suit and from otherwise interfering in the management of the properties in dispute either by herself or through her mukhtar-ams and karindas."

[450] Babu Jogindro Nath Chaudhri, Pandit Moti Lal Nehru and Babu Satish Chandar Banerji for the Appellants.

Babu Durga Charan Banerji and Pandit Sundar Lal for the Respondents.

Knox, Acting C. J., and Blair, J.—This is an application for an injunction under section 493 of the Code of Civil Procedure. Section 493 applies to suits for restraining a defendant from committing a breach of contract or other injury. It is admitted that the case is not concerned with a breach of contract, but it is sought to construe the words "other injury" as words which might have reference to acts of trespass upon property. There is no authority for such a construction.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

*[This decision is superseded by the Legislature adding the words, 'of any kind' after the word 'injury' in the C. P. C., 1908, O. 39, r. 2, sub-rule (1).]

counsel for Shibcharan and other appellants contended that we could not use it unless there was evidence which, if believed, amounted to proof against his clients. We cannot accede to this contention. We are not prepared to define the exact extent to which, and the circumstances under which, such a confession may be used. The Legislature in using the words which it has placed upon the Statute book obviously intended to confer a wide discretion upon Courts and to leave them to appraise the value of such a confession. We are not prepared to say that it might not have been used in the present case, and so far have supplemented the case against Shibcharan and Behari as to leave no room for doubt. * * *

* First Appeal No. 41 of 1900, from an order of Munshi Sheo Sahai, Additional Subordinate Judge of Saharanpur, dated the 2nd March 1900.

[22 All. 450]

The 16th July, 1900. .

PRESENT :

MR. JUSTICE KNOX, ACTING C. J., AND MR. JUSTICE BLAIR.

Mahabir Prasad.....Objector

versus

Partab Chand.....Opposite Party.*

*Civil Procedure Code, section 244—Parties to the suit or their representatives—
Purchaser at auction sale.*

Where a decree-holder who had obtained a decree and order under sections 88, 89 of the Transfer of Property Act over certain property, proceeded to attach it in execution of his decree : *Held*, that a third party who had bought the rights and interests of the judgment-debtors at an auction sale held in consequence of a money decree was not a legal representative of the judgment-debtors so as to entitle him to be heard under section 244 of the Code of Civil Procedure at the execution proceedings. *Sabhajit v. Sri Gopal*, (1894) I. L. R., 17 All., 222, F. B., followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683, P. C., distinguished.

THE facts appear sufficiently from the judgment.

Babu Parbati Charan Chatterji for the Appellant.

Pandit Madan Mohan Malaviya, Babu Datti Lal and Babu Davendro Nath Ohdedar for the Respondent.

Knox, Acting C. J., and Blair, J.— This appeal arises out of an application for execution of a decree. The decree-holder is one Rai Bahadur Partab Chand ; the judgment-debtors are persons with whose names we are not concerned. The rights and interests, however, of these judgment-debtors in certain property were purchased at an auction sale held in consequence of a [451] money decree. At that sale those rights and interests were purchased by Rai Bahadur Mahabir Prasad Narain Singh, the appellant. Upon Rai Bahadur Partab Chand attaching the same property over which he had obtained first a conditional decree under section 88, and then an order absolute under section 89 of the Transfer of Property Act, Rai Bahadur Mahabir Prasad Narain Singh intervened and asked to be heard as the representative of the judgment-debtors in Rai Bahadur Partab Chand's decree. His application has been rejected by both the Courts below ; it has also been rejected by this Court upon the ground that a Full Bench of this Court in *Sabhajit v. Sri Gopal*, (1894) I. L. R., 17 All., 222, F. B., held that a purchaser at an auction sale is not a representative of the judgment-debtor, whose interests he has purchased, within the meaning of section 244 of the Code of Civil Procedure.

We should have thought the matter not open to any further question. The learned vakil, however, who appears on behalf of the objector, sought to establish that this Full Bench ruling was in derogation of what their Lordships of the Privy Council laid down in *Prosunno Kumar Sanyal v. Kali Das Sanyal*, (1892) I. L. R., 19 Cal., 683, P. C. We have carefully examined that case : what was therein laid down was this—that when a question arises between the parties to a decree relating to its execution, discharge or satisfaction, the fact that the purchaser, who is no party in the suit, is interested in the result, has never been held as a bar to the application of section 244. This in no way affects what was held by this Court in *Sabhajit v. Sri Gopal*, (1894) I. L. R., 17 All., 222, F. B. In this case the parties to the suit were the parties to the

* Appeal No. 10 of 1900, under section 10 of the Letters Patent.

proceedings ; added to them was the purchaser, not as a representative of one of the parties, but as a looker-on interested in the result. Here the question which has to be decided is not one in which the judgment-debtor is any longer interested ; in other words, it is not a question arising between the parties to the suit, and section 244 has no application.

We dismiss the appeal with costs.

Appeal dismissed.

NOTES.

[A purchaser at an execution sale is a representative of the judgment-debtor :—(1908) 30 All., 379. See also (1908) 31 All., 82 ; (1908) 30 All., 231 ; (1904) 26 All., 447.]

[452] *The 16th July, 1900.*

PRESENT :

MR. JUSTICE BURKITT AND MR. JUSTICE HENDERSON.

Beni Madho Das.....Plaintiff

versus

Kaunsal Kishor Dhusar.....Defendant.*

Act No. IX of 1872 (Indian Contract Act), section 30—Loan to facilitate gambling—Loan to aid in paying off gambling debt—Contract not tainted with immorality.

Held that the fact that the object with which the plaintiff lent money to the defendant was to enable him to pay off a gambling debt, did not taint the transaction with immorality so as to disentitle the plaintiff to recover.

THE facts appear sufficiently from the judgment of the Court.

Pandit *Moti Lal Nehru*, and *Babu Durga Charan Banerji*, for the Appellant.
Mr. *Dwarka Nath Banerji*, for the Respondent.

Burkitt and Henderson, JJ.—In this case we are unable to concur with the decision of the Lower Appellate Court.

The facts briefly are that, on the 20th November 1896, several persons, including the defendant-respondent—persons described by the Lower Appellate Court as being men of high social standing and considerable wealth—met together at the house of the plaintiff-appellant, and gambling ensued ; but in that gambling the plaintiff-appellant took no part whatsoever. From time to time it would appear that the defendant-respondent lost certain sums of money, and in order to pay those he borrowed from the plaintiff up to Rs. 4,000, which he promised to repay. This fact is distinctly found by the Lower Appellate Court, which finds that the money was borrowed by respondent to pay his gambling debts. The Lower Appellate Court very properly finds that the agreement between the plaintiff and defendant was not by way of wager, and therefore not void under section 30 of the Contract Act ; and it further finds that the agreement by the defendant-respondent to repay Rs. 4,000 was in consideration of that sum having been lent to him at his request by the plaintiff ; and the Court further found that that consideration as it stood was not in itself unlawful or immoral. On those findings one would have expected that the Lower Appellate Court would have given a decree to the plaintiff. The learned District Judge, however,

* Second Appeal No. 430 of 1898, from a decree of Mr. E. O. E. Leggatt, District Judge of Mirzapur, dated the 6th April 1898, reversing a decree of *Babu Jai Lal*, Officiating Subordinate Judge of Mirzapur, dated the 10th May 1897.

came to the conclusion that [453] the general object of the plaintiff in lending money was to facilitate gambling, and that every loan had this object in view, and every agreement to repay carried the same taint; and each contract had as its general defect the facilitation and promotion of gambling at the plaintiff's house.

In those remarks we are unable to concur with the learned Judge of the Court below. The object of the one series of transactions with which we are concerned here was to enable the respondent to pay off his gambling debt as is found by the Court below. The consideration for the agreement was the promise made by the defendant to repay the money on demand. We do not see how the remarks of the Judge as to the general object the plaintiff had in lending the money affects the case. The Judge finds that the object or the consideration—for they are only different names for the same thing seen from a different point of view—was not of itself unlawful or immoral. In our opinion to lend money for the purpose of paying off a gambling debt with a knowledge of it being applied for payment of such a debt cannot be considered to be an immoral act. We think the Court below ought not to have reversed the judgment given in favour of the plaintiff by the Court of First Instance. We therefore allow this appeal and restore the decision of the Court of First Instance. Appellant is entitled to his costs in this Court.

Appeal decreed.

[22 All. 453]

The 16th July, 1900.

PRESENT :

MR. JUSTICE BANERJI AND MR. JUSTICE AIKMAN.

Wahid-un-Nissa and others.....Defendants
versus

Gobardhan Das.....Plaintiff.*

*Mortgage—Puisne mortgagee not made party to suit by prior mortgagee—
Subsequent suit by puisne mortgagee—Apportionment of redemption
money—Third parties, purchasers.*

A prior mortgagee, K, obtained a decree in a suit upon his mortgage, to which suit a puisne mortgagee, G, was not made a party and subsequently one, B, attached the decree, and, having put up the property for sale, purchased it himself. G, the puisne mortgagee, having brought a suit for redemption of K's mortgage and sale of the property, K sold his rights to P, who was thereupon added as a defendant. G obtained a decree for redemption and sale.

[454] Held per BANERJI, J., that P was entitled to the whole amount which G had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase-money paid by B at the auction sale, which amount, and which amount only, would be due to B or his representatives. *Dip Narain Singh v. Hira Singh*, (1897) I. L. R., 19 All., 527, and *Baldeo Bharthi v. Hushiar Singh*, Weekly Notes, 1895, p. 45, approved.

* Second Appeal No. 832 of 1897, from a decree of L. G. Evans, Esq., District Judge of Aligarh, dated the 6th August 1897, modifying a decree of Babu Anant Ram, Subordinate Judge of Aligarh, dated the 30th September 1896.

Held per AIKMAN, J., that the auction purchaser, *B* (or his representatives), was entitled to the whole amount to be paid by *G* for redemption of the first mortgage. *Dip Narain Singh v. Hira Singh*, (1897) L. L. R., 19 All., 527, dissented from, and *Baldeo Bharthi v. Hushiar Singh*, Weekly Notes, 1895, p. 45, distinguished.

THE facts of the case sufficiently appear from the judgment of either of their lordships.

Messrs. *Abdul Raoof and Karamat Husain*, for the Appellants.

Mr. *D. N. Banerji*, Babu *Jogindro Nath Chaudhri*, Pandit *Sundar Lal* and Pandit *Moti Lal Nehru*, for the Respondent.

Banerji, J.—This appeal has been brought in a suit which arose out of the following facts :—

On the 19th April 1878, Mussammats *Habiban* and *Bina* made a simple mortgage of 544 bighas 2 biswas in favour of *Kaim Ali Khan*, *Mazhar Ali Khan* and *Nazar Ali Khan* for Rs. 1,500, and on the 29th January 1886, *Habiban* alone mortgaged a fourth share of the same property to one *Gobind Ram*. She subsequently made two other mortgages, to which it is not necessary to refer.

The first mortgagees brought a suit upon their mortgage against one of the mortgagors and the heirs of the other, and obtained a decree for sale on the 1st August 1889. The decree is No. 72 of 1889, and the amount of it was Rs. 3,306-14-6. The puisne mortgagees were not joined as parties to the suit.

Bansidhar, one of the defendants in the present suit, held a simple decree for money against *Kaim Ali* and others, the first mortgagees, and in execution thereof caused the aforesaid decree to be attached. As attaching creditor he took out execution of the decree, caused the mortgaged property to be sold by auction on the 24th March 1894, and purchased it himself for Rs. 1,050. On the 24th November 1894, he sold the said property to *Wahid-un-nissa* and *Jan Muhammad*, defendants, for Rs. 4,400, and [455] those persons, on the same date, made a usufructuary mortgage of it to *Dungar Singh* and others, defendants, fourth party, for Rs. 6,000. These defendants are admitted to be in possession of the property.

Gobind Ram, the second mortgagee, brought a suit for sale upon his mortgage, and obtained a decree on the 23rd February 1892. When, in execution of that decree, he sought to bring the mortgaged property to sale, he was not permitted to do so by reason of the prior sale of the 24th March 1894. He thereupon assigned his decree to the present plaintiff, *Gobardhan Das*, on the 4th November 1894, and the latter, as the assignee of the decree, brought the present suit on the 7th December 1894.

The ground of his claim is that, as *Gobind Ram* was not made a party to the suit brought by the first mortgagees, the decree obtained in that suit, and the auction sale held in execution of the decree, are not binding on him; that, as subsequent mortgagee of the property, he had still the right to redeem the first mortgage, and that by virtue of the assignment made to the plaintiff, the plaintiff is entitled to redeem the said mortgage. He prayed for a decree for redemption of the mortgage of 1878 upon payment of Rs. 1,050, the amount of sale consideration paid for the mortgaged property, or such other sum as the Court might declare to be payable, and for possession of the property comprised in the first mortgage.

On the 17th December 1894, that is, after the institution of the present suit, the first mortgagees, *Kaim Ali* and others, conveyed to *Prasadi Lal* all their rights under the mortgage of 1878, and the decree obtained upon that

mortgage. Prasadi Lal was thereupon added as a defendant to the suit and is now arrayed as defendant, fifth party.

Wahid-un-nissa and Jan Muhammad denied the right of Gobind Ram and the plaintiff to redeem the first mortgage and asserted that as Gobind Ram was the mortgagee of only one-fourth of the property, the claim to redeem the remaining three-fourths was not maintainable and that redemption could take place, if at all, upon payment of the whole amount due under the mortgage, of 1878, which they alleged to be Rs. 9,182-0-6, and not upon payment of the sale price.

[456] The defence of Dungar Singh and others, mortgagees from the above defendants, was very similar, the only difference being that they alleged a larger sum to be due upon the first mortgage.

Prasadi Lal urged that the plaintiff was not entitled to redeem except upon payment of the whole amount due upon the mortgage, and he claimed to be entitled to the whole of that amount with the exception of Rs. 1,050, the amount of consideration paid by Bansidhar.

The Court of First Instance was of opinion that as Gobind Ram was the mortgagee of a fourth share of the property, the plaintiff was entitled to redeem that share only, on payment of a fourth part of the mortgage money, which the parties admitted amounted to Rs. 10,000 on the date of the decree of that Court. The claim for possession was dismissed, and a decree was made for sale upon payment of Rs. 2,500, to which it declared Prasadi Lal not to be entitled.

From this decree the plaintiff appealed, and Prasadi Lal preferred objections under section 561 of the Code of Civil Procedure.

The Lower Appellate Court referred certain issues to the Court of First Instance under section 566 of the Code, and ultimately held that the plaintiff was entitled to redeem the whole of the property in suit upon payment of Rs. 10,000 admitted to be due upon the first mortgage on the 30th September 1896, and further interest on the said amount up to the date of the decree of the appellate Court. The learned Judge next proceeded to consider the respective rights of the rival defendants to the said amount, and came to the conclusion that the present appellants were entitled to Rs. 1,050 paid by Bansidhar and interest on that amount, and that Prasadi Lal, as representing the first mortgagees, was entitled to the balance. He also held that the plaintiff should be granted a decree for sale, and accordingly made the decree from which this appeal has been preferred.

Various pleas were taken in the memorandum of appeal, but most of them have been abandoned. The pleas which the learned counsel for the appellants has urged before us are the third, the sixth and the seventh.

[457] It is contended that, as the suit was one for redemption, a decree for sale should not have been made. This might have been a valid plea had the appellants not submitted to the decree for sale made by the Court of First Instance. They did not appeal from that decree, and it appears from the judgment of the Lower Appellate Court that in the first Court they consented to a decree for sale being passed. Further, as the plaintiff, as representing the puisne mortgagee, is not entitled, according to the rulings of this Court, to sell under his mortgage without redeeming the prior mortgage, and as the ultimate object of his suit was that he might be in a position to sell under his mortgage, a decree for sale in the present suit would not prejudice any of the parties, and would prevent further litigation. I am not therefore prepared to accept this plea of the appellants.

The seventh plea, which is to the effect that Prasadi Lal, defendant, had no *locus standi* in the suit is, in my opinion, untenable. As has been already stated, the decree obtained by the first mortgagees, Kaim Ali Khan and others, on the 1st August 1889, upon their mortgage of the 19th April 1878, was for Rs. 3,306-14-6. Bansidhar, who caused that decree to be attached and the mortgaged property to be sold, realized Rs. 1,050 only out of the amount of that decree. This sum appears to have sufficed to satisfy his own decree, but a large amount was still due upon the decree to which the first mortgagees, Kaim Ali Khan and others, were entitled. Both parties admitted in the Courts below that Rs. 10,000 was recoverable under the said decree. It cannot therefore be said that the first mortgagees had no right left which they purported to transfer on the 17th December 1894 to Prasadi Lal. After the sale, which Bansidhar caused to be effected on the 24th March 1894, the first mortgagees had subsisting rights under their decree of the 1st August 1889; and as they transferred those rights to Prasadi Lal, the latter has stepped into the shoes of the first mortgagees, and is now their representative in interest. This representative status of Prasadi Lal was, I may observe, never questioned in either of the Courts below, and no issue was raised on that point. The only question which was discussed in the Lower Appellate Court as affecting Prasadi Lal was, whether he was entitled, as the representative [458] of the first mortgagees, to any part of the mortgage money which the plaintiff was bound to pay for redeeming the first mortgage. That is the question to which counsel on both sides chiefly confined their able and elaborate arguments in this Court, and that is the principal question which we have to determine in this appeal.

In my opinion it was not necessary, for the purpose of granting the relief to which the plaintiff was entitled, to determine the rival claims of the persons who alleged that they were entitled to the mortgage money. It was enough for the plaintiff to pay that money into Court, leaving it to the claimants of that money to have their respective rights to it determined in a suit of their own. This would have obviated the necessity of following the ordinarily unusual course of determining the rights *inter se* of persons arrayed in the suit as co-defendants. However, as the Lower Appellate Court has apportioned the mortgage money between different sets of defendants, and as both parties desire that the matter should be determined in this suit so as to avoid further litigation, I do not think we should decline to decide the question of apportionment.

The learned Judge of the Lower Appellate Court has held that as the purchase of the mortgaged property by Bansidhar, whom the appellants before us represent, discharged the decree obtained by the first mortgagees upon their prior mortgage to the extent of Rs. 1,050 only, and as a large portion of the amount of that decree still remains unsatisfied, the present appellants are entitled only to the aforesaid sum of Rs. 1,050 and interest thereon, and that the balance of the mortgage money should be paid to Prasadi Lal, who now represents the first mortgagees. In support of that view he has referred to some observations made by my brother AIKMAN and myself in our judgment in the case of *Dip Narain Singh v. Hira Singh*, (1897) I. L. R., 19 All., 527. In that judgment we said:—"Had a third party purchased the property and had his purchase money discharged the prior mortgage in full, he would undoubtedly have been entitled to claim that a subsequent mortgagee who, by reason of his not being a party to the prior mortgagee's suit, had the right to redeem him, must pay him the full amount of the prior [459] mortgage. But if the purchase money paid by such a purchaser did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole amount of the prior mortgage.

The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage; but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of the mortgage money is due. When there are more purchasers than one, the apportionment should be made between them *pro rata*, and the balance should go to the mortgagee." These observations fully bear out the conclusion of the learned Judge, which is further supported by the ruling of EDGE, C. J., and myself in *Baldeo Bharthi v. Hushiar Singh*, Weekly Notes, 1895, p. 45. If the view expressed in the above cases is correct, the apportionment ordered by the Court below is unimpeachable, and this appeal must fail. It is, however, argued that the question before us did not directly arise in, at least, the first of the two cases referred to above, and being thus an open question, should be considered and decided by us again. This is no doubt true, but I consider it highly inexpedient that the decisions of the highest Court in the Province should be frequently altered, and title acquired on reliance on those decisions thus unsettled and shaken. Unless, therefore, it is established that a decision already given after careful consideration is grossly erroneous, I should be loath to depart from it, even if its correctness may be open to question, and even if the opinion expressed in it is only *obiter*. It is contended that the view taken in one of the two cases mentioned above by my brother AIKMAN and myself, and that taken by Sir JOHN EDGE and myself in the other, are erroneous and not warranted by law. No case, reported or unreported, has been cited to us in which this or any other High Court has held or expressed a different opinion, and no authority has been referred to which bears directly on the point and shows conclusively that this Court erred in making the observations contained in the judgments pronounced in the two cases mentioned above. Speaking for myself, I must say that I have heard nothing in the argument addressed to us which induces me to alter the opinion I [460] have already expressed on the point, and to think that it is contrary to any specific provision of law, or to any rule of justice, equity and good conscience, according to which the Courts in these Provinces are bound to act. And I may add that after an anxious consideration of all that has been said in this case I still adhere to that opinion.

I need hardly mention that in every suit for sale brought by a prior mortgagee a puisne mortgagee, of whose interests the plaintiff has notice, should, under section 85 of the Transfer of Property Act, 1882, be joined as a party in order that he may be afforded an opportunity to exercise the right of redeeming the prior mortgage which, as subsequent mortgagee, he possesses. Where, therefore, a prior mortgagee has obtained a decree for sale without making the subsequent mortgagee a party to his suit, the right of redemption of the latter does not become extinct and he is entitled to exercise it even after a sale has taken place in execution of the decree obtained upon the prior mortgage. He must, according to the rulings of this Court, "be placed in the same position he would have held had he been a party to that litigation." Having been relegated to the position which he would have occupied had he been a party to the suit, he could redeem the prior mortgage only upon payment of the whole amount due upon the mortgage. This is conceded on both sides, and is what was held in *Dip Narain Singh v. Hira Singh*, (1897) I. L. R., 19 All., 527. When such payment is made after a sale has taken place under the first mortgagee's decree, the question arises—Who is entitled to the amount paid? That is the question which we have to decide in this appeal.

There can be no doubt that if the first mortgagee himself has purchased the mortgaged property, he alone is entitled to the mortgage money. It is also

beyond question that if a stranger, *i.e.*, a person other than the mortgagee, becomes the purchaser, and the price paid by him fully satisfies the amount of the mortgage debt, the whole of the mortgage money should go to him alone, the mortgagee having no longer any right to that money. It is contended that he would be equally entitled to the whole of the mortgage money even if the price paid by him satisfied the [461] mortgage only partially. The reasons advanced in support of this contention are, that upon the making of an order for sale under section 89 of the Transfer of Property Act, 1882, the mortgage security becomes extinct; that after an auction sale has taken place in pursuance of the order, the mortgagee ceases to have any right in respect of the property sold; that the rights of the mortgagor and mortgagee pass to the purchaser, and that therefore, upon redemption, the purchaser alone is entitled to the mortgage money. In the first place, this argument assumes that the purchaser is in substance an assignee of the mortgage, which he certainly is not. In the next place, it overlooks the very nature of a mortgage and the rights of the mortgagee. Every mortgage presupposes the existence of a debt, and it is for the purpose of securing the repayment of the debt that a mortgage of property is made. In every simple mortgage, unless there is a specific covenant to the contrary, there is a personal obligation upon the mortgagor to pay the debt, and there is also the liability of the mortgaged property for the debt. So that the security for the debt is two-fold, namely, first, the personal security of the mortgagor, and next, the security of the property. The liability of each kind of security is to the extent of the whole amount of the debt. It is for this reason that, when a person entitled to redeem seeks to redeem the mortgage, he must pay the whole amount due for the time being upon the mortgage. It is for the same reason that when the proceeds of the sale of the mortgaged property are insufficient to pay the amount due on the mortgage, the mortgagee is declared entitled to obtain under section 90 of the Transfer of Property Act a decree for the balance, provided, of course, that his right to the balance has not been extinguished by the operation of limitation or for any other reason. The debt, that is, the principal money advanced by way of loan and interest thereon, called the mortgage money in section 58 of the said Act, being the sum which must be paid in order to obtain redemption, the creditor, that is, the mortgagee, is the person who would ordinarily be entitled to get that sum. If a person other than the mortgagor entitled to make such payment, *e.g.*, a purchaser of the mortgaged property, has paid off the whole amount of the debt, he, and not the mortgagee, would be entitled to the whole of the [462] money paid for redemption. But if such other person has paid only a part of the debt due to and recoverable by the mortgagee, I fail to see under what principle of law or equity he would have the right to appropriate any sum in excess of the amount paid by him. If the appellants' contention is correct, such person would be entitled to the whole of the money paid for redemption. As, however, in the case supposed, a part only of the debt due to the first mortgagee had been discharged, the right of the first mortgagee to recover the balance due to him would still subsist. When, therefore, he realizes the amount of the balance, as he is entitled to do, the result will be that the amount of the same debt will have been recovered twice over—a result which no Court of Justice should countenance or sanction. Another and a more serious anomaly will arise if the appellants' contention be accepted. The subsequent mortgagee who redeems a prior mortgage is entitled to add to the amount of his own mortgage the amount of the prior mortgage and to recover the total sum from his mortgagor and the mortgaged property. If the proceeds of the sale of the mortgaged property prove insufficient for the realization of that sum, he will be able to recover the balance from the mortgagor

by obtaining a decree under section 90 of the Transfer of Property Act. If the whole amount of the prior mortgage be paid to the purchaser of the property, the first mortgagee, whose debt would remain unsatisfied, would, according to the learned counsel for the appellants, also have the right to realize, by means of a decree under section 90, the balance due to him. This right, the learned counsel said, was a safeguard of the interest of the first mortgagee. So that the mortgagor may have to pay the same amount twice over, that is, once to the first mortgagee and again to the subsequent mortgagee. I need hardly say that I do not feel myself justified in adopting a view which will work such injustice.

If, again, we turn to the case of the mortgagee, similar injustice will be done to him in the event of the whole of the mortgage money being paid to the auction purchaser. When the subsequent mortgagee has redeemed the first mortgage by paying into Court the whole of the purchase money, the first mortgagee is not, in my opinion, entitled to obtain a decree under section 90, on the ground that he has realized by the sale of the mortgaged property [463] only a part of the debt; for when the mortgage has been fully redeemed by payment of the mortgage money into Court, it cannot possibly be said that a balance is still due upon the mortgage. The consequence will therefore be that, although the first mortgagee to whom a portion of the debt is due has not actually realized it, he will be wholly without a remedy in respect of that portion.

Now, let us see whether the view adopted by the learned Judge will lead to similar injustice or anything approaching it. The learned Judge has directed that the appellants should get the amount which Bansidhar, their predecessor in title, paid for the property, and interest on that amount from the date of his purchase. He has thus awarded the sum by which the purchaser was actually out of pocket. The purchaser has suffered no loss, and his only loss, if it may be called a loss, is that of the gain which he expected to derive from an apparently speculative purchase. When property is purchased under circumstances similar to those of the present case, the purchaser makes his purchase subject to the risk of its being defeated by the second mortgagee who was omitted from the first mortgagee's suit, and to the risk of his having to surrender the property upon the first mortgage being redeemed by the puisne mortgagee. It is not likely that a purchaser under such circumstances would pay full value for the property. If he has to give up the property for which, in the ordinary course of things, he must have paid inadequate value, and he is compensated by the payment to him of the money which he paid as the value of the property, I do not see that any hardship is done to him. If the property is of large value, sufficient to cover the amounts payable under both the first mortgage and the second mortgage, and he prefers to retain it and for that purpose has to pay the amounts of the two mortgages, he suffers no loss, because he receives back the amount of the purchase money already paid by him, and for the balance he gets an adequate equivalent in the property itself. The present case appears to me to be an apt illustration in point. Bansidhar purchased the property in question after Gobind Ram, the second mortgagee, had obtained his decree. That decree was apparently in course of execution when the auction sale at which Bansidhar [464] purchased took place, for we find that the said sale was confirmed after the postponement of the sale which had been ordered in execution of Gobind Ram's decree. Bansidhar, who, as attaching creditor, was himself executing the decree obtained on the first mortgage, must have known that in making the purchase he was undertaking a risk, namely, that of the sale being ignored by Gobind Ram, who was not a party to the first mortgagee's suit. He paid for the property a price which was evidently much below its proper

value. He himself sold it immediately afterwards for more than four times the value he had paid for it, and it appears to have been admitted in this suit that the property was well worth Rs. 10,000. A person who purchased property of such value for Rs. 1,050 only cannot reasonably complain if he has to surrender the property upon getting back what he actually paid. And the appellants are in no better position than the person from whom they derive their title. It is true that if, under such circumstances, the purchaser has to surrender the property, he derives no benefit, but as he sustains no loss and as the benefit he expected to derive was that arising from a speculative purchase, he is not entitled to any sympathy. In my opinion the mode in which the Court below has apportioned the mortgage money is more in consonance with justice and equity than that contended for on behalf of the appellants.

It is strenuously argued on behalf of the appellants that after the sale under the first mortgage the first mortgagee ceased to have any right to the property, that it is because the property has passed to the purchaser and he objects to its being sold in satisfaction of the second mortgage that the second mortgagee is under the necessity of redeeming the first mortgage, that the mortgage money paid by the second mortgagee is paid by him in order to make the property available to him for the realization of the amount of his mortgage, and that the person who holds the property is therefore the only person who is entitled to the mortgage money paid by the second mortgagee. It is further urged that when the mortgagee asks for any portion of that money he seeks to resort to a source which he has already exhausted by causing the property to be sold. This contention might probably [465] have been valid had the property been the only security for the mortgage debt, and the only source from which that debt could be recovered. But as has been already said, the security for the mortgage debt is, in the absence of a specific contract to the contrary, not only the security of the property, but also the personal obligation of the mortgagor to pay the debt, and the liability for the whole amount of the debt attaches to each of these securities.

A puisne mortgagee who was not a party to the first mortgagee's suit and had no opportunity of redeeming the first mortgage has to pay the full amount of the debt because he is bound to pay the amount which he would have had to pay had he been made a party, and there can be no question that he would have had to pay the full amount of the mortgage money due for the time being, inasmuch as that amount would have been recoverable from the property also. Where the first mortgagee has realized only a part of the debt by the sale of the property, that is, by enforcing the security of the property, there is still a balance due to him which he can realize by enforcing the other security. It follows that when the subsequent mortgagee pays the full amount of the debt and thereby totally discharges the debt, the person to whom the balance is due, that is, the first mortgagee, is the person who has the right to appropriate that portion of the money paid by the subsequent mortgagee which represents the balance, the purchaser whose purchase money has satisfied the remainder of the debt being entitled to the remainder of the money paid by the subsequent mortgagee. There can be no doubt that if in such a case the purchaser cannot hold up the payment made by him as a shield for his protection to the full extent of the mortgage money, he is not entitled to the whole of that money. It is, however, said that such a purchaser is entitled to use the first mortgage as a shield to the extent of the whole amount of that mortgage, but no authority has been cited in support of this contention. The contrary view was held in *Baldeo Bharthi v. Hushiar Singh*, Weekly Notes, 1895, p. 45. It does not appear to me to be reasonable that the

purchaser should be awarded an amount which he never paid. The money paid by the second mortgagee does not [466] consist of the proceeds of the mortgaged property, nor is it paid as an equivalent of the value of the said property. That money cannot, therefore, be regarded as derived from the source which has already been exhausted by the auction sale which has taken place in execution of the first mortgagee's decree. This case is not a case in which, under the contract of mortgage, the property was the only security for the debt. The second mortgagee, it is true, pays the mortgage money because of his interest in the property, but, as has been already pointed out, he does not pay it as solely representing the value of the security of the property. The fact of his ignoring the auction sale and offering to redeem the first mortgage does not revive the debt, because the debt had never been extinguished, and it is not on the ground of the revival of the debt that the first mortgagee can get the balance due to him. A comparison of the provisions of section 89 of the Transfer of Property Act with those of section 87 shows that an auction sale of the mortgaged property does not extinguish the debt, although it extinguishes the security as between the mortgagor and the mortgagee. No doubt the first mortgagee cannot proceed against the mortgaged property any longer, but I see no reason why he should be deprived of the money which is undoubtedly due to him because the person who purchased the mortgaged property took with his eyes open a defeasible title, and evidently paid for the property a value much below the value which it would otherwise have fetched. For the above reasons I see no valid grounds for departing from the view which my learned colleague and myself expressed, after careful and mature consideration, in *Dip Narain Singh v. Hira Singh*, (1897) I. L. R., 19 All., 527, at p. 534. I am not aware of any ruling in which a different view was adopted, and, as I have already said, none was cited to us at the hearing. All the cases bearing on the point which I have been able to find in the reports are cases in which the purchaser had fully discharged the prior mortgage. I am unable to hold that upon considerations either of law or of equity the conclusion at which the Court below has arrived as to the apportionment of the mortgage money is erroneous. I would therefore dismiss the appeal with costs.

[467] The objections preferred under section 561 of the Code of Civil Procedure by the plaintiff and by Prasadi Lal are, in my judgment, untenable. As the plaintiff in his claim distinctly asked for possession, to which, it is admitted, he was not entitled, the learned Judge was justified in refusing to allow him his costs of the suit.

I think the award of interest on the purchase money paid by Bansidhar which has been decreed to the appellants was under the circumstances of the case, equitable. I would therefore also dismiss the objections under section 561 with costs.

I would extend the time for payment to the 15th of January 1901.

Aikman, J.—The facts which gave rise to the suit out of which this appeal has arisen are somewhat complicated. On the 19th of April 1878, the owners of certain property situated in the village of Barka, in the Aligarh district, mortgaged it to Kaim Ali Khan and two others, described in the plaint as defendants, first party, as security for a loan of Rs. 1,500. On 29th January 1886, one-fourth of the same property was mortgaged to one Gobind Ram as security for a loan of Rs. 325.

On 1st August 1889, the first mortgagees got a decree for sale on their mortgage in a suit to which they had not made Gobind Ram a party.

On 23rd February 1892, Gobind Ram in a suit in which he impleaded Ganga Ram and Dungar Singh, in whose favour mortgages of portions of the

property had been executed subsequent to his mortgage, obtained a decree for sale under his mortgage of the 29th January 1886.

• The decree obtained by the defendants, first party, was attached by one Bansidhar, defendant, second party, in execution of a simple money decree he held against them. The mortgage decree was put in execution, and on the 24th March 1894, the mortgaged property was sold by auction and purchased by Bansidhar for the sum of Rs. 1,050.

Eight months afterwards Bansidhar sold the property for Rs. 4,400 to Jan Muhammad Khan and Musammat Wahid-un-nissa, defendants, third party, who forthwith executed a usufructuary mortgage of it in favour of Dungar Singh and others, defendants, fourth party.

[468] On 4th December 1894, Gobind Ram, the second mortgagee, sold his decree to Gobardhan Das, the plaintiff in the present suit, for Rs. 840-6-9. The plaintiff alleges that Gobind Ram not having been made a party to the suit in which the decree on the first mortgage was obtained, did not lose his right to redeem that mortgage, which right has passed to him, the plaintiff.

The relief which the plaintiff asked for in this suit was a decree for possession of the property covered by the first mortgage on payment of Rs. 1,050, the amount fetched at the auction sale, or any sum the Court might adjudge to be proper. To this prayer the words "and by redemption of the mortgage" are added. The plaintiff also adds a prayer for any other relief which, under the circumstances of the case, he might be held entitled to.

The present suit was instituted on the 8th December 1894. On the 17th December 1894, the defendants, first party, sold to one Prasadi Lal any rights they had under their mortgage deed of 19th April 1878, and decree of 1st August 1889, and Prasadi Lal was made a defendant to the suit. On 8th February 1894, he filed a written statement, alleging that the sum of Rs. 9,590-4-0 was due under the mortgage deed, and that plaintiff was not entitled to redeem the mortgaged property until he had paid him (Prasadi) that amount.

The Lower Appellate Court has made a decree in favour of the plaintiff, declaring that if he pays into Court the sum of Rs. 11,020 in discharge of the first mortgage, he shall be entitled to bring to sale the property covered by the first mortgage in order to realize both this sum of Rs. 11,020 and the amount due under the decree of 23rd February 1892, which was passed in favour of plaintiff's predecessor in title, the second mortgagee. Out of the amount of Rs. 11,020 directed to be paid into Court in redemption of the first mortgage, the Lower Appellate Court has ordered that the representatives of the auction purchaser under the decree on the first mortgage shall receive only the amount paid at the auction sale with interest, and that the balance shall go to Prasadi, the assignee of the rights of the first mortgagees. The representatives in title of the auction purchaser come here in second appeal.

[469] The main plea urged in this appeal is that the apportionment of the Rs. 11,020 made by the Lower Appellate Court is wrong. It is contended that the assignee of the first mortgagees is not entitled to any part of this amount, the whole of which, it is urged, should go to the representatives in title of the auction purchaser. The question as to who is entitled to the money to be paid in redemption of the first mortgage was the subject of long and able argument at the bar.

The learned District Judge refers in support of his decision to a passage in a judgment of this Court in case of *Dip Narain Singh v. Hira Singh*, (1897) I. L. R., 19 All., 527. The passage relied upon by the District Judge is as

follows:—"If the purchase money paid by such a purchaser (*i. e.*, a third party buying at a sale in execution of a decree on a prior mortgage) did not fully satisfy the amount of the prior mortgage, he is not entitled, upon redemption by a puisne mortgagee, to the whole of the amount of the prior mortgage. The subsequent mortgagee would, in our opinion, have to pay the full amount due upon the prior mortgage, but that amount would be apportioned between the purchaser, whose purchase money satisfied the mortgage in part, and the mortgagee to whom the balance of mortgage money is due." Now it must be admitted that the above passage fully supports the order which the District Judge has made as to the apportionment of the money to be paid in redemption of the first mortgage. But a reference to the rest of the judgment will show that the opinion expressed in the passage cited was not necessary for the decision of the case before the Court, and must therefore be looked upon as *obiter dictum*. I was a party to the judgment in *Dip Narain Singh v. Hira Singh*, (1897) I. L. R., 19 All., 527. The able argument of the learned counsel for the appellants has satisfied me that the opinion expressed in the passage cited as to how the money should be apportioned is erroneous.

In order to explain the reasons for the view I now take, I will state the present case as follows, disregarding the various devolutions of interest which have taken place, as they only complicate matters and do not affect the decision of the question at issue.

[470] There are on a certain property two mortgages. The holder of the prior mortgage obtains a decree on his mortgage in a suit to which he does not make the second mortgagee a party. This decree is put into execution, the property is sold and purchased by a third party. The puisne mortgagee, not having been made a party to the suit on the first mortgage, has not lost his right under his mortgage. The right is to bring the property to sale in order to realize the amount due on his mortgage. But, as held by this Court, he cannot bring the property to sale until he has redeemed the first mortgage. It has been decided in the case cited above and in other cases that what the puisne mortgagee has to pay is not the amount which the property fetched at auction, but the amount which he would have had to pay had he been made a party to the suit brought by the first mortgagee, that is, the full amount of the mortgage money due on the first mortgage. The question is—Who is to get this amount? It appears to me that the first mortgagee can have no claim whatever to it, and for the following reasons. When the property was sold in execution of a decree passed on the first mortgage, the purchaser got a complete title to the property so far as the first mortgagee and the mortgagor were concerned. The rights of the mortgagor in the property entirely passed away with the sale, and, whatever rights the first mortgagee may have to proceed against the other property of the mortgagor, he has no right to get anything more out of the mortgaged property when once it has been sold in execution of the decree upon his mortgage. The only defect in the purchaser's title to the property is that the property is still liable for the amount of the second mortgage, owing to the second mortgagee not having been made a party to the suit on the first mortgage. When the second mortgagee pays the amount due under the first mortgage, that is only a condition precedent to his getting payment of his money by having the property sold if necessary. Supposing the amount due under the first mortgage is Rs. 10,000, and the amount due under the second mortgage Rs. 800. When the second mortgagee pays in Rs. 10,000 he is entitled to have the property sold, and out of the proceeds he gets Rs. 10,000 plus Rs. 800, the amount of his own debt. It is clear, therefore, that all that he has got is Rs. 800, the amount of his own debt. If he [471] is paid the amount of his own debt, he

has no right to proceed against the mortgaged property. As said above, his redemption of the first mortgage is only a step towards getting in his own money. It is a remarkable fact that in this case the representatives of the auction purchaser in their written statement distinctly said that they were willing to pay any amount found due to the second mortgagee, but no notice whatever is taken by the Courts below of this offer, and the fact that the Courts did not take notice of it is not made a ground of appeal in this Court.

Now, supposing the second mortgagee pays in the amount due under the first mortgage, from what source will this amount ultimately come? It is clear that it will come out of the property, for unless the property is of sufficient value to satisfy both the first and the second mortgagees, the second mortgagee will not, in order to recover a comparatively small sum, as in this case, risk the loss of a very large amount. Now, if the amount paid in by the second mortgagee on account of the first mortgage comes out of the property, what right has the first mortgagee to receive any portion of it? As said above, when the property was sold in execution of the decree on the first mortgage, the right of the first mortgagee to receive anything more *out of the property* came to an end. I have no hesitation in holding that the first mortgagee is not entitled to receive any part of the sum paid by the second mortgagee in order to obtain the privilege of bringing to sale in satisfaction of his own debt a property in which the first mortgagee has ceased to have any interest, and which belongs solely to the auction purchaser, subject only to the liability to satisfy the second mortgage.

In the course of the argument stress was laid on the fact that the auction purchaser bought the property, when sold in execution of the decree on the first mortgage, for a very low price. I do not think this ought to affect the question we have to decide. He bought at a public auction—no fraud is attributed to him, and if he got a valuable property at a small price, that was his good fortune. For aught we know, Prasadi, who purchased the decree-holders' rights during the pendency of this suit, may have [472] paid a still smaller price, but what the price was we are unable to say, as the copy of the sale-deed filed by him has somehow disappeared from the record.

It was also urged in argument that payment of the whole amount to the auction purchaser would affect the first mortgagee's rights under section 90 of Act No. IV of 1882. In my judgment the first mortgagee's rights under section 90 would not be affected. But whether or not, he is not, in my opinion, entitled to get any further sum out of the mortgaged property than was realized when it was sold in execution of the decree on his mortgage.

For the respondent, Prasadi, reliance was placed on a decision of this Court in the case of *Baldeo Bharthi v. Hushiar Singh*, Weekly Notes, 1895, p. 45. The facts of that case differ from those of the present, for, as is observed in the judgment, the first decree was not a decree for sale.

In this case the plaintiff as assignee of a second mortgagee, who had lent a sum of Rs. 325 on the security of one-fourth of the property mortgaged in the first deed of mortgage, prayed to be put in possession of the whole of the mortgaged property on payment of the amount realized at the auction sale. The second mortgage was a simple mortgage, and the above relief was one to which it is clear the plaintiff was not entitled. But he also asked for any other relief to which, under the circumstances of the case, he might be found to be entitled. With reference to this prayer I am of opinion that the Court below was justified in passing a decree for sale on redemption of the first mortgage. But, as set forth above, I differ from the Lower Appellate Court as to the manner in which the money to be paid by the plaintiff before he can

sell the property in satisfaction, should be disposed of. I would sustain the 6th and 7th grounds of the memorandum of appeal to this Court, and hold that the money ought to go to the representatives of the auction purchaser, inasmuch as Prasadi by his sale-deed only acquired such rights as the first mortgagees may have to proceed under section 90 of the Transfer of Property Act, and did not acquire any right to money which would come out of the mortgaged property, seeing that any rights [473] which his assignors had over that property disappeared when it was sold in execution of their decree.

I would modify the decree of the lower Court by directing that the whole of the money to be paid by the plaintiff for redemption of the first mortgage shall go to the appellants, the representatives of the auction purchaser, and I would allow them the costs of their appeal.

There is an objection filed by the plaintiff-respondent to the order of the lower Court in regard to costs. I would not interfere with that order, which was within the discretion of the lower Court, and would dismiss the objection with costs.

BY THE COURT—

Under the second paragraph of section 575 of the Code of Civil Procedure the decree of the Court below is affirmed, and the appeal and the objections under section 561 are dismissed with costs. The time for payment of the mortgage-money is extended to the 15th of January 1901.

Appeal dismissed.

NOTES.

[Owing to the difference of opinion there was an appeal to the Full Bench, which affirmed the judgment of BANERJI, J.:—(1903) 25 All., 358 F. B. See also (1907) 11 C. W. N., 403 : 5 C. L. J., 315; (1906) 29 Mad., 491.]

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XV of 1856—

s. 2. *Hindu Law—Hindu widow—Rights of widow in deceased husband's property—*

• *Widows whose re-marriage is valid independently of the Statute.* Held, that a Hindu widow belonging to the Kurmi caste, in which the re-marriage of widows was permitted, by custom of the caste, independently of Act XV of 1856, was not, by reason of her re-marriage, deprived of her right to remain in possession of her deceased husband's estate during her lifetime, and that a suit brought during her lifetime by the reversioners to the estate of her husband to obtain immediate possession of such estate could not succeed. *Har Saran Das v. Nandi and Dharam Das v. Nand Lal Singh* followed.

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s. 1. *Criminal Procedure Code, s. 83—Warrant.* Held, that s. 83 of the Code of Criminal Procedure is applicable to warrants issued under Act XIII of 1859. *Queen-Empress v. Kattayan* followed.

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ss. 21, 161. "Public servant"—*Manager employed under the Court of Wards.*

Held, that the manager of an estate employed under the Court of Wards is a "public servant" within the meaning of s. 21 of the Indian Penal Code. *Queen-Empress v. Arayi* referred to.

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s. 124A. *Exciting disaffection—Meaning of the term "disaffection," explained.*

Any one who, by any of the means referred to in s. 124A of the Indian Penal Code, excites, or attempts to excite, feelings of hatred, dislike, ill-will, enmity or hostility towards the Government established by law in British India, excites, or attempts to excite, as the case may be, feelings of "disaffection" as that term is used in s. 124A. Such feelings are necessarily inconsistent with and incompatible with a disposition to render obedience to the lawful authority of Government and to support that Government against unlawful attempts to subvert or resist it. The term "disaffection" may be taken as synonymous with "disloyalty." The ordinary meaning of the term "disaffection" as used in s. 124A is not varied by the explanation appended to that section. When a person is charged with having committed the offence punishable under s. 124A of the Indian Penal Code, his intention may be inferred from one particular speech, article or letter, or from that speech, article or letter considered in conjunction with what such person has said, written, or published on another or other occasions. Where it is ascertained that the intention of such person was to excite feelings of disaffection to the Government established by law in British India, it is immaterial whether or not the words spoken, written or published could have the effect of exciting such feelings of disaffection, and it is immaterial whether the words were true or were false, and, except on the question of punishment, or in a case in which the speaker, writer or publisher is charged with having excited such feelings of disaffection, it is immaterial whether or not the words did in fact excite such feelings of disaffection. *Queen-Empress v. Jogendra Chunder Bose. In re Bal Gangadhar Tilak* referred to.

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- s. 177. *False information—Police officer recording a false report.* Held, that a Police officer at a Police station, who, being as such officer bound to enter all reports brought to him of cognizable or non-cognizable offences in the station diary, refused to enter a report made to him concerning the commission of an offence, and entered instead in the diary a totally different and false report as that which was made to him had thereby committed the offence punishable under s. 177 of the Indian Penal Code.
QUEEN-EMPRESS v. MUHAMMAD ISMAIL KHAN XX 151
- s. 188. See **CRIMINAL PROCEDURE CODE**, SS. 133, 135 AND 136.
- ss. 192 and 193. *Fabricating false evidence—False entry made by a Police officer in a special diary.* Held that a Police officer who made a false entry in the special diary relating to a case which was being investigated by him could not be convicted therefor of the offence of fabricating false evidence as defined in s. 192 of the Indian Penal Code, inasmuch as the document in which the alleged false entry was made was not one which was admissible in evidence. *Empress v. Gauri Shankar and Keilasum Putter* referred to.
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- s. 193. *Criminal Procedure Code, s. 164—False evidence—Statement made in the course of a "Judicial proceeding"—Statements made before a Magistrate under s. 164.* Held, that where a witness had made one statement on oath or solemn affirmation before a third class Magistrate under s. 164 of the Code of Criminal Procedure, and again another and totally inconsistent statement at the trial of the case before a Magistrate of the first class he might properly be convicted under the second—if not under the first—paragraph of s. 193 of the Indian Penal Code. *Queen-Empress v. Bharna* considered and distinguished.
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- s. 215. *Agreeing or consenting to take illegal gratification—Nature of agreement or consent.* In order to constitute the offence punishable under s. 215 of the Indian Penal Code it is necessary that the person who is willing to take and the person who is willing to give the illegal gratification must agree not only as to the object for which the gratification is to be given, but also as to the shape or form the gratification is to take.
QUEEN-EMPRESS v. CHITTAR XX 399
- s. 218. *Public servant framing incorrect record—Injury to the public—Police officer framing a false report.* A report of the commission of a dacoity was made at a thana. The Police officer in charge of the thana at first took down the report which was made to him, but subsequently destroyed that report and framed another and a false report—of the commission of a totally different offence—to which he obtained the signature of the complainant, and which he endeavoured to pass off as the original and correct report made to him by the complainant. Held, that on the above facts the Police officer was guilty of the offences punishable under s. 204 and s. 218 of the Indian Penal Code.
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- ss. 268, 290. *Public nuisance—Soliciting for purposes of prostitution.* Held that the soliciting for purposes of prostitution of passers-by on a public road is not a public nuisance as that term is defined in s. 268 of the Indian Penal Code.
QUEEN-EMPRESS v. NANNI XXII 113
- s. 307. *Attempt to murder—Intention—Knowledge of probable consequences of act—Presumption.* Where a woman of twenty years of age was found to have administered datura to three members of her family, it was held that she must be presumed to have known that the administration of datura was likely to cause death, although she might not have administered it with that intention.
QUEEN-EMPRESS v. TULSHA XX 143
- ss. 397, 34. *Dacoity—Commission of grievous hurt in the course of a dacoity—Person liable under s. 34, liable also under s. 397.* Held, that the words "such offender" in s. 397 of the Indian Penal Code include any person taking part in the dacoity who, though he may not himself have struck the blow causing the grievous hurt, is nevertheless liable for the act by reason of s. 34 of the Code.
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- s. 412. See **CRIMINAL PROCEDURE CODE**, s. 288.
- ss. 463 et seq. *Forgery—Meaning of the term "fraud" discussed.* A Police head-constable's character and service roll in his custody was found to have been

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tampered with in this way, that a page, apparently containing remarks unfavourable to the head-constable, had been taken out, and a new page with favourable remarks, purporting to have been written and signed by various superior officers of Police, had been inserted in its place, the intent being to favour the chances of the promotion of the said head-constable. *Held*, that this interpolation amounted to forgery within the meaning of s. 463 of the Indian Penal Code, but that inasmuch as it was not proved that the head-constable himself prepared and inserted the false page in his character roll, he was rightly convicted of abetment only. *Queen-Empress v. Shoshi Bhushan, Queen-Empress v. Vithal Narayan and Lolit Mohan Sarkar v. The Queen-Empress* referred to. **QUEEN-EMPRESS v. MUHAMMAD SAEED KHAN** **XXI** 113

498. *Enticing away a married woman—Evidence of marriage—Mere statement of the complainant and the woman insufficient.* Where a charge is made under s. 498 of the Indian Penal Code of enticing away a married woman, the Court should require some better evidence of the marriage than the mere statement of the complainant and the woman. **QUEEN-EMPRESS v. DAL SINGH** **XX** 166

499. *Defamation—Statement made by an accused person in an application to a Court—Statement made in good faith for the protection of the interests of the person making it.* In an application for the transfer of a criminal case the applicants alleged, with some apparent reason, that the case had been falsely got up against them by the complainant at the instigation of one Umrao Singh in order to prejudice them in their defence in a civil suit which Umrao Singh had caused to be brought against them. *Held* that this statement did not amount to defamation—not because of the application of any principles of English law, for such principles did not apply to prosecutions for defamation under the Indian Penal Code—but because the statement fell within the ninth exception to s. 499 of the Indian Penal Code. *Queen-Empress v. Balkrishna Vithal, In re Nagarji Trikamji, Queen v. Pursoram Doss, Greene v. Delannoy and Abdul Hakim v. Tej Chandar Mukarji* referred to.

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ss. 17, 20. *Decree for nullity of marriage passed by a District Judge—Confirmation of decree by High Court—Period for confirmation—Effect of confirmation, if made before statutory period has elapsed—Act I of 1872 (Indian Evidence Act), ss. 41, 44.* Section 20 of the Indian Divorce Act, IV of 1869, does not make the proviso in s. 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore be confirmed before the expiration of six months from the pronouncing thereof. *A. v. B.* dissented from. Assuming the proviso in s. 17 to be applicable to a decree of nullity, a decree by the High Court confirming the same before the six months' period has expired, cannot on that ground be treated as made by a Court not competent to make it, within the meaning of ss. 41 and 44 of the Indian Evidence Act, 1872, and is therefore, under s. 41, conclusive proof that the marriage was null and void. **CASTON v. CASTON** **XXII** 270

VII of 1870—

s. 5, sch. II, art. 11. See **LETTERS PATENT**, s. 10.
s. 5, sch. II, art. 17, CL. (vi). See **CIVIL PROCEDURE CODE**, s. 539.
s. 7. See **CIVIL PROCEDURE CODE**, s. 335.

ss. 10 and 12. *Court-fee—Procedure—Second appeal—Appeal to Lower Appellate Court by respondent in High Court insufficiently stamped.* Where it was discovered in second appeal in the High Court that the respondent, when appellant in the Lower Appellate Court, had not paid a sufficient Court-fee on his memorandum of appeal in that Court, and up to the date of the hearing of the appeal in the High Court, though called upon to do so, had not made good the deficiency, it was *held* that the proper procedure was not to dismiss the respondent's appeal to the Lower Appellate Court, but to stay the issuing of the decree, if any, of the High Court in favour of the respondent until such time as the additional Court-fee due by him might be paid. **NARAIN SINGH v. CHATURBHUI SINGH** **XX** 362

ss. 12 and 28. *Court-fee—Finality of decision of Court on question of Court-fee.* The decision of the Court on a question of the Court-fee payable on a plaint or memorandum of appeal which is to be "final as between the parties to the suit"

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must be a decision made between the parties on the record and after they have had an opportunity of being heard, and not a mere decision based upon the report of a *Munsarim* before the plaint or memorandum of appeal is filed, and therefore before any parties are before the Court. Hence where a Court of First Instance held on the report of the *Munsarim* that a plaint presented to it had been insufficiently stamped, but subsequently, both parties being before the Court and arguments having been heard, decided that the Court-fee originally paid was sufficient; it was held that the latter decision was the decision which was final as between the parties within the meaning of s. 12 of the Court-fees Act, 1870.

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sch. I, cl. 5. See SUIT 4.

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s. 30. See CRIMINAL PROCEDURE CODE, s. 288.

ss. 41, 44. See ACT IV OF 1869, ss. 17, 20.

ss. 65, 90. *Presumption as to ancient documents—Destruction of original—Presumption applied to certified copy—Regulation No. LII of 1803, s. 37—Disqualified proprietor—Procedure preliminary to taking estate under the Court of Wards—Procedure prescribed by the regulation to be strictly followed.* Held that the presumption allowed by s. 90 of the Indian Evidence Act, 1872, may be applied where the original of a document sought to be proved has been destroyed and only secondary evidence of its contents in the shape of a certified copy is available. *Khetter Chunder Mookerjee v. Khetter Paul Sreeterutno* followed. The procedure prescribed by Regulation No. LII of 1803 for disqualifying proprietors and taking their estates under the Court of Wards must be strictly followed in order that the disabilities incident to the statute of a disqualified proprietor may ensue. *Mohumud Zahoor Ali Khan v. Mussamut Thakoorani Rutta Koer* referred to. It is incumbent therefore upon one seeking to dispute an adoption on the ground that the person making it was a "disqualified proprietor" to show that all the procedure necessary to make such person a disqualified proprietor was carried out according to law.

ISHRI PRASAD SINGH v. LALLI JAS KUNWAR XXII 294

s. 68. See ACT IV OF 1882, s. 59.

s. 92. See MORTGAGE 6.

s. 92. *Evidence admitted to contradict a recital of receipt of consideration in a deed of sale—Oral agreement.* The Judicial Committee, approving the decision of the High Court on the point, regard it as settled law that where there has been a false acknowledgment by recital in a deed of sale of the payment by the purchaser of the consideration money, and its receipt by the vendor, it is open to the latter to prove that no consideration money was actually paid, notwithstanding anything in s. 92 of the Indian Evidence Act, 1872. That section does not enact that no statement of fact in a written instrument is to be contradicted by oral evidence. Where the consideration money had been acknowledged to have been paid by a recital in the sale deed to that effect: Held that it was no infringement of the above section for a Court to accept proof that, by a collateral arrangement between vendor and purchaser, the consideration money remained with purchaser, in his hands for the purpose and under the conditions agreed upon between them.

SAH LAL CHAND v. INDARJIT XXII 370

s. 105. *Act XLV of 1860, ss. 96 et seq.—Right of private defence—Presumption—Pleadings.* Held, that accused person who at his trial has not pleaded the right of private defence, but has raised other pleas inconsistent with such a defence, cannot in appeal set up a case, founded upon the evidence taken at his trial, that he acted in the exercise of the right of private defence; neither is the Court competent to raise such a plea on behalf of the appellant. *Queen-Empress v. Prag Dat* referred to.

QUEEN-EMPRESS v. TIMMAL XXI 122

115. *Admission—Estoppel—Admission of point of law no estoppel.* An admission on a point of law is not an admission of a "thing" so as to make the admission matter of estoppel within the meaning of s. 115 of the Evidence Act. *Juttendro Mohun Tagore v. Ganendro Mohun Tagore and Gopee Loll v. Mussamut Sree Chundraoolee Buhoojee* referred to.

JAGWANT SINGH v. SILAN SINGH XXI 285

IX of 1872—

ss. 15, 16, 19. *Contract—Undue influence—Coercion—Civil Procedure Code, ss. 522, 526—Award—Validity of award—Award purporting to be a considered award of*

Act—(continued.)

IX of 1872—(continued.)

the arbitrators, but really an agreement between the parties to the submission. Under s. 16 of the Indian Contract Act, 1872, as it stood before it was amended by Act VI of 1899, it is not sufficient, in order to render a contract voidable on account of undue influence, that the party claiming to avoid the contract should have been at the time he entered into it in a state of fear amounting to mental distress which enfeebled the mind: but there must further be action of some kind, the employment of pressure or influence by or on behalf of the other party to the contract. *Jones v. Merionethshire Building Society* referred to. Where an award which purported to be a considered award of the arbitrators framed after consideration of the statements of the parties and the evidence of witnesses was found in reality to be merely the adoption by the arbitrators of an agreement arrived at and signed by the parties to the reference, it was held that this would not prevent the award being a valid and binding award between the parties.

GOBARDHAN DAS v. JAI KISHEN DAS ... XXII 224

s. 23. See ACT XII OF 1881, s. 7.

s. 23. *Agreement opposed to public policy—Contract relating to purchase of land within his circle by a patwari—Act XIX of 1873 (N.-W.P. Land Revenue Act), s. 257. Held* that a contract entered into by a patwari for the purchase for his benefit of land situated within his circle is a contract which is opposed to public policy, even though it may not be rendered void by the rules framed by the Board of Revenue for the guidance of patwaris.

SHIAM LAL v. CHHAKI LAL ... XXII 220

s. 23. *Void contract—Agreement to relinquish ex-proprietary rights—Partition—Act XII of 1881, ss. 7 and 9—Act XIX of 1873, s. 125.* By a mutual agreement entered into between the parties to a private partition of certain villages held by them jointly the parties agreed that, if either party at the time of the partition was holding sir-land in a village which upon partition fell into the share of the other party, he would relinquish his rights in such sir-land in favour of the party into whose share the said village had fallen. *Held*, that under such private partition the holder of the sir-land became, on partition being effected, an ex-proprietary tenant in respect of the land previously held by him as sir, and that consequently the agreement to relinquish his rights in such land was not enforceable in law. *Held* also that s. 125 of Act XIX of 1873 does not apply to a partition by private agreement. *Gaya Singh v. Udit Singh* referred to. *Ram Prasad v. Dina Kuar* dissented from by KNOX and BANERJI, JJ.

KASHI PRASAD v. KEDAR NATH SAHU ... XX 219

s. 30. *Loan to facilitate gambling—Loan to aid in paying off gambling debt—Contract not tainted with immorality. Held*, that the fact that the object with which the plaintiff lent money to the defendant was to enable him to pay off a gambling debt, did not taint the transaction with immorality so as to disentitle the plaintiff to recover.

BENI MADHO DAS v. KAUNSAL KISHOR DHUSAR ... XXII 452

s. 43. *Joint contract—Right of promisee to sue any or all of the joint promisors—Right of joint promisors to be joined as defendants—Decree against some only of several joint promisors—Effects of such decree—Civil Procedure Code, s. 29—Hindu law—Joint Hindu family—Position of managing member.* The effect of s. 43 of the Indian Contract Act, 1872, being to exclude the right of a joint contractor to be sued along with his co-contractors, the rule laid down in the cases of *King v. Hoare* and *Kendall v. Hamilton* is no longer applicable to cases arising in India, at all events in the Mufassil, since the passing of that Act, and a judgment obtained against some only of the joint contractors and remaining unsatisfied is no bar to a second suit on the contract against the other joint contractors. *King v. Hoare, Kendall v. Hamilton, In re Hodgson, Hammond v. Schofield, Nuthoo Lall Chowdhry v. Shoukee Lall, Hemendro Coomar Mullick v. Rajendrolall Moonshee, Gurusami Chetti v. Samurti Chinna Mannar Chetti, Lukmidas Khimji v. Purshotam Haridas, Rahmubhoy Hubibbhoy v. Turner, Chockalinga Mudali v. Subbaraya Mudali, Narayana Chetti v. Lakshmana Chetti, Sitanath Koer v. Land Mortgage Bank of India, Nobin Chandra Roy v. Magantara Dassya, Roy Lutchmiput Singh Bahadur v. The Land Mortgage Bank of India, Radha Pershal Singh Bahadur v. Ramkhalawan Singh, Bhukandas Vijbhukandas v. Lallubhai Kashidas, Laksmishankar Devshankar v. Vishnuram, Dharam Singh v. Angan Lal, Motilal Becharadass v. Ghellabhai Hariram, Brinsmead v. Harrison, Wilson, Sons & Co. v. Balcarres Brook Steamship Co., Robinson v. Geisell, Balmakund v. Sangri, Priestley v. Fernie, Bir Bhaddar Sewak Pande v. Sarju Prasad, Bhawani Pershad v. Kallu, Dhunput Singh v. Sham Soonder Mitter*

Act—(continued.)**IX of 1872—(concluded.)**

referred to. The managing member of a Hindu joint family holds a position in relation to the other members of the family and the family property peculiar to himself and not precisely analogous to anything known to English law. He is not the agent of the other members of the family.

MUHAMMAD ASKARI v. RADHE RAM SINGH ... XXII 307

s. 45. See PARTNERSHIP 2.

ss. 135, 137. *Principal and surety—Agreement to give time to principal debtor—Gratuitous agreement—Surety not discharged.* A mere gratuitous agreement by a creditor to give time to the principal debtor will not discharge the surety. In order to have such effect an agreement to give time to the principal debtor must amount to a contract, that is, there must be consideration therefor. *Philpot v. Briant, Tucker v. Laing, and Clarke v. Birley* referred to.

DAMODAR DAS v. MUHAMMAD HUSAIN ... XXII 351

ss. 148, 151, 152. *Contract—Bailment—Liability of bailee—Liability of guest at hotel in respect of furniture used by him.* The defendant's wife went to stay at a hotel owned by the plaintiffs. While there she was seized with cholera and died. In consequence of the infectious nature of the disease, the plaintiffs were obliged to destroy the furniture which was in the rooms of the defendant's wife, and used by her during her illness. The plaintiffs subsequently sued to recover the value of such furniture from the defendant. *Held* that in the absence of evidence to show that the deceased had not taken as much care of the furniture as a person of ordinary prudence would, under similar circumstances, take of his own goods, the defendant was not liable, having regard to ss. 121 and 152 of the Indian Contract Act, 1872. *Shields v. Wilkinson* referred to.

RAMPAL SINGH v. MURRAY & CO. ... XXII 164

ss. 151, 152, 161. See ACT IX OF 1890, ss. 72, 76.

VIII of 1873, s. 45. See ACT XIX OF 1873, s. 241 (i).

XV of 1873, s. 15. See ACT XV OF 1883, ss. 23, 42, 44.

XIX of 1878—

s. 107. *Pre-emption—Wajib-ul-arz—Effect on pre-emptive rights of partition without new wajib-ul-arzes being framed.* When a mahal is divided by perfect partition into two or more separate mahals, a separate record of rights should be framed for each of the new mahals. Where under such circumstances no fresh records of rights are framed for the new mahals, the co-sharers in any one of the new mahals cannot, unless under very exceptional circumstances, claim, under the terms of the old record of rights applicable to the original undivided mahal, pre-emption in respect of land situated in any of the other new mahals. *Ghure v. Man Singh* referred to.

ABDUL HAI v. NAIN SINGH ... XX 92

ss. 107 et seq. *Partition—Revenue Courts not competent to partition buildings.* In a partition under the N.-W.P. Land Revenue Act, 1879, neither buildings nor the materials thereof can be partitioned; what is partitioned is the land in the mahal. Where such land is covered with buildings, the Court making the partition has to follow the provisions of s. 124 of the Act; but it can decide no question of right to the buildings, nor can it partition them.

ASHIQ HUSAIN v. MUHAMMAD JAN ... XXII 329

ss. 111, 113 and 241. *Partition—Objection to partition—Jurisdiction—Civil and Revenue Courts.* The procedure provided by s. 113 of Act XIX of 1873 does not become obligatory on a Collector or an Assistant Collector in partition proceedings unless an objection to the partition has been made by a co-sharer in possession, and unless such objection was made before the day specified in the notice which the Collector or Assistant Collector is bound to issue under s. 111, and not even then unless such objection raises a question of title. Unless, therefore, such objection has been made, a Civil Court is not empowered to exercise any jurisdiction in the matter of the distribution of the land or the allotment of the mahal by partition.

HARDEO SINGH v. NARPAT SINGH ... XX 75

s. 125. See ACT IX OF 1872, s. 23

s. 154. See MUHAMMADAN LAW 2.

ss. 166, 167 168. *Act XII of 1884 (Agriculturists' Loans Act), s. 5—Takavi loan—Sale of house in default of payment of loan—Effect of such sale.* The provisions

Act—(continued.)**XIX of 1873—(continued.)**

of ss. 166, 167 and 168 of the N.-W.P. Land Revenue Act, 1873, apply only to the sale of a patti or mahal. Where therefore a house upon which there existed a prior incumbrance was sold on account of the non-payment of certain takavi advances, it was held that such sale did not avoid the prior incumbrance. **SHEO SAMPAT PANDE v. BANDHU PRASAD MISR** ... XXII

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s. 184. *Sale for arrears of Government revenue—Alleged benami purchase—Suit on a mortgage against the debtor and the certified purchasers alleged to be benamidars of the debtor—Civil Procedure Code, s. 317.* Per KNOX, J.—The operation of s. 184 of Act XIX of 1873 is not confined to disputes between certified auction-purchasers and persons who allege that such auction-purchasers purchased on their behalf as their *benamidars*, but extends to cases where the dispute is between the certified purchasers and third persons who allege that the certified purchasers are not the real purchasers. In such a case the claimants cannot succeed without proof of fraud. *Mussamut Buhuns Kowur v. Lalla Buhoree Lall, Sohun Lall v. Lala Gya Pershad, Karnizak Sukina v. Monohur Das, Chundra Kaminy Debea v. Ram Ruttun Pattuck and Tara Soonduree Debee v. Oojul Monee Dcssee* referred to. Per BANERJI, J.—Section 184 of Act XIX of 1873 contemplates a suit between the person claiming, to be the real purchaser and the certified purchaser, and not a suit by a creditor of such person in which the creditor seeks to establish that the purchase was in reality made by his debtor and that the certified purchaser is only the *benamidar* of the debtor. Section 184 does not preclude a creditor of the beneficial owner from suing the certified purchaser on the allegation that his purchase was *benami* for the debtor, and that the latter is the real purchaser. *Mussamut Buhuns Kowur v. Lalla Buhoree Lall, Bodh Sing Doodhooria v. Gunes Chunder Sen, Lokhee Narain Roy Chowdhry v. Kalypuddo Bandopadhyay, The Uncovenanted Service Bank v. Abdul Bari, Sohun Lall v. Gya Pershad, Puran Mal v. Ali Khan, Kanizak Sukina v. Monohur Das, Subha Bibi v. Hara Lal Das, Ameer-oon-nissa Beebee v. Binode Ram Sein and Chundra Kaminy Debea v. Ram Ruttun Pattuck* referred to.

THE DELHI AND LONDON BANK, LTD. v. CHAUDHRI PARTAB BHASKAR. XXI

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ss. 165, 168. *Sale for arrears of revenue—Disposal of surplus proceeds—Distribution amongst creditors of defaulter—Suit by one of such creditors against another—Cause of action.* An estate which had been mortgaged separately to two different mortgagees was sold for default in payment of Government revenue. By the sale a much larger sum than was sufficient to satisfy the arrears of revenue was realized. The Collector, instead of paying the surplus to the defaulter, mortgagor, paid therewith one of the mortgagees in full and the other in part. The mortgagee who had been paid in part only sued the other mortgagee for the balance due on his (the plaintiff's) mortgage, alleging that it was prior to that of the defendant and ought to have been paid off in full. *Held*, that the suit would not lie. The action of the Collector in contravention of the express provisions of s. 185 of Act XIX of 1873 gave the plaintiffs no cause of action against the other mortgagee.

KUNJ BEHARI LAL v. PARBOTAM NARAIN ... XXI

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19A. See PRE-EMPTION 10.

205B. *Court of Wards—Contract entered into by disqualified proprietor whilst his property was under the charge of the Court of Wards.* Section 205 of Act XIX of 1873 does not cease to have effect when property to which it might apply is released from the custody of the Court of Wards. Such property cannot at any time be taken in execution of a decree obtained on a contract entered into by a ward of the Court at a time when his property was under the superintendence of the Court.

HIMANCHAL SINGH v. JHAMMAN LAL ... XXII

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s. 241 (i). *Act VIII of 1873 (Northern India Canal and Drainage Act), s. 45—Civil and Revenue Courts—Jurisdiction—Suit to recover alleged excess payments in respect of irrigation dues.* *Held* that no suit would lie in a Civil Court to recover payments alleged to have been made in respect of irrigation dues in excess of what was properly leviable on the plaintiff.

BALWANT SINGH v. THE SECRETARY OF STATE FOR INDIA ... XXII

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s. 257. See ACT IX OF 1872, s. 23.

XIV of 1874—

s. 6. *Rule 17 of the Kumaun Rules, 1894—Code of Civil Procedure, ss. 562, 564—Right of appeal against order under s. 562—Order of remand where decision of first Court was not confined to preliminary point.* Where the Deputy Commissioner of Naini Tal decided that a suit was barred by limitation, but at the same time

Act—(continued.)**XIV of 1874—(continued.)**

also came to a definite decision on each of the other issues, and the Commissioner in appeal, setting aside the finding as to limitation, remanded the case under s. 562 of the Code of Civil Procedure. *Held*, that under Government Notification No. 628/VII—569 B, dated 27th June 1894, Rule 17, an appeal lies from such an order of remand. *Saiyid Muszar Hossein v. Mussamut Bodha Bibi* referred to. *Held*, further that the suit between the parties not having been confined by the Deputy Commissioner to the preliminary point, it was not, under ss. 562, 564, of the Code of Civil Procedure, open to the Commissioner to make an order under s. 562.

HAFIZ ABDUL RAHIM KHAN v. RAJA HARI RAJ SINGH ... XXII 405

I of 1877—

Chap. VIII. See ACT XV OF 1889, SS. 29, 42, 44.

s. 21. See PARTNERSHIP I.

s. 42. See LETTERS PATENT, s. 10.

III of 1877—

s. 17. *Construction of contract in a mortgage deed as to interest. Also, the absence of requirement to register, under s. 17 of Act III of 1877, petitions filed in judicial proceedings.* A deed of mortgage stipulated in general terms that interest was to run upon the principal sums advanced, without any limitation as to the period of its currency; and also stipulated that, in default of punctual payment at the end of each year, the mortgagees were to be at liberty to treat unpaid interest as principal, and to recover it from the mortgaged property. According to the tenor of the deed, when all its provisions and conditions were considered, it was not the true construction that the capital sum was to cease to bear interest at the contract rate upon the arrival of the time stipulated for payment. *Mathura Das v. Raja Narindar Bahadur Pal* referred to and followed. Section 17 of the Registration Act, III of 1877, does not apply to proper judicial proceedings whether consisting of pleadings filed by the parties or orders made by the Court.

BINDESRI NAIK v. GANGA SARAN SAHU ... XX 171

s. 35. *Mortgage—Mortgage executed and registered by major son and by the father for himself and for a minor son—Registration.* A joint Hindu family consisted of the father and two sons, the one of full age, the other a minor. The father and the major son executed a mortgage of the joint family property, the father describing himself in the bond as acting for himself and as guardian and next friend of the minor son. The bond was registered on the admission of the father and the major son. *Held*, on suit by the mortgagees for sale, that there being no dispute as to the fact of the debt for which the mortgage was executed, and it not being alleged that such debt was incurred for any purpose which would exempt the son from the pious obligation of paying it, that there was no defect in the registration of the bond in suit which would prevent its affecting the share of the minor son. *Shankar Das v. Jograj Singh* overruled. *Muhammad Ewaz v. Birj Lal. In re Ram Chunder Biswas and Badri Prasad v. Madan Lal* referred to.

KESHO DEO v. HARI DAS ... XXI 281

s. 50. *Registered and unregistered documents—Priority—Notice.* *Held*, that s. 50 of the Indian Registration Act, 1877, will not avail to give the holder of a subsequent registered deed priority in respect of his deed over the holder of an earlier unregistered deed, not being a compulsorily registrable deed, if in fact the holder of the registered deed has at the time of its execution notice of the earlier unregistered deed.

DIWAN SINGH v. JADHO SINGH ... XX 252

XV of 1877—

s. 5. See ACT XII OF 1881, SS. 93 (h), 208.

s. 7; sch. II, art. 120. *Hindu law—Reversioners—Suit to set aside alienation by Hindu widow—Similar suit barred by limitation as against a prior reversioner—Suit by subsequent reversioner not thereby barred.* *Held* that, where there are several reversioners entitled successively under the Hindu law to an estate held by a Hindu widow, no one such reversioner can be held to claim through or drive his title from another, even if that other happens to be his father, but he derives his title from the last full owner. If, therefore, the right of the nearest reversioner for the time being to contest an alienation or an adoption by the Hindu widow is allowed to become barred by limitation as against him, this will

Act—(continued.)**XV of 1877—(continued.)**

not bar the similar rights of the subsequent reversioners. *Beni Prasad v. Har-dai Bibi, Ramphal Rai v. Tula Kuari, Jumoon Dassya Chowdhurani v. Bama-soonderai Dassya Chowdhurani and Isri Dut Koer v. Mussamut Hansbutti Koer-* ain referred to. *Chhaganram Astikram v. Bai Motigavri and Pershad Singh v. Chedee Lall* dissented from. A minor plaintiff instituting a suit which falls within art. 120 of the second schedule of the Indian Limitation Act, 1877, is not excluded from the benefit of s. 7 merely because the right of some other person through whom he does not claim to sue for similar relief has become time barred. The "right to sue" mentioned in the third column of art. 120 means the right to sue of the plaintiff or of some one through whom he claims. "The period of limitation" mentioned in s. 7 means the period of limita-tion for the suit which the plaintiff or some one through whom he claims is entitled to institute. *Siddhessur Dutt v. Sham Chand Nundun, Mrino Moyee Debia v. Bhoobun Moyee Debia, Gobind Coomar Chowdhry v. Huro Chunder Chowdhry and Gobind Chandra Sarma Mazoomdar v. Anand Mohun Sarma Mazoomdar* referred to.

BHAGWANTA v. SUKHI XXII 33
ss. 7 and 8. See EXECUTION OF DECREE 10.

s. 14. *Limitation—"Other cause of like nature" to defect of jurisdiction—Error in procedure.* In cases in which s. 14 of the Indian Limitation Act, 1877, is pleaded as protecting the plaintiff from the bar of limitation, if there was an inability in the Court to entertain the former suit produced by any cause not connected in any way with want of good faith or due diligence in the plaintiff, that cause is of like nature to defect of jurisdiction within the meaning of s. 14. It is not necessary that the cause which prevented the former Court from entertaining the suit should be a cause which was independent of and beyond the control of the plaintiff. Hence where the inability of the Court to entertain the former suit arose from misjoinder of plaintiffs and causes of action, and there was on the plaintiff's part in the former suit no want of good faith or due diligence, the plaintiff was held entitled to the benefit of the time during which he was prosecuting the former suit, that is, from the time when the plaint in that suit was filed until the time when it was returned to the plaintiffs for amend-ment. *Chunder Madhub Chuckerbutty v. Ram Koomar Chowdry, Brij Mohan Das v. Mannu Bibi, Deo Prasad Singh v. Pertab Kiree, Bishambhar Haldar v. Bonomali Holdar, Ram Subhag Das v. Gobind Prasad, Jema v. Ahmad Ali Khan, Mullick Kefait Hossein v. Sheo Pershad Singh, Bai Jamna v. Bai Ichha, Narasimma v. Muttayan, Tirtha Sami v. Seshagiri Pai, Subbarau Nayudu v. Yagana Pantulu, Venkiti Nayak v. Murugappa Chetty and Assan v. Pathumma* referred to.

MATHURA SINGH v. BHAWANI SINGH XXII 248

***Schedule II—**

arts. 10 and 120. See PRE-EMPTION 7.

art. 32.* *Suit for removal of trees from tenant's holding—Limitation—Jurisdic-tion—Civil and Revenue Courts—Act XII of 1881 (N.-W.P. Rent Act), s. 93.* Held, that a suit by zamindars for the removal of trees planted by a tenant on his cultivatory holding was governed by the limitation prescribed in art. 32 of sch. II of the Indian Limitation Act, 1877. *Gangadhar v. Zahurriya and Mu-sharaf Ali v. Ifthkar Husain* referred to. Held also, that such a suit was not cognizable by a Civil Court. *Deodat Tiwari v. Gopi Misr* referred to.

JAI KISHEN v. RAM LAL XX 519

art. 47. *Limitation—Criminal Procedure Code, s. 146—Suit for possession of pro-perty attached by a Magistrate under s. 146.* Article 47 of the second schedule to Act XV of 1877 does not apply to a suit brought by one of the two claimants against the other to recover possession of property which has been attached by a Magistrate under the provisions of s. 146 of the Code of Criminal Procedure. *Chuj Mull v. Khyratee and Akilandammal v. Periasami Pillai* referred to. To such a suit as above Government is not a necessary party.

GOSWAMI RANCHOR LALJI v. SRI GIRDHARIJI XX 120

art. 120. See PRE-EMPTION 2.

art. 120. *Suit by auction-purchaser of mortgaged property to cancel a perpetual lease granted by the mortgagor in contravention of a covenant in the mortgage.* During the continuance of a mortgage which contained a covenant against alienation of the mortgaged property, the mortgagor made a perpetual lease of that property. The mortgagee brought a suit on his mortgage, and having obtained

Act—(continued.)**XV of 1877—(continued.)****Schedule II—(continued)**

a decree, put the mortgaged property up to sale. The auction-purchaser of the mortgaged property on becoming aware of the existence of the perpetual lease, sued for its cancellation and for a declaration that the defendant had no right to interfere with or obstruction the plaintiff in respect of the property in question. *Held*, that the limitation applicable to such suit was that prescribed by art. 120 of the second schedule to the Indian Limitation Act, 1877, and not that prescribed by art. 91 or art. 95. The main prayer of the plaint was for a decree declaring and establishing the plaintiffs' title and the prayer for cancellation of the lease could be treated as merely subsidiary to the main relief asked. *Pachamuthu v. Chinnappan and Uma Shankar v. Kalka Prasad* referred to. *Din Dial v. Har Narain* followed.

MUHAMMAD BAQAR v. MANGO LAL

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arts. 120 and 144. See DECLARATORY DECREE.

arts. 132, 111. See ACT IV OF 1882, s. 55 SUB-SEC. 4 (b).

arts. 134 and 144. *Trust—Mortgage—Limitation—Suit by trustee to set aside mortgages of trust property made by his predecessor in office.* A *sajjada nashin* in possession of certain *wagf* property during the years 1864 to 1869 executed various mortgages of portions of the *wagf* property, professing to do so in his capacity of *sajjada nashin*. The mortgagor died in February 1891, and on 6th of April 1891, was succeeded by his son as *sajjada nashin*. On the 25th of November 1893, the son brought a suit to recover possession of the mortgaged property, of which the mortgagees were in possession, on the ground that the mortgages were in violation of the trust and thereof invalid. *Held* by the Court that the suit was barred by limitation. *Per* BLAIR, J.—Whether or not art. 134 of the second schedule to the Indian Limitation Act, 1877, applies to the case is immaterial, if art. 134 does not apply the suit would be barred by art. 144 of the same schedule, limitation commencing to run against the trustee from the dates of the mortgagees obtaining possession under their respective mortgages. *Nilmony Singh v. Jagabandhu Roy, Yesu Ramji Kalnath v. Balkrishna Lakshman, Bejoy Chunder Banerjee v. Kally Prosonno Mookerjee and Madhava v. Narayana* referred to. *Per* BANERJI, J.—The suit is barred by art. 134 of the second schedule to the Indian Limitation Act, 1877, which is as much applicable to a suit against a mortgagee for value from a trustee as to a suit against a person to whom the trustee has sold trust property for value. *Gobind Nath Roy Bahadur v. Ranee Luchmee Koomaree; Yesu Ramji Kalnath v. Balkrishna Lakshman, Maluji v. Fakir Chand and Nilmony Singh v. Jagabandhu Roy* referred to. *Per* AIKMAN, J.—The term "purchased" as used in art. 134 of the second schedule cannot be taken as including "mortgaged" but art. 144 would apply and be a bar to the suit.

BEHARI LAL v. MUHAMMAD MUTTAKI

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art. 144. See ADVERSE POSSESSION.

arts. 144, 148. *Limitation—Mortgage—Suit by a mortgagor for recovery of possession from a mortgagee holding over after expiry of the term of a usufructuary mortgage.* When a mortgagee in possession under a usufructuary mortgage, holds over after the time limited in the mortgage deed for surrender of the property, his possession does not, by that fact alone, become adverse to the mortgagor, who still has a period of sixty years within which to sue for recovery of possession. *Jagurnath Sakoo v. Syud Shah Mahomed Hossein* referred to.

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art. 164. See CIVIL PROCEDURE CODE, s. 396.

art. 178. See ACT IV OF 1882, s. 90 : CIVIL PROCEDURE CODE, s. 244.

art. 179. See ACT IV OF 1882, s. 89 : CIVIL PROCEDURE CODE, s. 206.

art. 179. *Act IV of 1882, s. 87—Execution of decree—Application for order absolute for foreclosure—Limitation.* An application for an order under s. 87 of Act IV of 1882 is, like an application for an order under s. 89 of the said Act, subject to the limitation prescribed by art. 179 of the second schedule to Act XV of 1877. *Oudh Behari Lal v. Nageshar Lal and Chunni Lal v. Harnam Das* referred to.

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art. 179. *Execution of decree—Limitation—Starting point for limitation where an appeal has abated.* *Held*, that the order of an appellate Court abating an appeal, because no representative of the appellant was on the record, was not

Act—(continued.)

XV of 1877—(concluded.)

Schedule II—(concluded.)

the "final order or decree of the appellate Court" within the meaning of cl. 2, art. 179 of the second schedule to the Indian Limitation Act, 1877, but that limitation would run from the date of the original decree.

FAZAL HUSEN v. RAJ BAHADUR XX 124
art. 179 (4). See CIVIL PROCEDURE CODE, s. 294 : EXECUTION OF DECREE 11.

XI of 1878—

s. 19 (f). *Notification No. 458 of the 18th March 1898—Exemptions from the operation of the Arms Act—Volunteers.* A volunteer, being a person exempted in virtue of Notification No. 458, dated 18th March, 1898, of the Government of India, is not exempted merely with reference to his duties as a volunteer, but generally (subject to the exceptions mentioned in the said Notification). It is therefore not unlawful for a volunteer to possess fire-arms and to use the same.

QUEEN-EMPRESS v. SAMUEL LUKE XXII 323

ss. 19, 27. *Exemptions from provisions of Arms Act—Government Notification No. 518 of the 6th March 1879—Government Notification No. 458 of the 18th March 1898—"Personal use" of arms—Arms carried and used by servant of exempted person.* By a notification under s. 27 of the Arms Act (XI of 1879) issued by the Government of India, certain persons, amongst them Rajas and members of the Legislative Council of the Lieutenant-Governor of the N.-W.P., were exempted from the operation of ss. 13 and 16 of the said Act; but with this proviso, that, "except where otherwise expressly stated, the arms or ammunition carried or possessed by such persons shall be for their own personal use, etc., etc." Held that the terms of this proviso would allow of a person exempted under the notification above alluded to sending a servant armed with a gun into a neighbouring district to shoot birds for him, and that a gun so carried and used by the servant of the exempted person was in the "personal use" of the exempted person within the meaning of the notification.

QUEEN-EMPRESS v. GANGA DIN XXII 118

I of 1879—

s. 61. *Stamp—Promissory note—Person receiving an under-stamped promissory note not liable under s. 61.* Under s. 61 of Act I of 1879 the "person accepting" a promissory note not duly stamped, is the person who executes such note as acceptor, not a person who merely receives the note. The mere receiver of an unstamped or insufficiently stamped promissory note is not as such liable to any penalty under this section either as principal or abettor. *Queen v. Gulam Husain Sahib, The Queen v. Nadi Chand Poddar, Empress v. Janki and Empress v. Gopal Das* referred to.

QUEEN-EMPRESS v. NIHAL CHAND XX 440

sch. I, art. 8. *Stamp—Articles of association—Special resolution—Resolution superseding articles of association—Act VI of 1882 (Indian Companies Act).*

ss. 76, 79. A company limited by shares and already possessing articles of association proceeded to pass a special resolution, in virtue of which a document was drawn up entitled "articles of association" in supersession of the articles theretofore in force. The record of this special resolution was, under the provisions of s. 79 of the Indian Companies Act, 1882, sent to the Registrar of Joint Stock Companies, to be recorded by him. The document was impounded by the Registrar on the ground that it required to be stamped as articles of association, and was not so stamped. Hereafter a reference was made by the Board of Revenue to the High Court under the provisions of s. 46 of the Indian Stamp Act, 1879, as to whether the document in question required to be stamped. Held that the Indian Companies Act did not contemplate any such thing as new articles of association, and that the document in question was nothing more than the record of a special resolution, and as such did not require to be stamped.

IN RE THE NEW EGERTON WOOLLEN MILLS XXII 131

XVIII of 1879—

s. 86. *Order including a person's name in the list of touts—Revision—Statute 24 and 25 Vic., Cap. CIV, s. 15—Powers of superintendence of the High Court.* Held that in the case of an order passed under s. 36 of Act XVIII of 1879, the High Court could only interfere in the exercise of the powers of superintendence conferred upon it by s. 15 of the Indian High Courts Act, 1861, and that it would not interfere even then, where the sole ground upon which its interference was asked for was that the decision of the District Judge was against the weight of the evidence.

IN RE MADHO RAM XXI 181

Act—(continued.)

V of 1881—

- s. 3. *Probate—Will—Document intended to take effect partly in the lifetime of the executant and partly after the executant's death.* There is no objection to one part of an instrument operating in *presenti* as a deed and another in *futuro* as a will. *Cross v. Cross* referred to.

CHAND MAL v. LACHMI NARAIN ... XXII 152

- s. 9. *Application for probate by an executor—No discretion as to granting such application.* Although under s. 85 of the Probate and Administration Act, 1881, it is within the discretion of the Court to refuse to grant an application for letters of administration, no such discretion is given in regard to an application for probate by a person selected by a testator for the administration of his estate. *Heera Coomar Sircar v. Doorgamoni Dasi* referred to.

PRAN NATH GHOSE v. JADO NATH BHATTACHARJI ... XX 189

- s. 50. *Revocation of grant of letters of administration no bar to a fresh application.* Where a grant of letters of administration made by a District Judge had been revoked under the provisions of s. 50 of Act V of 1881, it was held that, the cause of revocation being removed, the Judge had jurisdiction to entertain a fresh application for the same object.

BRIJ LAL v. THE SECRETARY OF STATE FOR INDIA ... XX 109

XII of 1881—

- s. 7. *Ex-proprietary tenant—Ex-proprietary rights arising on sale of part only of vendor's proprietary rights.* Held that in order that the provisions of s. 7 of the N.-W. P. Rent Act, 1881, may come into operation, it is not necessary that the zamindar should lose or part with his proprietary rights in respect of the whole of his interest in the mahal. *Bhawani Prasad v. Gulam Muhammad* approved. Held also that if a zamindar sells his zamindari rights and includes in the sale the right to cultivatory possession of the sir-land, and agrees to relinquish his ex-proprietary rights in respect of the sir-land, the vendee, in event of such possession not being delivered or ex-proprietary rights not being relinquished, is not entitled to claim a refund of the sale price or any portion thereof. *Bhukham Singh v. Har Parsad* approved.

MURLIDHAR v. PEM RAJ ... XXII 205

ss. 7 and 9. See ACT IX OF 1872, s. 23.

ss. 34 *et seq.*, 95 (d) and 206 *et seq.* See JURISDICTION 1.

- s. 36. *Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.* Held, that the mere fact of a plaintiff in a suit for ejectment in a Civil Court having on a previous occasion applied to the Revenue Court for the ejectment of the defendant would not estop him from asserting that the defendant was unlawfully in possession, that is, as a trespasser.

ZUBEDA BIBI v. SHEO CHARAN ... XXII 83

- ss. 36, 96. (b). *Application for ejectment as a tenant—Subsequent suit for ejectment as a trespasser—Estoppel—Civil and Revenue Courts—Jurisdiction.* Held that the fact that a plaintiff in a civil suit for ejectment of an alleged trespasser has on a previous occasion taken proceedings against the defendant under s. 36 of the Rent Act, 1881, is not of necessity fatal to the suit in the Civil Court. *Baldeo Singh v. Imdad Ali* and *Deo Narain Rai v. Sheo Charan Rai* distinguished. *Zubeda Bibi v. Sheo Charan* followed.

HAMID ALI SHAH v. WILAYAT ALI ... XXII 93

- s. 44. *Landholder and tenant—Improvements—Wells—Power of tenants to construct wells without consent of landholder.* Held, that having regard to s. 44 of the N.-W.P. Rent Act, 1881, an occupancy-tenant may, if such well be an improvement within the meaning of the section, construct either a kachcha or pacca well on his holding without any reference to the consent of the zamindar. *Raj Bahadur v. Birmka Singh* and *Muhammad Raza Khan v. Dalip* referred to.

DHARAMRAJ KUNWAR v. SUMERAN SINGH ... XXI 386

- s. 93 (b). *Landholder and tenant—Suit to eject a tenant—Act inconsistent with the purpose for which the land was let—Sub-lease to a theatrical company.* An agricultural tenant, at a time when there were no crops growing on his holding, let part of it temporarily to a theatrical company for the purpose of their holding performances thereon. Held, that this was not an act sufficient to cause a forfeiture of the tenancy within the meaning of s. 93 (b) of Act XII of 1881.

YUSUF ALI KHAN v. HIRA ... XX 469

Act—(continued.)

XII of 1881—(continued.)

- s. 93 (h). *Lambardar and co-sharer—Suit against lambardar for profits—Liability of heir of lambardar.* The liability of a lambardar to pay to a co-sharer the profits which the lambardar has failed, through his gross negligence, to collect, is a personal liability and cannot be enforced against the lambardar's legal representative. *Gulab v. Fateh Chand* referred to.

MURAD-UN-NISSA v. GHULAM SAJJAD XX 73

- ss. 93 (h), 203. *Suit for profits—Limitation—Act XV of 1877 (Indian Limitation Act), s. 5—Act I of 1887 (General Clauses Act), s. 7.* Held, that a suit for profits under s. 93 (h) of Act XII of 1881, the period of limitation for the filing of which expired in respect of a portion of the claim on a day when the Court was closed, could not be brought on the day when the Court reopened, but, so far as that portion was concerned, was barred by limitation.

MUHAMMAD HUSEN v. MUZAFFAR HUSEN XXI 22

- ss. 93, 94. *Suit for recorded share of profits—Suit for settlement of accounts—Limitation.* Where for the purposes of a suit in which a share of profits is claimed by a recorded co-sharer, either against the lambardar or against one or more or all of the other co-sharers, the Court is asked to adjust the accounts, what has to be looked to is the main and substantial object of the suit. If the main and substantial object of the suit is to obtain a settlement of accounts, and the obtaining a decree for a share of the profits is only the ulterior object of obtaining such settlement of accounts, then the suit is to be regarded as a suit for settlement of accounts. If the main and substantial object of the suit is to recover a share of profits which the defendant has received in excess of what he is entitled to, and if the Court is only asked to go into the accounts incidentally to that main object, and for the purpose of determining whether the sum claimed is due, then the suit is not a suit for settlement of accounts merely, but it is a suit for a share of profits within the first category of s. 93 (h) of the N.-W.P. Rent Act, 1881. *Rohan v. Jwala Prasad* explained. *Indo v. Indo* referred to.

MALIK MUHAMMAD KARIM v. GANGA PANDE XXII 334

- s. 95 (n). *Landholder and tenant—Dispossession of tenant—Effect on tenant's right of his neglecting to apply under s. 95 to be restored to possession.* Held, that the failure of a tenant to apply under s. 95 (n) of the N.-W. P. Rent Act, 1881, for the recovery of the occupancy of land, of which he has been wrongfully dispossessed, within the period of six months after the date of dispossession prescribed for such applications by s. 96 (e) has the effect not only of barring the tenant's remedy, but of extinguishing the tenant's right to the occupancy of the land.

DALIP RAI v. DEOKI RAI XXI 204

- s. 95 (n). *Landholder and tenant—Effect on tenant's rights of his neglecting to apply under s. 95.* A tenant of certain *muafi* land was dispossessed by his zamindars, as he alleged, wrongfully. The dispossessed tenant did not avail himself of the remedy provided by s. 95, cl. (n) of Act XII of 1881; but sometime after the expiry of the period of limitation for an application under that section, he dispossessed the zamindars, who had meanwhile taken the land in suit into their own cultivation. The zamindars thereupon sued in the Civil Court for the ejectment of the former tenant as a trespasser. Held, that the defendant could not set up in answer to this suit his status as tenant which he had lost by not availing himself within limitation of the means provided by s. 95, cl. (n) of Act XII of 1881, to contest his own ejectment.

DALIP RAI v. DEOKI RAI XX 471

ss. 170, 171, 172. See CIVIL PROCEDURE CODE, ss. 285, 295, 4A.

- s. 189. *Appeal—"Rent payable by the tenant" not in issue—Landholder and tenant.* Certain defendants being sued by the zamindars for the rent of land held by them, pleaded in effect that, whatever the rent of the land in suit might be, they were entitled to retain it under an agreement between them and the predecessor in title of the plaintiffs in lieu of interest payable to them on account of a mortgage given by the said predecessor in title. Held, that the case was not one in which an appeal would lie to the District Judge under s. 189 of the N.-W.P. Rent Act, inasmuch as the rent payable by the tenant was not in issue in the suit.

DEOCHARAN SINGH v. BENI PATHAK XXI 247

- s. 208. *Jurisdiction—Civil and Revenue Courts—Suit not tried on the merits in the Court of First Instance.* Held, that the application by an appellate Court of the

Act—(continued.)**XII of 1881—(concluded.)**

provisions of s. 208 of Act XII of 1881 is not precluded by the fact that the Court of First Instance has dismissed the suit on a preliminary point without any trial of it on its merits.

BHOLAI KHAN v. ABU JAFAR XXI 267

XXII of 1881—

ss. 27, 28, 29, 30, 34 and 47. *Act XII of 1896, ss. 36, 37, 38, 41, 57—Excise Officer—Jurisdiction.* Held that an officer invested with powers under ss. 27, 28, and 29 of Act XXII of 1881, who had power in certain events to take the case before a Magistrate under s. 32, was an "excise officer" within the meaning of s. 47 of the Act. *Queen-Empress v. Ram Charan* overruled:

QUEEN-EMPRESS v. MAKUNDA XX 70

XXVI of 1881—

ss. 64, 66. *Promissory note not presented for payment at maturity—Effect of non-presentment.* Held, that the non-presentment for payment at maturity of a promissory note, the presentment of which is required by s. 66 of the Negotiable Instruments Act, 1881, has not the effect of relieving from liability the maker of the note. *Farzand Ali v. The Agra Savings Bank* and *Ramakistnayya v. Kassim* followed.

PHUL CHAND v. GANGA GHULAM XXI 450

II of 1882—

ss. 82, 88. See **CIVIL PROCEDURE CODE**, ss. 294, 317.

IV of 1882—

s. 39. See **HINDU LAW 6.**

s. 52. *Lis pendens—Transfer pendente lite—Time at which a suit becomes "contentious"* Held, that a suit becomes a "contentious suit" within the meaning of s. 52 of the Transfer of Property Act, 1882, at the time when the summons is served on the defendant. *Radhasyam Mohapatra v. Sibn Panda* and *Abboy v. Annamalai* followed.

PARSOTAM SARAN v. SANEHI LAL XXI 408

s. 52. *Transfer pendente lite—Lease of property in respect of which a decree for sale has been made under s. 88.* Held, that a lease of property made by a judgment-debtor against whom a decree for sale had been made under s. 88 of the Transfer of Property Act for sale of that property came within the purview of s. 52 of the Transfer of Property Act.

THAKUR PRASAD v. GAYA SAHU XX 349

s. 55, sub-sec. 4(b). *Vendor's lien—Suit to enforce charge against the property—Limitation—Act XV of 1877 (Indian Limitation Act), sch. II, arts. 132, 111.* Held, that a suit by a vendor of immoveable property to enforce against the property his lien for the unpaid purchase-money under s. 55, sub-sec. 4(b) of the Transfer of Property Act, 1882, falls within art. 132 of the second schedule to the Indian Limitation Act, 1877. *Virchand Lalchand v. Kumaji and Chunilal v. Bai Jethi* followed. *Natesan Chetti v. Soundararaja Ayyangar* dissented from. *Ramdin v. Kalka Pershad, Sutton v. Sutton and Toft v. Stevenson* referred to.

HAR LAL v. MUHAMDI XXI 454

s. 68. See **MORTGAGE 2.**

s. 59. *Act I of 1872 (Indian Evidence Act), s. 68—Attesting witness—Scribe of a deed.* Held, that a deed may be legally proved by the evidence of the scribe thereof who has signed his name, but not explicitly as an attesting witness, on the margin, and has been present when the deed was executed. *Muhammad Ali v. Jafar Khan* followed.

RADHA KISHEN v. FATEH ALI RAM XX 582

s. 60. MORTGAGE 3.

s. 60. *Mortgage—Purchase by mortgagee of portion of the mortgaged property—Mortgage not thereby necessarily extinguished.* The purchase of a part of the mortgaged property by a mortgagee, subject to his mortgage, has not necessarily the effect of fully discharging the mortgage, without regard to the value of the property purchased and the price paid for it, whether such purchase be made in execution of a simple decree for money or in execution of a decree obtained by the mortgagee himself upon a subsequent mortgage, although it is possible that under some circumstances such purchase may have the effect of extinguishing the mortgage. *Ahmad Wali v. Bakar Husain* overruled; *Nawab Asimut Ali Khan v. Jowahir Singh, Nilakant Banerji v. Suresh Chandra Mullick, Mahtab Singh*

Act—(continued.)

IV of 1882—(continued).

v. Misree Lall, Bitthul Nath v. Toolsee Ram, Kesree v. Seth Roshun Lal, Kuray Mal v. Puran Mal, Mahtab Rai v. Sant Lal, Sumera Kuar v. Bhagwant Singh, Chunna Lal v. Anandi Lal, Khwaja Bakhsh v. Imaman, Ballam Das v. Amar Raj and Bisheshar Singh v. Laik Singh referred to.

NAND KISHORE v. RAJA HARI SINGH XX 23

s. 72. *Mortgages compelled to pay Government revenue which should have been paid by the mortgagor—Remedies of the mortgagor.* Where a mortgagee has been compelled to pay Government revenue which should have been paid by the mortgagor, the mortgagee may either add the amount which he has so been made to pay to the amount of the mortgage debt under s. 72 of the Transfer of Property Act, 1882, or he may sue the mortgagor separately to recover the amount so paid. If, however, he has sued separately and obtained a decree against his mortgagor, he cannot then add the amount due to the mortgage debt; his two remedies are not concurrent.

IMDAD HASAN KHAN v. BADRI PRASAD XX 401

s. 82. See MORTGAGE 1.

s. 85. See BURDEN OF PROOF 1: HINDU LAW 12: MORTGAGE 4.

s. 85. *Civil Procedure Code, s. 43—Cause of action—Mortgages—Holder of two mortgages on the same property suing separately on each.* There is nothing in the Code of Civil Procedure or in the Transfer of Property Act to prevent the holder of two independent mortgages, over the same property, who is not restrained by any covenant in either of them, from obtaining a decree for sale on each of them in a separate suit.

SUNDAR SINGH v. BHOLU XX 322

s. 85. *Mortgage—Non-joinder of parties—Subsequent mortgagee after suit upon prior mortgage filed.* Held, that s. 85 of the Transfer of Property Act, 1882, does not require the joinder in a suit on a prior mortgage of a subsequent mortgagee whose mortgage was only executed subsequent to the filing of such suit.

ISHAQ ALI KHAN v. CHUNNI XXI 149

s. 85. *Mortgage—Prior and subsequent mortgagees—Effect of non-compliance with s. 85.* A prior mortgagee, without making a puisne mortgagee a party to his suit, sued on his mortgage, obtained a decree for sale, sold the mortgaged property, and purchased it himself. Subsequently the puisne mortgagee holding a mortgage over the same property brought his mortgage into suit without making the prior mortgagee a party, and obtained a decree for sale. Held that the puisne mortgagee could not bring the mortgaged property to sale in execution of such decree. *Janki Prasad v. Kishen Dat* followed.

MEHRBANO v. NADIR ALI XXII 212

ss. 86 and 87. See PRE-EMPTION 1 AND 2.

ss. 86 and 87. *Mortgage—Redemption—Redemption possible at any time prior to the passing of the order absolute under s. 87.* A mortgagor who has obtained a decree for redemption of his mortgage can pay in the redemption money and obtain redemption at any time until an order absolute under s. 87 is made against him. *Poresb Nath Mojumdar v. Ramjodu Mojumdar* and *Raham Ilahi Khan v. Ghasita* referred to.

NIHALI v. MITTAR SEN XX 446

ss. 86, 88, 89. See EXECUTION OF DECREE 6.

s. 87. See ACT XV OF 1877, SCH. II, ART. 179.

s. 88. See EXECUTION OF DECREE 7.

ss. 88, 89. See CIVIL PROCEDURE CODE, SS. 13, 244.

s. 89. *Execution of decree—Order absolute for sale—Limitation—Act XV of 1877, sch. II, art. 179.* An application for an order absolute for sale under s. 89 of the Transfer of Property Act, 1882, is an application to which art. 179 of the second schedule to the Indian Limitation Act, 1877, applies. *Oudh Bahari Lal v. Nageshar Lal* referred to; *Ranbir Singh v. Drigpal Singh* overruled.

CHUNNI LAL v. HARNAM DAS XX 302

s. 89. *Execution of decree—Sale in execution of a decree for sale on a mortgage—Stay of sale on payment into Court of decretal amount and costs—Civil Procedure Code, s. 291.* Held, that s. 291 of the Code of Civil Procedure must be taken to have modified s. 89 of Act IV of 1882 when the debt and costs (including the costs of the sale) are tendered to the officer conducting the sale, or when it is

Act—(continued.)**IV of 1882—(concluded.)**

- proved to his satisfaction that the amount of such debt and costs has been paid into the Court that ordered the sale. *Raja Ram Singhji v. Chunni Lal* followed.
- HARJAS RAI v. RAMESHAR** XX 354
- s. 90. *Application for a decree under s. 90—Limitation Act XV of 1877 (Indian Limitation Act), sch. II, art. 178. Held, that the limitation governing an application for a decree under s. 90 of the Transfer of Property Act is that prescribed by art. 178 of the second schedule to the Indian Limitation Act, 1877.*
- RAM SARUP v. GHOURANI** XXI 453
- s. 90. *Application for decree over against non-hypothecated property—Balance legally recoverable—Limitation. On an application under s. 90 of the Transfer of Property Act, 1882, the time to be looked at in considering whether the balance sought to be recovered is legally recoverable from the mortgagor is the date of the institution of the suit and not the date of the making of the application under s. 90. Bageshri Dial v. Muhammad Naqi referred to.*
- HAMID-UD-DIN v. KEDAR NATH** XX 386
- s. 90. *Execution of decree—Decree for sale on a mortgage—Mortgaged property sold in execution of a decree held by a different mortgagee—Section 90 not applicable. In order to make the remedy provided by s. 90 of the Transfer of Property Act available, it is necessary that the mortgaged property should have been sold in execution of the decree held by the person applying for a further decree under s. 90. Section 90 does not apply where the mortgaged property has been sold under a decree held by some other person. Muhammad Akbar v. Munshi Ram followed.*
- BADRI DAS v. INAYAT KHAN** XXII 404
- s. 90. *Mortgage—Personal covenant to pay—Application to sell non-hypothecated property—"Balance legally recoverable"—Cause of action—Limitation. A mortgage bond securing a debt payable on demand provided that for the payment of the amount of mortgage debt the immoveable property mentioned in it should be held as collateral security, and that "in case of this hypothecated property being insufficient for the satisfaction of the entire amount of the bond, the creditors would be at liberty to realize the amount remaining due from the obligors personally and from their other property." Held, that no separate cause of action for the personal remedy accrued after the mortgaged property was found on sale to be insufficient to satisfy the mortgage debt, but that the cause of action for both remedies was one and the same and accrued when the covenant to pay was broken. Hence, the suit for sale of the mortgaged property having been brought more than ten years after the date of the mortgage, the balance due upon the mortgage was not legally recoverable otherwise than out of the property sold and an application for a decree under s. 90 of the Transfer of Property Act was not maintainable. Musahab Zaman Khan v. Inayat-ul-lah, In re McHenry, McDermott v. Boyd and Muller v. Runga Nath Moulick referred to.*
- CHATTAR MAL v. THAKURI** XX 512
- ss. 92 and 93. See MORTGAGE 9.
- ss. 122 and 123. *Gift—Registration—Registration of deed of gift of immoveable property after the death of the donor. A gift of immoveable property duly made by means of a registered deed is not invalid merely because registration of the deed of gift may have taken place after the death of the donor. Hardei v. Ram Lal referred to.*
- NAND KISHORE LAL v. SURAJ PRASAD** XX 392
- s. 135. *Actionable claim—Person claiming the benefit of s. 135 not obliged to pay before judgment the amount paid by the assignee. Held, that a person who is entitled to claim the benefit of s. 135 of the Transfer of Property Act of 1882 does not lose the benefit of that section if he puts the assignee to proof of the price paid by him and waits until the amount of the price has been determined and declared by the Court. There is nothing in the section to preclude the debtor from securing his discharge by payment of the decree. Rani v. Ajudhia Prasad, Muchiram Barik v. Ishun Chunder Chuckerbutti, Jani Begam v. Jahangir Khan, Hakim-un-nissa v. Deonarain and Nilakanta v. Krishnasami referred to.*
- PHUL CHAND v. CHHOTE LAL** XX 327
- s. 135. *Actionable claim—Sale of mortgagor's interest in mortgaged property. The sale by a mortgagor of his interest in the property mortgaged is not the sale of an actionable claim within the meaning of s. 135 of the Transfer of Property Act, 1882.*
- TOTA RAM v. LALA** XX 468

Act—(continued.)

. VI of 1882—

ss. 29, 58, 92. *Application to compel registration of transfers of shares—Discretionary power of Directors to refuse registration—Articles of Association—Interference of the Courts.* Where the Directors of a Company (the Muir Mills) refused to register the transfer of shares and relied on art. 21 of the Articles of Association, which empowered the Directors to "decline to register any transfer of shares to any person of whom they may for any reason disapprove."—(1) *Held*, that it is not necessary under s. 58 for the applicants to join their vendors in their applications. *Ex parte Penney* distinguished; *Skinner v. City of London Marine Insurance Company, London Founders' Association v. Clarke, Paine v. Hutchinson, Ex parte Gilbert* referred to. *Ex parte Shaw* followed; (2) Where it was found that there was a defect in the constitution of the Board of Directors, which was not cured by the Articles of Association: *Held*, that the Court was not bound to dismiss the application under s. 58 on the ground of its being premature, there having been no refusal to register by a properly constituted Board, but might treat the defence set up as a refusal, and deal with the application on the merits. (3) Where it was found that the real objections entertained by the Directors to the various transferees were (1) their connection as employes of the Cawnpore Woollen Mills with McRobert (the Managing Director of the Cawnpore Woollen Mills) and the personal animosity existing between Johnson (the Managing Director of the Muir Mills) and McRobert, and (2) the desire of the Directors (of the Muir Mills) that McRobert should not add to his voting power at the meetings of the Company, and (3) that therefore the objections were not personal to the applicants themselves. *Held*, that where the Articles of Association give a discretionary power to the Directors to refuse to register a transfer, and it appears that the Directors have *bona fide* considered the matter, the Courts will not compel them to disclose their reasons, but if they do disclose their reasons, or evidence is produced as to their reasons, the Courts will consider whether those reasons proceeded on a right or wrong principle. *Held*, further, applying the principles of English cases, that objections not personal to the transferees do not constitute legitimate reasons. *Poole v. Middleton, In re Bell Bros., Ex parte Penney, Moffat v. Farquhar, Kikhsro v. Coorla Spinning and Weaving Co., In re Coalport China Co.* referred to.

THE MUIR MILLS COMPANY, LTD. OF CAWNPORE v. CONDON AND BUTTERWORTH XXII

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ss. 55, 56. *Company—Register of shareholders—Inspection—Refusal to allow inspection of register of shareholders.* Where a person who is entitled, under the provisions of s. 55 of the Indian Companies Act, 1882, to obtain inspection of the register of shareholders of a Company, applies for inspection during business hours and not at a time when inspection is prohibited, either under s. 56 or by reason of any rules framed by the Company under s. 55, such inspection must be granted, and even a temporary refusal, based upon grounds of convenience to the Company's business, will render a director responsible for such refusal liable to the penalty provided for by s. 55.

* QUEEN-EMPRESS v. BEER XX 126

ss. 76, 79. See ACT I OF 1879, SCH. I, ART. 8.

ss. 92 and 93. See MORTGAGE 9.

XV of 1883—

ss. 29, 42, 44. *Act XV of 1873, s. 15—Municipal Board—Powers of taxation—Procedure—Consideration of objections to proposed tax—Final imposition of tax—Special meeting—Act I of 1877, Ch. VIII—Injunction.* The N.-W.P. and Oudh Municipalities Act, 1883, not conferring the powers given by Act XV of 1873 to "cancel or vary" a tax imposed, the procedure to be adopted for the enhancement of an existing tax must be the same as that prescribed for the imposition of a new tax. In imposing a new tax the procedure laid down in s. 42 of Act XV of 1883 must be strictly followed. Where therefore neither the special meeting of the Board at which an assessee's objections to a proposed tax were considered, nor the special meeting at which the tax was finally imposed, were properly constituted within the meaning of s. 29 of Act XV of 1883, it was *held* that the imposition of the tax was invalid. *The Municipality of the City of Poona v. Mohan Lal* approved. *Held* also that there is nothing in Ch. VIII of the Specific Relief Act to prevent the High Court from granting an injunction against a Municipality as part of the remedy in a regular suit. *Moran v. The Chairman of Motihari Municipality* considered. *Ganga Narain v. The Municipality of Cawnpore* referred to.

STRACHEY v. THE MUNICIPAL BOARD OF CAWNPORE XXI

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Act—(continued.)**XV of 1883—(continued.)**

- s. 46. *Issue of distress warrant for recovery of alleged arrears of municipal tax—Jurisdiction of Magistrate.* Held that where a Magistrate, acting under s. 46 of Act XV of 1883, issues a warrant for the realization of arrears of municipal taxes alleged to be due, the Magistrate is acting in a ministerial capacity only and has no jurisdiction to inquire as to whether such arrears are really due or not.
ELLIS v. THE MUNICIPAL BOARD OF MUSSOORIE ... XXII 111

- s. 69. *Complaint of offence against municipal bye-law—Power of Municipal Board to give a general authority to institute complaints on its behalf.* Held that s. 69 of the N.-W.P. and Oudh Municipalities Act, 1883, confers upon Municipal Boards in the N.-W. P. and Oudh the power to delegate generally their authority to make complaints in respect of municipal offences; and this general delegation includes not merely the giving of authority to do the formal act of presenting a complaint to a Court, but the exercise of discretion as to whether in any given case a complaint shall or shall not be made.
POWELL v. THE MUNICIPAL BOARD OF MUSSOORIE ... XXII 123

XII of 1884—

- s. 5. See ACT XIX OF 1873, SS. 166, 167, 168.

I of 1887—

- s. 7. See ACT XI OF 1881, SS. 93 (h), 203.

IX of 1887—

- s. 15. See CIVIL PROCEDURE CODE, s. 586.

- s. 23. *Civil Procedure Code, s. 586—Suit of the nature cognizable by Courts of Small Causes.* A suit is none the less a suit cognizable by a Court of Small Causes because that Court may have exercised the discretion conferred on it by s. 23 of the Provincial Small Cause Courts' Act, and returned the plaint to be presented to a Court having jurisdiction to determine a question of title raised therein. *Kali Krishna Tagore v. Izzat-an-nissa Khatun.*

SADA SHANKAR v. BRIJ MOHAN DAS ... XX 480

- s. 25. *Civil Procedure Code, s. 622—Revision—Discretion of Court in dealing with applications under s. 25 of Act IX of 1887.* Although s. 622 of the Code of Civil Procedure may properly be taken as indicating the lines along which a Judge would do well to exercise his discretion in admitting an application under s. 25 of the Small Cause Courts Act, a Judge is not absolutely bound to refuse any application under s. 25 of the latter Act which could not be admitted under s. 622 of the Code of Civil Procedure. *Sarman Lal v. Khuban* referred to and explained.

VIAS RAM SHANKAR v. RALLA RAM MISIR ... XXI 89

VII of 1888—

- ss. 30 and 55. See CIVIL PROCEDURE CODE, SS. 312 AND 320.

VII of 1889—

- s. 4. See CIVIL PROCEDURE CODE, s. 596.

- ss. 6 and 7. *Certificate to collect debts—Minor.* Held, that a certificate of succession may be granted under Act VII of 1889 to a minor through his next friend. *Kali Coomar Chatterjee v. Tara Prosunna Mookerjee* referred to.

RAM KUAR v. SARDAR SINGH ... XX 352

VIII of 1890—

- s. 34. *Joint Hindu family—Guardian and minor—Court not competent to appoint a guardian to the property of a minor who is a member of a joint Hindu family.* It is not competent to a Court to appoint a guardian to the property of a minor when such minor is a member of a joint Hindu family and has no other property than his share in the joint family estate. *Jhabbu Singh v. Ganga Kishen and Gurja v. Moher Singh* referred to.

BANDHU PRASAD v. BHIRAJI KUAR ... XX 400

- s. 41. *Guardian and ward—Death of guardian—Suit by ward against guardian's son for rendition of accounts.* Held that no suit would lie by a ward against the son of his late guardian for rendition of accounts. *Rameshwar Tiwari v. Kishun Kumar* referred to.

MANMOTHONATH BOSE MULLICK v. BASANTO KUMAR BOSE MULLICK. XXII 392

- s. 47. *Appeal—Order refusing to direct the removal of a guardian.* Where an applicant for a certificate of guardianship applied for a two-fold relief, namely, that the

Act—(continued.)***VIII of 1890—(continued.)**

existing guardian might be removed and that she herself might be appointed guardian, and her application was dismissed, it was held that no appeal would lie from the order of dismissal, such order being an order refusing to direct the removal of a guardian. *Mohima Chunder Biswas v. Tarini Sunker Ghose, Pakhwanti Dai v. Indra Narain Singh* and *In re Bai Harkha* referred to.

IMTIAZ-UN-NISSA v. ANWAR-UL-LAH XX 433

IX of 1890—

ss. 72, 76. *Act IX of 1872 (Indian Contract Act)*, ss. 151, 152, 161—*Contract—Bailment—Liability of bailee—Burden of proof—Railway Company*. Where goods are delivered to a Railway Company for carriage not "at owner's risk" and such goods are lost or destroyed while in the custody of the company, it is not for the owner suing for compensation for such loss or destruction to prove negligence on the part of the company but, when the owner has proved delivery to the company, it is for the company to prove that they have exercised the care required by the Indian Contract Act, 1872, of bailees for hire.

• NANKU RAM v. INDIAN MIDLAND RAILWAY COMPANY XXII 361

ss. 113, 132. *Act XLV of 1860*, ss. 40, 64—*Criminal Procedure Code*, s. 33—"Offence"—*Travelling on a railway without a proper ticket—Punishment*. A passenger who travels in a train without having a proper pass or ticket with him has not committed an "offence." He cannot therefore be legally sentenced to imprisonment in default of payment of the excess charge and fare which may be recovered under the provisions of s. 113, cl. (4) of Act IX of 1890.

QUEEN-EMPRESS v. RAM PAL XX 95

XI of 1890—

s. 6 (1). *Meaning of the word "permit."* Held that the word "permits", as used in s. 6, cl. (1) of Act XI of 1890, implies knowledge of that which is permitted.

QUEEN-EMPRESS v. LALTA PRASAD XX 186

I of 1892—

s. 5, sub-sec. 2. *Lodging-house—House of "pragwal" used for accommodation of pilgrims*. Held, that a "pragwal" who, according to custom, affords accommodation to his clients when they come to Allahabad for religious purposes, is bound, under the N.-W. P. and Oudh Lodging House Act, 1892, to take out a license in respect of such houses as he may use for the accommodation of his clients.

QUEEN-EMPRESS v. BEHARI LAL XX 534

IV of 1893—

s. 10. *Partition—Offer by a party to a partition suit of compensation—Decree in partition suit when final—Civil Procedure Code*, s. 396. Held, that s. 10 of Act

• IV of 1893 would apply to a suit for partition in the stage where an interlocutory decree for partition had been made, but that decree had not become final by the Court's acceptance of the lots prepared by the officer appointed for that purpose. *Shah Muhammad Khan v. Hanwant Singh* and *Zubaida Jan v. Muhammad Taieb* referred to.

ABDUS SAMAD KHAN v. ABDUR RAZZAQ KHAN.. XXI 409

I of 1894—

ss. 18, 19, 32 and 54. *Reference by Collector to Judge—Appeal from Judge's order—Decree—Court-fee*. Held, that an appeal will lie to the High Court from an order of the District Judge made upon a reference by the Collector under ss. 18 and 19 of the Land Acquisition Act, 1894, as to the disposal of compensation awarded for land taken up by Government under the Act. *Balaram Bhramarutar Ray v. Sham Sunder Narendra* followed. Held, also, that in an appeal from the order of the District Judge above referred to the memorandum of appeal must be stamped as an appeal from an original decree.

SHEO RATTAN RAI v. MOHRI XXI 354

XII of 1896—

ss. 36, 37, 38, 41, 57. See ACT XXII OF 1881, ss. 27, 28, 29, 30, 34 AND 47.

s. 49. *License to sell spirits retail—Death of licensee before expiration of period of license—Right of his heir and partner in business to continue sale—Personal nature of license*. Held, that a license for the retail sale of liquor under the Excise Act, XII of 1896, granted in the name of one man, does not on his death before the expiration of the period of the license descend to his heir and partner in business so as to justify the said heir and partner in business in continuing

Attachment --

See CIVIL PROCEDURE CODE, SS. 273, 266, 268; 276; 311.

Of debt. See CIVIL PROCEDURE CODE, s. 268.

Attempt to murder--

See ACT XIV OF 1860, s. 307.

Auction-purchaser--

Suit by. See CIVIL PROCEDURE CODE, s. 335.

Title of. See EXECUTION OF DECREE 14.

Award--

See ACT IX OF 1872, SS. 15, 16, 19: ARBITRATION; CIVIL PROCEDURE CODE, s. 516: CONSTRUCTION OF DOCUMENT 1.

Bailment--

See ACT IX OF 1872, SS. 118, 151, 152: ACT IX OF 1890, SS. 72, 76.

Benamidar--

Mortgage--Suit for sale on a mortgage--Right of benamidar mortgagee to sue. Held, that the mortgagee named in a deed of mortgage is competent to sue in his own name for sale on the mortgage, though he is admittedly only a benamidar for some third person. *Nand Kishore Lal v. Ahmad Ata* followed. *Gopi Nath Chobey v. Bhugwat Pershad*, *Bhola Pershad v. Ram Lall*, *Sachitananda Mohapatra v. Baloram Gorain*, *Shanyara v. Krishnan*, *Ravji Appaji Kukarni v. Mahadev Bapuji Kulkarni* and *Daydu v. Balvant Ramchandra Natu* referred to; *Hari Gobind Adhikari v. Akhoy Kumar Mozumdar*, *Issur Chandra Dutt v. Gopal Chandra Das* and *Baroda Sundari Ghose v. Dino Bandhu Khan* dissented from.

YAD RAM v. UMRAO SINGH XXI 380

Benami Purchase--

See ACT XIX OF 1873, s. 181: CIVIL PROCEDURE CODE, s. 317.

Burden of Proof--

See ACT IX OF 1890, SS. 72, 76: ADVERSE POSSESSION: GUARDIAN AND MINOR: LANDHOLDER AND TENANT 4.

1. Act IV of 1882 (*Transfer of Property Act*), s. 85--*Hindu law--Joint Hindu family--Suit on a mortgage executed by a Hindu father--Sons not made parties--Notice.* Where the sons in a joint Hindu family come into Court seeking to get rid of the effect, as against their interests in the joint family property, of a decree on a mortgage executed by their father obtained in a suit to which they were not made parties, the burden of proof lies on them to establish that the mortgagee when he brought his suit had notice of their interests in the mortgaged property.

RAM NATH RAI v. LACHMAN RAI XXI 193

2. *Hindu law--Joint Hindu family--Suit for partition--Plea by defendants that some of the property in suit was their self-acquired property.* In a suit for partition of property alleged to be the property of a joint Hindu family, of which the plaintiff was a member, the defendants, while admitting that some of the property scheduled in the plaint was joint property, pleaded that the bulk of the property in suit, of which they were in possession, was their own self-acquired property. Held that the burden of proof was on the defendants to show that such property was their self-acquisition. *Gajendar Singh v. Sardar Singh*, *Dhurm Das Pandey v. Mussamut Shama Soondri* and *Gobind Chunder Mookerjee v. Doorgapersaud Baboo* referred to.

KANHIA LAL v. DEBI DAS XXII 141

Cause of Action--

See ACT XIX OF 1873, SS. 185 AND 186: ACT IV OF 1882, SS. 85; 90: PRACTICE 3: PRE-EMPTION 9.

Suit for damages for removal of crop--Defendant entitled to possession under decree of a competent Court of Revenue--Plaintiff in actual possession under an illegal decree of a Civil Court--Trespass. A held a decree of a competent Court of Revenue for possession of certain land as against B, and obtained under that decree formal possession of the land. B, however, was allowed to remain in such necessary possession of the land as was requisite to enable him to remove a crop which was on the land. B removed his crop, and thereafter sued in a Civil Court for a declaration that he was A's tenant of the land in question, holding occupancy rights. A did not defend the suit, and the Civil Court passed a declaratory decree in favour of the plaintiff, and further proceeded to execute that declaratory decree by putting B in possession. Subsequently B sued A for damages in respect of the alleged removal by A of a second crop, which he asserted that he (B) had sown

Cause of Action—(continued.)

- upon the said land. *Held* that B had no cause of action, and that even if in fact he had sown the crop in respect of which damages were claimed, he did so at his own peril and as a trespasser.

UDIT NARAIN SINGH v. SHIB RAI XX 198

Certified Copy of Ancient Document—

See ACT I OF 1872, SS. 65, 90.

Civil and Revenue Courts—

See ACT XIX OF 1873, SS. 111, 113, 241: CIVIL PROCEDURE CODE, SS. 285, 295, 4A: JURISDICTION 1, 2 AND 3.

Jurisdiction. See ACT XV OF 1877, SCH. II, ART. 32: CAUSE OF ACTION: LAND-HOLDER AND TENANT 3: LETTERS PATENT, S. 10.

Jurisdiction of. See ACT XIX OF 1873, S. 241 (i): ACT XII OF 1881, SS. 36; 36, 96 (b); 208.

Civil Procedure Code—

- s. 13. *Res judicata*—Prior decree between the same parties in the same claim not arriving at a final decision. In a former suit between the same parties that were now in litigation, in which the same claim upon title was made, a decree dismissed the suit. But the judgment in the former suit stated that it was left open to the plaintiff to sue again, and that no matters affecting the rights of the parties were decided between them. *Held*, that the prior decree was not a final decision within the meaning of s. 13 of the Code of Civil Procedure, and the defence of *res judicata* was not maintained.

PARSOTAM GIR v. NARRADA GIR XXI 505

- s. 13, expl. II. *Res judicata*—Matter which might and ought to have been made ground of defence in a former suit—Mortgage—Prior and subsequent mortgagees. *Held*, that the holder of three prior mortgages over the same property, who, in answer to suits brought by the holders of other mortgages over that property of dates subsequent to his, had pleaded his rights under one only of the mortgages held by him, was barred by reason of expl. II to s. 13 of the Code of Civil Procedure from afterwards bringing a suit for sale upon one of the remaining mortgages, which he might and ought to have pleaded as an answer *pro tanto* to the suits of the other mortgagees. *Mahabir Prasad Singh v. Macnaghten, Kameswar Prasad v. Raj Kumari Ruttan Kuar, Kailash Mondul v. Baroda Sundari Dasi, Sheosagar Singh v. Sita Ram Singh and Mata Din Kasodhan v. Kazim Husain* referred to.

SRI GOPAL v. PIRTHI SINGH XX 110

- s. 13, expl. II. *Res judicata*—Matter which might have been a ground of defence in a former suit. A defendant in a suit for the recovery of possession of immoveable property pleaded only a right to the proprietary possession of the property in suit in himself. This defence failed, and a decree was given in favour of the plaintiff. Subsequently the plaintiff sold a portion of the property so decreed to them, and the *quondam* defendant brought a suit for pre-emption. *Held*, that the suit must fail inasmuch as the plaintiff's claim was one which he might have made when defendant in the former suit as an alternative to his defence of title. *Srimut Rajah Mootoo Vijaya, etc. v. Katama Natchiar, Kameswar Pershad v. Itaj Kumari Ruttan Kuar and Baldeo Sahai v. Bateshar Singh* referred to.

PULANDAR SINGH v. JWALA SINGH XX 516

- s. 13, expl. II. *Res judicata*—Muhammadan law—Dower—Suit for dower debt after previous suit for partition amongst heirs—Effect of partition decree as constituting *res judicata* between co-defendants. Two of the daughters of a deceased Muhammadan sued the remaining heirs for partition of the inheritance, and a decree for partition was made, which was confirmed on appeal by the High Court. Pending the appeal to the High Court, two other daughters of the deceased, who had been parties defendants in the suit for partition, brought a suit by which they claimed a large share in the estate of the deceased as part of the dower debt due to their mother. In this suit they impleaded as defendants all the surviving descendants of their deceased father. *Held* that the claim for dower should have been made a ground of defence in the former suit by the plaintiffs, who had been defendants in the suit for partition, and that as no such defence had been set up in that suit the claim in respect of the dower debt fell within the purview of expl. II to s. 13 of the Code of Civil Procedure, and the suit was barred, not only as against the plaintiffs to the former suit, but as against the other defendants to that suit.

DOST MUHAMMAD KHAN v. SAID BEGAM XX 81

Civil Procedure Code—(continued.)

s. 13, expl. III. Sec MESNE PROFITS.

ss. 13, 244. *Transfer of Property Act (IV of 1882) ss. 86, 89—Decree not in accordance with judgment—Interpretation of decree.* Where a mortgagee in suing upon his mortgage included in his plaint certain property which was not included in the mortgage deed, and this fact was apparently overlooked by the defendant who defended the suit, and where, while the judgment declared "that a decree be given against the hypothecated estate," in the decree the property affected was described as "the property specified in the plaint." *Held*, that the decree must be held to mean the hypothecated property mentioned in the plaint, and that neither s. 13 nor s. 244 of the Code of Civil Procedure concluded the defendant from subsequently suing to recover the property wrongly included in the plaint.

RAM CHANDER v. KONDO XXII 442

ss. 13, 544. *Res judicata—Under what circumstances a decision may be res judicata as between defendants.* Where an adjudication between defendants is necessary to give the appropriate relief to the plaintiff, the adjudication will be *res judicata* between the defendants as well as between the plaintiff and defendants. But for this effect to arise there must be a conflict of interest between the defendants and a judgment defining the real rights and obligations of the defendants *inter se*. Without necessity a judgment will not be *res judicata* amongst defendants, nor will it be *res judicata* amongst them by mere inference from the fact that they have been collectively defeated in resisting a claim made against them as a group. *Ramchandra Narayan v. Narayan Mahadev, Ahmad Ali v. Najabat Khan and Madhavi v. Kelu* followed. *Bishnath Singh v. Bisheshwar Singh* referred to. Section 544 of the Code of Civil Procedure does not, unless the decree itself proceeds on a ground common to all the defendants, enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by some only of such defendants and to reverse the decree of the Court below in favour of all the defendants. *Puran Mal v. Krant Singh* referred to.

CHAJJU v. UMRAO SINGH XXII 386

s. 14. *Suit on a foreign judgment—Power of Court to inquire into the merits—Muhammadan law—Dower.* Where a suit was brought in a Court in British India upon the basis of a decree of the Council of Regency of the State of Rampur, it was *held* that the Court was empowered by s. 14 of the Code of Civil Procedure, as amended by s. 5 of Act VII of 1888, to consider the merits of the case in which the decree of the Council of Regency had been passed.

THE COLLECTOR OF MORADABAD v. HARBANS SINGH XXI 1.

s. 25. *Transfer—Application to High Court after rejection of a similar application by the District Judge—Application disallowed.* Where an application to a District Judge to transfer a suit pending in the Court of the Subordinate Judge to his own file had been granted, the High Court declined to entertain an application for transfer of the same suit from the Court of the District Judge. *Farid Ahmad v. Dulari Bibi* referred to.

MUHAMMAD SAFDAR HUSEN v. PURAN CHAND XX 395

ss. 25, 562. *Transfer—Procedure—Suit transferred to his own file by District Judge—Appeal to High Court—Remand to District Judge—Judge not competent to transfer.* By order of a District Judge under s. 25 of the Code of Civil Procedure a suit was transferred from the Court of the Subordinate Judge to his own Court. The District Judge decided the suit, and from his decree there was an appeal to the High Court. The High Court remanded the suit under s. 562 of the Code to the Court of the District Judge. The latter transferred the suit so remanded for trial to the Subordinate Judge. *Held* that the District Judge had then no power to transfer the suit, but was bound to try it himself. *Semle* that s. 25 of the Code of Civil Procedure has no application to a case remanded under s. 562 of the Code.

SITA RAM v. NAUNI DULAIYA XXI 230

s. 29. See ACT IX OF 1872, S. 43.

s. 30. *Numerous persons interested similarly in the result of a suit—Permission given to some to sue on behalf of all—Permission granted after the filing of the suit by some only.* *Held*, that the permission required by s. 30 of the Code of Civil Procedure may be granted after the filing of a suit by some only of the persons interested therein. *Fernandez v. Rodrigues* followed.

BALDEO BHARTHI v. BIR GIR XXII 269

Civil Procedure Code—(continued.)

- s. 32. *Order adding defendant—Means of questioning such order—Practice.* Where an order adding a defendant under s. 32 of the Code of Civil Procedure was not appealed against, and no objection was taken thereto, in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh v. Chakardhari Singh* referred to. Where there is a subsisting decree in a previous suit which as regards the subject-matter of a subsequent suit would take effect under s. 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by such decree to question in the subsequent suit the validity of such decree, though it might have been open to such party in a separate suit to get the decree set aside. *Karamali Rahimbhoy v. Rahimbhoy Habibbhoy* referred to.
- BANSI LAL v. RAMJI LAL XX 370
- ss. 32 and 108. *Powers conferred by s. 32 exercisable even after an order has been passed under s. 108.* Held that the powers conferred by s. 32 of the Code of Civil Procedure in respect of the addition of parties were exercisable even after a suit had been reinstated on an application under s. 108 of the Code made by one of the defendants who had not been served with notice of the suit.
- TIKAM SINGH v. THAKUR KISHORE RAMANJI MAHARAJ XX 188
- s. 43. See ACT IV OF 1882, s. 85.
- s. 43. *Application for leave to sue in forma pauperis—Application rejected—Subsequent suit not barred—Civil Procedure Code, s. 413.* Held, that s. 43 of the Code of Civil Procedure would not apply so as to bar a subsequent suit where the so-called previous suit was not a regular suit, but an application for leave to sue in forma pauperis, which was rejected.
- NARAIN SINGH v. JASWANT SINGH XXI 359
- ss. 51, 578. *Plaint not signed by plaintiff or his authorized agent—Effect of such want of signature—Plaint not necessarily void—Breach of contract—Measure of damages.* Held, that the mere fact that the plaint in a suit has not been signed by the plaintiff named therein or by any person duly authorized by him in that behalf as required by s. 51 of the Code of Civil Procedure will not necessarily make the plaint absolutely void. A defect in the signature of the plaint, or the absence of signature, where it appears that the suit was in fact filed with the knowledge and by the authority of the plaintiff named therein, may be waived by the defendant, or, if necessary, cured by amendment at any stage of the suit, and, having regard to s. 578 of the Code of Civil Procedure is not a ground for interference in appeal. *Rajit Ram v. Katesar Nath* and *Mohini Mohun Das v. Bungsi Buddan Saha Das* referred to. *Marghub Ahmad v. Nihal Ahmad* overruled. *Mahabir Prasad v. Shah Wahid Alam* distinguished. *Katesar Nath v. Aggyan and Budri Prasad v. Bhagwati Dhar* discussed. The plaintiffs sold to the defendant a certain number of cases of embroidered muslin. The defendant took delivery of some of the cases, but refused to take delivery of or pay for the rest. The plaintiffs re-sold the goods refused by the defendant, and brought a suit against the defendant for damages. Held, that the proper measure of damages was the difference between the contract price of the goods which the defendant had refused to accept, and the price realized by the plaintiffs on the re-sale. *Moll Achutte & Co. v. Luchmi Chand* followed. *Yule & Co. v. Mahomed Hossain* dissented from.
- BASDEO v. SMIDT XXII 55
- s. 53. *Verification of plaint—Plaint verified when in an incomplete state—Amendment of plaint.* The substantial portion of a plaint, consisting of the statement of the claim of the plaintiffs and the prayer, was written upon two sheets of plain paper and verified by the plaintiffs. Subsequently to the affixing of the plaintiffs' signatures, a front sheet, consisting of a piece of stamped paper with the name of the Court and the names and addresses of the parties, was added, and the plaint thus composed filed in Court. Held, that the verification was defective; but that the suit ought not to have been dismissed. The plaintiffs ought to have been allowed an opportunity of amending the plaint by making a proper verification.
- FATEH CHAND v. MANSAB RAI XX 442
- ss. 102, 103, 157. *Order dismissing a suit for default of appearance—Construction of order—Application for restoration of suit—Pleadings—What constitutes an "Appearance."* In construing an order alleged by one side and denied by the other to be an order under s. 102 of the Code of Civil Procedure, the order will be considered as an order under s. 102, if, apart from the mere description which the Court gives of its action, and apart from the actual fact of the plaintiffs'

Civil Procedure Code—(continued.)

appearance or non-appearance, the real meaning and substance of the Court's action is, that it dismisses the suit on the view, whether right or wrong, that the plaintiff appears and the defendant does not appear. Where, his suit having been dismissed for default of appearance under s. 102 of the Code, the plaintiff applies for its restoration, the defendant cannot contest the application *in limine* as one which cannot be entertained at all under s. 103 by showing that at the time of the dismissal there was an appearance by the plaintiff in fact or in law; but as an answer to the application on the merits the defendant can raise the contention that the plaintiff was not prevented from appearing because in fact he did appear. It is not an "appearance" within the meaning of s. 102 of the Code when the plaintiff is represented only by a pleader who is without instructions enabling him to proceed with the case, and who is merely instructed to apply for an adjournment. *Shankar Dat Dube v. Radha Krishna* and *Soonderlal v. Goorprasad* approved. *Mahomed Azeem-ool-lah v. Ali Buksh*, *Kashi Parshad v. Debi Das* and *Kanahi Lal v. Naubat Rai* referred to.

LALTA PRASAD v. NAND KISHORE XXII 66

s. 108. See CIVIL PROCEDURE CODE, S. 396.

s. 108. *Decree ex parte—Appearance—Pleader retained in suit but not instructed.* A party defendant retained a pleader to defend the suit against him, and the pleader filed a *vakalatnamah* and did certain acts for the defendant. However, when the suit came on for hearing the pleader came into Court and stated that he had no instructions and could not go on with the case, practically that he had retired, from the case. The Court proceeded with the suit and made a decree in favour of the plaintiff. *Held* that this decree was a decree *ex parte* within the meaning of s. 108 of the Code of Civil Procedure. *Bhagwan Dai v. Hira and Jonardan Dobeey v. Ramulhone Singh* referred to. *Sahibzada Zein-ul-abdin Khan v. Ahmad Raza Khan* distinguished.

SHANKAR DAT DUBE v. RADHA KRISHNA XX 195

s. 108. *Decree ex parte—Death of judgment-debtor—Application by legal representative to have the decree set aside.* *Held*, that where a defendant against, whom a decree has been passed *ex parte* for default of appearance; dies, his legal representative is not competent to apply under s. 108 of the Code of Civil Procedure for an order to set the *ex parte* decree aside.

JANKI PRASAD v. SUKHIRANI XXI 274

s. 108. *Decree ex parte—Suit to set aside as fraudulently obtained a decree ex parte—Application to set aside ex parte decree.* An *ex parte* decree was passed against a defendant. The defendant judgment-debtor applied under s. 108 of the Code of Civil Procedure to have such *ex parte* decree set aside, but his application was dismissed as barred by limitation. *Held*, that the defendant was not thereafter precluded from bringing a suit to set aside the *ex parte* decree as having been obtained by fraud. *Pran Nath Roy v. Mohesh Chandra Moitra* followed.

DWARKA PRASAD v. LACHHOMAN DAS XXI 289

s. 206. *Application to bring decree into accordance with the judgment—Decree erroneous but in accordance with judgment—Decree not susceptible of alteration.* Where a decree is in fact in accordance with the judgment on which it is based, such decree, however erroneous it may be, cannot be altered on an application under s. 206 of the Code of Civil Procedure to bring the decree into accordance with the judgment.

LAKHO BIBI v. SALAMAT ALI XX 337

s. 206. *Execution of decree—Limitation—Act XV of 1877, sch. II, art. 179—Application to "the proper Court."* An application under s. 206 of the Code of Civil Procedure does not give a fresh starting point to limitation and cannot be regarded as an application to the proper Court to take a step in aid of execution. *Kishen Sahai v. The Collector of Allahabad*, *Tarsi Ram v. Man Singh* and *Kallu Rai v. Fahiman* referred to.

DAYA KISHAN v. NANHI BEGAM XX 304

s. 211. See EXECUTION OF DECREE 3.

ss. 219, 206. See EXECUTION OF DECREE 7.

s. 223. *Execution of decree—Certificate of execution—Jurisdiction of Court to which a decree is transferred for execution.* The Court to which a decree is sent for execution retains its jurisdiction to execute the decree until the execution has been withdrawn from it, or until it has fully executed the decree and has certified that fact to the Court which sent the decree, or has executed it so far as that Court

Civil Procedure Code—(continued.)

has been able to execute it within its jurisdiction and has certified that fact to the Court which sent the decree, or until it has failed to execute the decree and has certified that fact to the Court which forwarded the decree. The mere striking off of an application for execution on the ground of informality in the application does not terminate the jurisdiction of the Court to execute the decree, nor render it necessary for the Court to send any certificate to the Court which forwarded the decree for execution. *Bagram v. Wise* followed.

ABDA BEGAM v. MUZAFFAR HUSEN KHAN XX 129

- s. 230. *Execution of decree—Decree for payment of money—Hypothecation decree—Construction of document.* A decree was passed on the 5th March 1884, based on a compromise between the parties. The decree was for the payment of certain sums of money by instalments, and further went on to declare that "The property in the bond remains hypothecated as before. The defendants have no power to transfer it. If any other person brings to sale the hypothecated property in satisfaction of the debt due by the defendants, the plaintiff shall have power to take out execution of the decree without waiting for the instalments, and to cause the hypothecated property to be sold by auction." *Held*, that this was not a simple decree for the payment of money such as would come within the purview of s. 230 the Code of Civil Procedure. *Janki Prasad v. Baldeo Narain* distinguished. *Chundra Nath Dey v. Burroda Shoondury Ghose* and *Lal Behary Singh v. Habibur Rahman* referred to.

PAHALWAN SINGH v. NARAIN DAS XXII 401

- s. 230. *Execution of decree—Limitation—Warrant of arrest—Warrant not exhausted if on one occasion the serving officer is unable to find the judgment-debtor.* The holders of a decree for money, dated the 2nd of December 1885, after various infructuous applications for execution, applied, on the 4th of August 1897, for a warrant for the arrest of the judgment-debtor. That application was granted, but the peons sent to arrest the judgment-debtor reported that he had concealed himself, and the Court in consequence struck off the application for execution. On the 29th of November 1897, the decree-holders again applied for the arrest of the judgment-debtor, but that application also was struck off without the arrest having been made. Against the order striking off this latter application the decree-holders appealed to the High Court, where on objection made that the decree could no longer be executed, having regard to s. 230 of the Code of Civil Procedure, it was *held* that the warrant of arrest issued on the decree-holders' application of the 4th of August 1897 still subsisted and ought to be executed. *Anwar Ali Khan v. Dhul Chand* followed.

JIT MAL v. JWALA PRASAD XXI 155

- s. 231. *Execution of decree—Suit under s. 231—Suit decreed—Appeal by decree-holders—Death of one of two joint decree-holders—Abatement of appeal.* A suit was instituted against two joint decree-holders under s. 283 of the Code of Civil Procedure for a declaration that certain property which had been attached by them belonged to the plaintiffs, and was not liable to be taken in execution of the decree. The suit was dismissed by the Court of First Instance, but decreed by the Lower Appellate Court. The decree-holders appealed, but during the pendency of the appeal one of them died and no steps were taken to bring his representatives on the record within the prescribed period. *Held* that the appeal abated. *Ghamandi Lal v. Amir Begam* referred to.

KAMLAPAT v. BALDEO XXII 222

- s. 232. See EXECUTION OF DECREE 1.

- s. 234. See EXECUTION OF DECREE 4.

- s. 244. See EXECUTION OF DECREE 5.

- s. 244. *Execution of decree—Jurisdiction of Court executing decree—Mortgage—Decree for sale on mortgage.* *Held*, that when a decree for the sale of specific mortgaged property is being executed, it is not open to persons made parties to the execution proceedings as legal representatives of the deceased judgment-debtor to contend in those proceedings that the mortgagor was not competent to make the mortgage, and that the decree was one which ought not to have been passed. *Maluji v. Fakir Chand, Seth Chand Mal v. Durga Dei, Sanwal Das v. Bismillah Begam and Lochan Singh v. Sant Chandar Mukerji* referred to.

LILADHAR v. CHATURBHUI XXI 277

- s. 244. *Execution of decree—Mortgage—Attempt to obtain redemption of a usufructuary mortgage by means of an application in execution.* Certain mortgagees held

Civil Procedure Code--(continued.)

a mortgage which, in its inception was a simple mortgage, but which was to become a usufructuary mortgage upon non-payment of the mortgage debt by a certain date. The mortgage debt was not paid within the time limited. The mortgagees sued on the covenant in their bond and obtained a decree for possession, declaring them entitled to remain in possession until the mortgage debt was satisfied from the usufruct. Sometime after the mortgagees had got possession under this decree, the mortgagors applied, ostensibly under s. 244 of the Code of Civil Procedure, for recovery of possession of the mortgaged property and for payment of a large sum of money, which they alleged the mortgagees had collected as profits in excess of what was due under the mortgage. *Held*, that such an application would not lie. If the allegations of the mortgagors were true, their proper remedy was by suit for redemption and not by application in the execution department. *Ravji Shivram v. Kaluram, Ram Chandra Ballal v. Baba Esgonda and Narsinha Manohar v. Bhagvantrav* referred to.

HAR PRASAD v. SHEO RAM XX 506

- s. 244. *Execution of decree--Question "arising between the parties to the suit"--Sale of property by the Collector as ancestral property--Suit to set aside sale on the ground that property was not ancestral.* Certain property of a judgment-debtor having been sold by the Collector acting under s. 320 of the Code of Civil Procedure as being ancestral property, the judgment-debtor sued the decree-holder and the auction-purchaser to have the sale set aside upon the two main grounds that the property was not ancestral, and therefore could not legally be sold by the Collector, and that the real purchaser at the auction sale was the decree-holder himself who had not obtained the leave of the Court to bid. *Held* that the questions thus raised were questions arising between the parties to the suit within the meaning of s. 244 of the Code of Civil Procedure and that the suit would not lie. *Basti Ram v. Fattu and Prosunno Kumar Sanyal v. Kali Das Sanyal* referred to.

DAULAT SINGH v. JUGAL KISHORE XXII 108

- s. 244. *Execution of decree--Questions for the Court executing the decree--Sale in execution--Suit by decree-holder and judgment-debtor against auction-purchaser to set aside sale alleging an uncertified adjustment of the decree prior to sale.* *Held*, that the provisions of s. 244 of the Code of Civil Procedure disallowing a separate suit to determine questions arising between the parties to the suit in which a decree has been passed and bearing upon the execution thereof, operates not only to prohibit a suit between the parties and their representatives, but also a suit by a party or his representative against an auction-purchaser in execution of the decree, the object of which suit is to determine a question which properly arose between the parties or their representatives relating to the execution, discharge or satisfaction of the decree. *Basti Ram v. Fattu and Prosunno Kumar Sanyal v. Kali Das Sanyal* referred to.

DHANI RAM v. CHATURBHUI XXII 86

- s. 244. *Execution of decree--Representatives of judgment-debtor--Death of party to suit before final decree in appeal--Subsequent proceedings in execution taken against representatives of such party--Sale in execution--Suit to set aside sale--Estoppel.* A decree was given to the defendant (then plaintiff) in 1856 for possession of land and mesne profits against numerous defendants, including one Dawan Rai. Some of the judgment-debtors, including Dawan Rai, appealed to the Sadr Diwani Adalat, but before the decree of the Sadr Diwani Adalat was passed, Dawan Rai died. No application was made to put any representative of Dawan Rai on the record; but in 1881 (the amount of the mesne profits payable under the decree having been finally determined in 1877), certain persons were made parties, as representatives of Dawan Rai, to various proceedings in execution of the decree for mesne profits, which ended in the sale of certain property which had been of Dawan Rai in his lifetime. Subsequently the said representatives of Dawan Rai brought a suit to recover the property sold as above described on the ground that they were no parties to the decree under execution. *Held*, that the plaintiffs were entitled to bring such a suit, and it was not barred by the provisions of s. 244 of the Code of Civil Procedure. *Radha Prasad Singh v. Lal Sahab Rai* referred to. *Held* also, that as it had not been shown that by reason of the plaintiffs not objecting that they had been improperly brought on to the record of the execution proceedings, the defendant had been induced to accept less favourable arrangement for the satisfaction of the decree that he might otherwise have done, there was no estoppel against the plaintiffs.

BENI PRASAD KUNWAR v. MUKHTESAR RAI XXI 316

Civil Procedure Code—(continued.)

s. 244. *Execution of decree—Sale in execution—Decree satisfied—Amendment of decree in favour of judgment-debtors—Application by judgment-debtors to recover surplus from decree-holders.* Where by a sale in execution the decree as it stood at the time when execution was taken out had been fully satisfied, but the decree was afterwards amended at the instance of the judgment-debtors, and in consequence of the amendment the decree-holders were found to have realized more from the judgment-debtors than they were entitled to, it was held that it was competent to the judgment-debtors by application under s. 244 of the Code of Civil Procedure to recover such surplus from the decree-holders.

DHAN KUNWAR v. MAHTAB SINGH XXII 79

s. 244. *Execution of decree—Sale in execution—Suit to recover property sold on grounds which might have been made grounds for appeal against the original decree—Representatives of judgment-debtors.* When a party to a decree and subsequent proceedings in execution thereof has suffered execution to proceed and property to be sold without appealing, he cannot sue to recover the property so sold on grounds which might have been taken in appeal from the decree or from orders in execution. *Held* also, that the question whether a person alleged to be a representative of a deceased party to a suit is such representative, and also the question whether property against which execution is sought in the hands of the representative of a deceased party was in fact the property of such deceased party and not the separate property of the representative, are questions to be decided under s. 244 of the Code of Civil Procedure and not by separate suit. *Rajrup Singh v. Ramgolam Roy, Chowdry Wahed Ali v. Mussamut Jumae and Seth Chand Mal v. Durqa Dei* referred to.

BENI PRASAD KUNWAR v. LUKHNA KUNWAR XXI 323

s. 244. *Execution of decree—Suit brought under circumstances where the proper remedy was by application under s. 244—Discretion of Court to treat the plaint as an application under s. 244.* Where certain judgment-debtors, whose property had been sold in execution of a decree, brought a suit to have the sale in execution set aside under circumstances in which their proper remedy in law, if any, was by means of an application under s. 244 of the Code of Civil Procedure, it was held that it was not an improper exercise of the discretion of the Court in which such suit was brought to treat the plaint as an application under s. 244 of the Code. *Biru Mahata v. Shyama Churn Khawas* followed. *Mayan Pathuli v. Pakuran* referred to.

JHAMMAN LAL v. KEWAL RAM XXII 121

s. 244. *Parties to the suit or their representatives—Purchaser at auction sale.* Where a decree-holder who had obtained a decree and order under ss. 88, 89 of the Transfer of Property Act over certain property, proceeded to attach it in execution of his decree: *Held*, that a third party who had bought the rights and interests of the judgment-debtors at an auction sale held in consequence of a money decree was not a legal representative of the judgment-debtors so as to entitle him to be heard under s. 244 of the Code of Civil Procedure at the execution proceedings. *Sabharjit v. Sri Gopal* followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal* distinguished.

MAHABIR PRASAD v. PARTAB CHAND XXII 150

s. 244. *Plaint in a suit treated as an application under s. 244—Act XV of 1877 (Limitation Act), sch. II, art. 178.* Where a suit is filed under circumstances in which the proper remedy is an application under s. 244 of the Code of Civil Procedure, and the Court in the exercise of its discretion treats the plaint in the suit as an application under s. 244, the rule of limitation applicable will be that appropriate to applications under s. 244, namely, that prescribed by art. 178 of the second schedule to the Indian Limitation Act, 1877. *Jhamman Lal v. Kewal Ram, and Biru Mahata v. Shyama Churn Khawas* referred to.

LALMAN DAS v. JAGAN NATH SINGH XXII 376

s. 244. *Representative of a party to the suit—Second mortgagee taking a mortgage during the pendency of a suit on the first mortgage.* *Held* that a second mortgagee who takes his mortgage during the pendency of a suit on the first mortgage is a representative of the mortgagor within the meaning of s. 244 of the Code of Civil Procedure. *Madho Das v. Ramji Patak* referred to.

SHEO NARAIN v. CHUNNI LAL XXII 243

ss. 244, and 258. *Execution of decree—Suit to set aside a sale on the ground of an adjustment of the decree out of Court—Adjustment not certified—Suit not maintainable.* *Held* that no separate suit would lie to set aside a sale held in

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- execution of a decree on the ground that the decree had been adjusted out of Court when in fact no such adjustment of the decree had been certified in the manner provided by s. 258 of the Code of Civil Procedure. *Shadi v. Ganga Sahai* and *Kalyan Singh v. Kunla Prasad* distinguished. *Ishan Chunder Bandopadhyaya v. Indro Narain Gossami* and *Pat Dasi v. Sharup Chand Mala* not followed. *Prosunno Kumar Sanyal v. Kali Das Sanyal*, *Azizan v. Mutuk Lal Sahu* and *Bairagulu v. Bapanna* referred to.
- JAIKARAN BHARTI v. RAGHUNATH SINGH XX 251
- ss. 268. *Execution of decree—Attachment of debt—Payment of debt attached out of Court.* Where a debt, which had been attached under s. 268 of the Code of Civil Procedure, was paid out of Court to the only person who, had the money due been paid into Court as required by the terms of the said section, would have been entitled to withdraw the said money from Court, and such payment was certified to the Court, it was held that such payment amounted to a sufficient compliance with the requirements of s. 268.
- FIDA HUSAIN v. MAULA BAKHSI XXI 145
- ss. 273, 266, 268. *Execution of decree—Attachment—Decree of Revenue Court not capable of attachment and sale under s. 273 in execution of a Civil Court decree.* Held, that though a decree of a Court of Revenue is not liable to attachment and sale in execution of a decree of a Civil Court under s. 273 of the Civil Procedure Code, such decree stands in the position of an ordinary debt and may be dealt with under s. 268 of the Code. *Onkar Singh v. Bhup Singh* and *Prince Gholam Mohamed v. Indra Chand Jahuri* referred to. *Takiya Begam v. Siraj-ud-daula* and *Sultan Kuar v. Gulzari Lal* distinguished.
- AULIA BIBI v. ABU JAFAR XXI 405
- ss. 276. *Alienation of attached property—Alienation valid so long as it does not interfere with any claim enforceable under a subsisting attachment.* The alienation which s. 276 of the Code of Civil Procedure is intended to prevent is an alienation which, if permitted, would defeat claims legally enforceable under the decree in execution of which the property alienated has been attached. Where a private alienation of attached property is made under such circumstances that it in no way interferes with the rights secured by his decree to the attaching decree-holder, s. 276 is no bar to such alienation. *Narain Das v. Sheoambar Ahir* and *Anund Loll Doss v. Jullodhur Shaw* referred to.
- ABDUL RASHID v. GAPPO LAL XX 121
- ss. 285, 295, 4A. *Execution of decree—Procedure—Act XII of 1881 (N.-W.P. Rent Act), ss. 170, 171, 172—Civil and Revenue Courts.* Held that the procedure prescribed by s. 285 of the Code of Civil Procedure, although it might be applicable as between Courts of Revenue of different grades, could not be applied where the conflict was between a Court of Revenue and a Civil Court. Hence where the same property had been attached both by a Court of Revenue and by a Civil Court, but was first brought to sale by the Court of Revenue, it was held that the purchaser at the sale held in execution of the decree of the Court of Revenue took a good title as against the purchaser at the sale held in execution of the decree of the Civil Court. *Onkar Singh v. Bhup Singh*, *Aulia Bibi v. Abu Jafar* and *Madho Prakash Singh v. Murli Manohar* referred to.
- RAGHUBAR DAYAL v. BANKE LAL XXII 182
- ss. 287. *Execution of decree—Misrepresentation of value in the proclamation of intended judicial sale—Substantial injury within the meaning of s. 311.* The value of property of which the sale has been ordered in execution of a decree, when stated in the proclamation of the intended sale, is a material fact within sub-sec. (e) of s. 287 of the Code of Civil Procedure. An under-statement of the value of the property having been made in such a proclamation, which was calculated to mislead bidders, and to prevent them from offering adequate prices, or from bidding at all, and the sale having resulted in a price altogether inadequate:—Held, that such misstatement was a material irregularity in publishing or conducting the sale, although there might be no rule requiring publication of the value in that proclamation; and that the special remedy, provided in s. 311, was applicable, as substantial injury had resulted.
- SADDATMAND KHAN v. PHUL KUAR XX 412
- ss. 291. See ACT IV OF 1882, s. 89.
- ss. 294. *Application by the decree-holder for leave to bid at a sale in execution of his decree—Limitation—Act XV of 1877 (Limitation Act), sch. II, art. 179, (4)—Execution of decree.* Held, that an application for leave to bid at a sale in execution under s. 294 of the Code of Civil Procedure is an application to take some

Civil Procedure Code—(continued.)

- step in aid of the execution of the decree within the meaning of art. 179 (4) of the second schedule of the Indian Limitation Act, 1877. *Bansi v. Sikree Mal* followed. *Raghunundun Misser v. Kally Dut Misser* dissented from.
- DALEL SINGH v. UMRAO SINGH XXII 399
- ss. 294, 317. *Indian Trusts Act (II of 1882)*, ss. 82, 82—*Purchase by alleged agent of decree-holder at sale in execution.* Certain decree-holders (appellants) were refused permission to purchase at the sale in execution, and subsequently the defendant, alleged by the decree-holders to be their agent, but of whose general duty the making of such purchase was not a part, purchased the property and got his name entered in the sale certificate. The decree-holders hearing of the purchase, supplied the purchase-money, ratified the purchase, and agreed to take a conveyance of the property after confirmation of the sale. On the refusal of the defendant to execute the conveyance, the decree-holders sued for a declaration that they were the real purchasers and for possession of the property. *Held* that under such circumstances the second paragraph of s. 317 of the Code of Civil Procedure did not exclude the application of the first paragraph of that section. *Held*, further, that ss. 82, 88 of the Indian Trusts Act (II of 1882) did not apply. *Sankunni Nayar v. Narayan Nambudri* and *Kumbalinga Pillai v. Ariaputra Padiachi* distinguished. *Monappa v. Surappa* referred to.
- GANGA BAKSH v. RUDAR SINGH XXII 434
- s. 311. *Execution of decree—Sale in execution—Sale without previous attachment—Material irregularity.* *Held*, that the absence of an attachment prior to the sale of immoveable property in execution of a decree amounts to no more than a material irregularity, but is not sufficient, unless substantial injury is caused thereby, to vitiate the sale. *Ram Chand v. Pitam Mal*, *Ganga Prasad v. Jag Lal Rai*, *Harbans Lal v. Kundan Lal* and *Tasadduk Rasul Khan v. Ahmad Husain* referred to. *Mahadeo Dubey v. Bholanath Dichit* distinguished.
- SHEODHYAN v. BHOLANATH XXI 311
- ss. 311, 312. See EXECUTION OF DECREE 13.
- ss. 311, 312. *Execution of decree—Sale in execution—Application to set aside sale—Court limited to grounds mentioned in s. 311.* A Court to which an application under s. 311 of the Code of Civil Procedure, to set aside a sale held in execution of a decree, is made, is limited to the grounds set forth in that section. If the Court fails to find both a material irregularity in publishing or conducting the sale together with consequent loss to the applicant, it is bound to dismiss the application and confirm the sale. It cannot set aside the sale upon other grounds not pleaded by the applicant. *Tasadduk Rasul Khan v. Ahmad Husain* and *Shirin Begam v. Agha Ali Khan* referred to.
- HARBANS LAL v. KUNDAN LAL XXI 140
- ss. 312 and 320 *Act VII of 1888*, ss. 30 and 55—*Execution of decree—Decree transferred to Collector for execution—Suit by auction-purchaser to confirm a sale which had been set aside by the Collector.* At a sale of ancestral property held by a Collector executing a decree transferred to him under s. 320 of the Code of Civil Procedure the plaintiffs, decree-holders, were the auction-purchasers. On the application of the defendants, judgment-debtors, the sale was set aside by the Collector. Thereupon the plaintiffs, decree-holders, auction-purchasers, filed a suit for a declaration that the auction sale was a valid one and that the order of the Collector setting it aside was ineffectual. *Held* that such a suit was maintainable. *Shib Singh v. Mukat Singh* overruled; *Ugar Nath Tiwari v. Bhonath Tiwari* and *Diwan Singh v. Bharat Singh* referred to.
- SHIAM BEHARI LAL v. RUP KISHORE XX 379
- s. 317. See ACT XIX OF 1873, s. 184.
- s. 317. *Benami transaction—Suit against heir of certified purchaser—Interpretation of Statutes.* *Held* that s. 317 of the Code of Civil Procedure would not preclude a suit against a person who claimed title through the certified purchaser based on the allegation that the certified purchaser was not the real purchaser, but only purchased benami for the person through whom the plaintiff claimed. *Mussamut Buhuns Kowur v. Lalla Buhoorae Lall* referred to.
- SIBTA KUNWAR v. BHAGOLI XXI 198
- s. 317. *Execution of decree—Sale in execution—Benami purchase—Suit by creditor on the ground that the certified purchaser is not the real purchaser—Hindu law—Pious duty of son to pay his father's debts.* *Held* that the provisions of s. 317 of the Code of Civil Procedure are subject to no limitation other than such as is contained in the section itself, namely, that the suit the maintenance of which is

Civil Procedure Code—(continued.)

prohibited by that section should be (1) brought against a certified purchaser and (2) based upon the ground that the purchase was made on behalf of a person other than the certified purchaser. The question of who the plaintiff may be is not material. The judgment of KNOX, J., in *The Delhi and London Bank v. Chaudhri Partab Bhaskar* approved, *Ram Kurup v. Sri Devi* followed, *The Uncovenanted Service Bank v. Abdul Bari* distinguished, *Mussamut Buhuns Kowur v. Lalla Buhooree Lall* and *Williamson v. Norris* referred to.

KISHAN LAL v. GARURUDDHWAJA PRASAD SINGH ... XXI 239

- s. 319. *Execution of decree—Possession—Formal possession—Effect of formal possession as against a third person other than the judgment-debtor.* Held, that whatever might be the effect of the delivery of formal possession under s. 319 of the Code of Civil Procedure as against the judgment-debtor himself, such formal delivery of possession will not take effect as actual possession as against a purchaser of the rights of the judgment-debtor who has previously obtained actual possession. *Mangli Prasad v. Debi Din* referred to.

NARAIN DAS v. LALTA PRASAD ... XXI 269

- s. 320. See s. 244.

- ss. 320 and 322A. *Decree transferred for execution to Collector—Collector not authorized to hear objections to execution of decree so transferred.* Held that where a decree for money has been transferred for execution to the Collector under the provisions of s. 320 of the Code of Civil Procedure, the Collector is not authorized under s. 322A to hear any objection by the parties interested in the property advertised for sale to the sale of that property, nor is it any part of the Collector's duty to decide whether the property has or has not been properly attached.

ONKAR SINGH v. MOHAN KUAR ... XX 428

- s. 326. *Execution of decree—Limitation—Execution as to immoveable property of judgment-debtor stayed by reason of such property being in charge of the Collector.* The plaintiffs obtained in 1874 a decree for money against the defendant. In 1879, by an order under s. 326 of the Code of Civil Procedure, the immoveable property of the judgment-debtor was placed under the management of the Collector. Before this order was made, and during the period when the judgment-debtor's property was in charge of the Collector, various applications for execution were made by the decree-holders. Finally, in 1896, about ten years after the last preceding application, the decree-holders applied for execution of their decree shortly after the property had been released by the Collector. Held that as regards the immoveable property of the judgment-debtors, against which execution was sought, the application was not barred by limitation, inasmuch as the decree-holders had no remedy by execution against that property until the Collector's management had ceased.

GIRDHAR DAS v. HAR SHANKAR PRASAD ... XX 383

- s. 335. *Execution of decree—Suit by unsuccessful auction-purchaser for a declaration of right and for possession—Court-fee—Act VII of 1870 (Court Fees Act), s. 7.* A purchaser of property at a sale held in execution of a decree obtained formal possession, but was resisted in obtaining actual possession by a person, who claimed to be the owner in possession of the property. An application made by the auction-purchaser under s. 335 of the Code of Civil Procedure was rejected, and the auction-purchaser accordingly filed a suit against the person in possession claiming a declaration of his right to the property, and to be put in actual possession thereof. Held, that such a suit was one for a declaratory decree and consequential relief and Court-fee was payable under cl. iv (c) of s. 7 of the Court Fees Act. *Dhondo Sakharan Kulkarni v. Govind Babaji Kulkarni* referred to.

PIRYA DAS v. VILAYAT KHAN ... XXII 384

- ss. 344 et seq. *Insolvency—Holder of decree on mortgage not entered amongst the scheduled creditors—Decree-holder not debarred from executing his decree.* Held that a judgment creditor holding a decree for sale upon a mortgage against an insolvent judgment-debtor will not, by reason of his debt not having been scheduled in the insolvency proceedings, lose his right to execute his decree. *Harro Pria Dabia v. Shama Charan Sen* and *Shridhar Narayan v. Atmaram Govind* referred to.

SHEORAJ SINGH v. GAURI SAHAI ... XXI 227

- s. 365. See HINUD LAW 7.

- ss. 368, 582, 591. *Abatement of Appeal—Order or decree—Order as to abatement of appeal embodied in the judgment and decree—Rules of the Court, Rule 9.* Where

Civil Procedure Code—(continued.)

- one of four respondents (plaintiffs) in the Lower Appellate Court died, and no application was made within six months to put the legal representative on the record, and in the application that eventually was made the wrong person was named as legal representative: *Held*, the appeal was one where the right to appeal did not survive against the surviving respondents, but against them and the representatives of the respondent who had died. Under the circumstances s. 368 read with s. 582 of the Code applied, and the proper order was to have directed the suit to abate: *Held*, further, that where the order of the lower Court as to abatement was embodied in the judgment and decree, objection was properly taken thereto by way of second appeal against the decree. *Sheo Nath Singh v. Ram Din Singh, Sher Singh v. Diwan Singh, Dhari Upadhia v. Raushan Chaudhri, Sant Lal v. Sri Kishan, Chandarsang v. Khimabhai* referred to.
- HEM KUNWAR v. AMBA PRASAD XXII 490
- ss. 372, 582. *Appeal—Devolution of interest pending appeal—Array of parties in appeal.* By virtue of the first portion of s. 582 of the Code of Civil Procedure, s. 372 of the Code applies to appeals in cases of assignment, creation or devolution of any interest pending the appeal otherwise than by death, marriage or insolvency. *In re Sarat Chandra Singh* followed. *Rajaram Bhagwat v. Jibai and Ramji Morari v. J.E. Ellis* referred to. *The Collector of Muzaffarnagar v. Husaini Begam* distinguished.
- IN RE DURGA PRASAD XXII 231
- ss. 372, 582. *Parties to an appeal—Attaching creditor of decree-holder seeking to be brought on to the record as a respondent.* *Held* that a creditor of a decree-holder who had attached the decree pending an appeal against it was not entitled to be made a party respondent to the appeal under ss. 372 and 582 of the Code of Civil Procedure.
- CHAIL BEHARI LAL v. RAHMAL DAS XX 38
- ss. 372, 588. *Assignment pending suit—Application by assignees to be allowed to appeal against the decree—Order rejecting application—Appeal.* A defendant, pending the suit, made an assignment of his interest therein. No application was made by the assignees or the assignor to have the assignees brought on the record, and the suit was decided *ex parte* to the detriment of the assignees. The assignees filed a memorandum of appeal claiming that they were entitled to file an appeal under the circumstances set forth in their memorandum. The Court, apparently treating this memorandum as an application under s. 372 of the Code of Civil Procedure, dismissed it. *Held*, that an appeal would lie from this order of dismissal as from a decree. *Indo Mati v. Gaya Prasad* followed.
- MOTI RAM v. KUNDAN LAL XXII 380
- s. 396. See ACT IV OF 1893, s. 10.
- s. 396. *Suit for partition—Nature of decree in such suit—Act XV of 1877, sch. II, art. 164—Limitation—Execution of process for enforcing the judgment—Civil Procedure Code, s. 108—Application to set aside a decree passed ex parte.* The action of an *amīn* appointed under s. 396 of the Code of Civil Procedure in a partition suit to demarcate the shares assigned to the respective parties to the suit is not the executing of a process for enforcing the judgment within the meaning of art. 164 of the second schedule to the Indian Limitation Act, 1877. *Dwarka Nath Misser v. Barinda Nath Misser* referred to.
- SHAH MUHAMMAD KHAN v. HANWANT SINGH XX 311
- ss. 406, 407. *Application for leave to sue in formā pauperis—Applicant to make out that he has a good subsisting cause of action.* Clause (c) of s. 407 of the Code of Civil Procedure does not refer solely to a question of jurisdiction, but the applicant must make out that he has a good subsisting *prima facie* cause of action capable of enforcement in Court and calling for an answer. *Chattarpal Singh v. Raja Ram, Dulari v. Vallabdas Pragji and Vijendra Tirtha Swami v. Sudhindra Tirtha Swami* referred to. *Koka Ranganayaka Ammal v. Koka Venkatchellapati Nayudu* dissented from. *Venkubai v. Lakshman Venkoba Khot* distinguished.
- KAMRAKH NATH v. SUNDAR NATH XX 299
- s. 409. *Application for leave to sue in formā pauperis—Decree—Appeal.* *Held* that no appeal will lie from an order rejecting an application for leave to appeal in *formā pauperis*. *Baldeo v. Gula Kuar and Lekha v. Bhauna* referred to.
- THE SECRETARY OF STATE FOR INDIA v. JILLO... .. XXI 183
- s. 410. See SUIT 4.
- s. 413. See s. 43.

Civil Procedure Code—(continued.)

- s. 435. *Company—Corporation—Unincorporated society—Form of suit.* The corporation contemplated by the Code of Civil Procedure is a corporation as known in English Law, that is, a corporation created with the express consent of the Sovereign, or of such antiquity that the consent of the Sovereign may be presumed. In a suit by an unregistered and unincorporated society the names of the members of the company must be disclosed. If this is not done, and if the society is neither a corporation nor a company authorised to sue or be sued in the name of an officer or of a trustee, so as to make the provisions of the Code of Civil Procedure, s. 435 applicable, the plaint is a bad plaint. *Koylash Chandra Roy v. Ellis, The Muhammadan Association of Meerut v. Bakhshi Ram and Yusuf Beg v. The Board of Foreign Missions of the Presbyterian Church of New York* referred to.

PANCHAITI AKHARA, ETC. v. GAURI KUAR XX 167

- s. 440. *Guardian and minor—Suit brought on behalf of a minor by a person other than the minor's certificated guardian.* Where a suit was filed on behalf of two minors by a person who was not the certificated guardian of the minors, there being a guardian duly appointed by a competent Court in existence at the time, it was held that the suit was wrongly brought, having regard to s. 440 of the Code of Civil Procedure, and that the plaint should have been returned for amendment, and that the defect in the form of the suit was not cured by the fact, if it was one, that the person appearing therein as guardian of the minors was the *karta* of a joint Hindu family of which all the plaintiffs were members. *Beni Ram Bhutt v. Ram Lal Dhukri* referred to.

SHAM KRISHNA v. RAM DAS XX 162

- ss. 440 et seq. *Lunatic—Act XXXV of 1858—Lunatic, not adjudged to be so, may sue through a next friend or defend through a guardian ad litem.* The provisions of Ch. XXXI of the Code of Civil Procedure are not exhaustive, and where a person is admitted or has been found to be of unsound mind, although he has not been adjudged to be so under Act XXXV of 1858, or by any other law for the time being in force, he should, if a plaintiff, be allowed to sue through his next friend, and the Court should appoint a guardian *ad litem* where he is a defendant. *Porter v. Porter, Venkatramana Rambhat v. Timappa Devappa, Tukaram Anant Joshi v. Vithal Joshi, Uma Sundari Dasi v. Ramji Haldar and Jonnagadla Subbaya v. Thatiparthi Senadala Bulhaya* referred to.

NABBU KHAN v. SITA XX 2

- s. 462. *Compromise on behalf of a minor—Suit to set aside compromise as having been entered into without the leave of the Court.* Where the guardian *ad litem* of certain minors assented on their behalf to a compromise, which compromise was accepted by the Court, and a decree passed thereon, and was found not to be prejudicial to the interests of the minors; it was held that the minors could not, after the decree based upon the compromise had become final, succeed in a suit to set it aside on the sole ground that the Court had not previously given leave to the guardian to enter into the compromise. *Kalavati v. Chedi Lal* distinguished.

AMAN SINGH v. NARAIN SINGH XX 98

- s. 493. *Temporary injunction—"Other injury."* Held, that the words "or other injury" in s. 493 of the Code of Civil Procedure do not include acts of trespass upon property.

DARAB KUAR v. GOMTI KUAR XXII 449

- s. 505. *Criminal Procedure Code, s. 145—Order of Magistrate for maintenance of possession no bar to the appointment of a receiver by a Civil Court.* The fact that there exists in respect of any immoveable property an order of a Magistrate passed under s. 145 of the Code of Criminal Procedure is no bar to the exercise by a Civil Court of the power conferred on it by s. 505 of the Code of Civil Procedure of appointing a receiver in respect of the same property.

BARKAT-UN-NISSA v. ABDUL AZIZ XXII 214

- s. 516. *Award—Decree passed upon an award filed in Court without notice of its filing having been sent to the parties—Revision.* Held, that it was a good ground for revision of a decree based upon an award filed in Court that no notice of the filing of the award was given by the Court to the parties as required by s. 516 of the Code of Civil Procedure, even though the applicant in revision might have received information *aliunde* that the award had been filed. *Rangasami v. Muttusami* followed.

CHATABRUJ DAS v. GANESH RAM XX 474

Civil Procedure Code—(continued.)

ss. 522, 526. See ACT IX OF 1872, SS. 15, 16, 19.

- s. 539. *Jurisdiction—Suit for a declaration that a certain piece of land is a grave-yard.* Held that a suit for a declaration that a certain piece of land was a grave-yard dedicated to the use of such persons as had no grave-yards of their own, and asking the Court to appoint a mutawalli and settle a scheme for the management of the grave-yard, was not such a suit as fell within the purview of s. 539 of the Code of Civil Procedure. *Lakshmandas Parashram v. Ganpatrav Krishna and Strinivasa Ayyangar v. Strinivasa Swami* referred to.

MUHAMMAD ABDULLAH KHAN v. KALLU XXI 187

- s. 539. *Trust—Suit for removal of trustees—Parties—Alienees of trustees not necessary parties.* A suit may properly be brought and a decree made under s. 539 of the Code of Civil Procedure for the removal of a trustee. *Narasimha v. Ayyan Chetti, Suthappayyar v. Periasami, Rangasami Naickan v. Varadappa Naickan, Chintaman Bajaji Dev v. Dhondo Ganesh Dev, Tricumdass Mulji v. Khimji Vullabhdass, Sayad Hussain Mian v. The Collector of Kaira, Sajedur Raja v. Baidyanath Del, Mohi-ud-din v. Sayid-ud-din, and Sajedur Raja Chowdhuri v. Gour Mohun Das Baishnav* referred to. *Subbayya v. Krishna* followed. In such a suit as above it is not necessary to make the alienees from the trustee defendant parties to the suit. *Bishen Chand v. Syed Nadir, Chintaman Bajaji Dev v. Dhondo Ganesh Dev and the Attorney-General v. The Port Reeve and others of Avon* referred to.

HUSENI BEGAM v. THE COLLECTOR OF MORADABAD XX 46

- s. 539. *Trust—Suit to compel trustees to account—Court-fee—Act VII of 1870 (Court Fees Act), sch. II, art. 17, cl. (vi)—Suit for removal of trustees.* The mere fact that the plaintiffs in a suit under s. 539 of the Code of Civil Procedure may ask for an account to be taken from the trustees and that the trustees may be compelled to refund moneys alleged to have been misappropriated by them, does not take the case out of the purview of art. 17, cl. (vi) of the second schedule to the Court Fees Act, 1870, and render the plaintiffs liable to pay an *ad valorem* Court-fee on that part of their plaint. *Thakuri v. Bramha Narain* referred to. A suit for the removal of an old trustee who has committed a breach of trust and for the appointment of new trustees may properly be brought under s. 539 of the Code of Civil Procedure. *Huseni Begam v. The Collector of Moradabad* approved. *Rangasami Naickan v. Varadappa Naickan* dissented from.

GIRDHARI LAL v. RAM LAL XXI 200

- s. 544. *Appeal—Ground of appeal common to all the judgment-debtors—Reversal or modification of the decree as against all on appeal by one only.* Section 511 of the Code of Civil Procedure does not enable an appellate Court to decide, upon a ground which it considers to be common to all the defendants, an appeal preferred by one only of such defendants and to reverse or modify the decree of the Court below in favour of all the defendants, unless the lower Court has proceeded upon a ground common to all the defendants. It is only when the decree appealed against has proceeded upon a ground common to all the defendants, that is, when the Court below has made a decree against several defendants upon a finding which applies equally to all of them, that under s. 544 any one of the defendants may appeal against the whole decree and the appellate Court may reverse or modify that decree in favour of all the defendants. *Protab Chunder Dutt v. Koordanissa Bibee* referred to.

PURAM MAL v. KRANT SINGH XX 8

- s. 544. *Decree proceeding upon ground common to several defendants—Decree upset in appeal, but restored on appeal by one only of the defendants—Execution for costs by other defendants—Appeal—Decree to be executed when there has been an appeal.* A suit brought against several defendants was dismissed with costs. The plaintiffs appealed, and the case was remanded to the Court of First Instance under s. 562 of the Code of Civil Procedure. One of the defendants appealed against the order of remand to the High Court, which set aside the order of remand and restored the decree of the first Court. Held, that the decree of the first Court being restored in its entirety, the defendants who had not appealed were entitled to take out execution of that decree for the costs awarded to them by it, notwithstanding that they were not parties to the decree of the High Court. *Muhammad Sulaiman Khan v. Muhammad Yar Khan* distinguished. *Shohrat Singh v. Bridgman* referred to.

MUL CHAND v. RAM RATAN XX 493

Civil Procedure Code—(continued.)

- ss. 556, 558. *Appeal—Dismissal of appeal—Default of appearance.* Where on an appeal being called on for hearing the vakil who held the brief for the appellant stated that he was unable to argue the case, the fact being that the brief had come into his hands too late for him to prepare himself in the case, and the appeal was in consequence dismissed, it was held that this was not a dismissal for default of appearance. *Shankur Dat Dube v. Radha Krishna* distinguished. *Ram Chandra Pandurang Naik v. Madhav Purshottam Naik* referred to. *Rakhal Chandra Rai Chowdhri v. The Secretary of State for India in Council* dissented from.
- CHIRANJI LAL v. KUNDAN LAL XX 294
- ss. 556, 558. *Application to restore an appeal dismissed ex parte—Evidence—Practice.* When an application is made to restore an appeal which has been dismissed *ex parte* for default of appearance the applicant must produce all his evidence in support of the application before the Court to which it is made. If he does not do so and the application is dismissed, he cannot be allowed to supplement such evidence in a Court of appeal on appeal from the order dismissing his application. *Hari Das Mukerji v. Radha Kishen Das* followed.
- MUZAFFAR ALI KHAN v. KEDAR NATH XX 266
- s. 561. *Letters Patent—Appeal—Objections filed by respondent.* Held that s. 561 of the Code of Civil Procedure is not applicable to appeals under s. 10 of the Letters Patent.
- KAUSALIA v. GULAB KUAR XXI 297
- s. 562. See s. 588 (21) : LETTERS PATENT, s. 10.
- ss. 562, 564. See ACT XIV OF 1974.
- ss. 562, 588. *Appeal from order of an appellate Court—High Court bound by findings of fact of the Court below.* In an appeal from an order of an appellate Court the High Court is bound to accept, as in a second appeal from a decree, the findings of fact arrived at by the Lower Appellate Court. *Gauri Shankar v. Karima Bibi* approved.
- TIKA RAM v. SHAMA CHARAN XX 42
- s. 583. *Restitution of benefit obtained under a decree subsequently reversed in appeal—Interest allowable on amount so recovered.* Where, in consequence of a decree having been reversed on appeal, the decree-holder is entitled to recover under s. 583 of the Code of Civil Procedure any sum which before such decree was reversed he had been obliged to pay in execution of that decree, such decree-holder is entitled also to receive interest on the amount so recoverable. *Rodger v. The Comptoir D'Escompte de Paris, Jaswant Singh v. Dip Singh, Ram Sahai v. The Bank of Bengal, Bhagwan Singh v. Ummatul Hasnain, Ayyavayyar v. Shastram Ayyar and Hatti Prasad v. Chatarpal Dube* referred to. *Mewa Kuar v. Banarsi Prasad* dissented from.
- PHUL CHAND v. SHANKAR SARUP' XX 430
- s. 583. *Restoration of benefit obtained under a decree which has been subsequently reversed in appeal—Interest—Mesne profits.* Held, that a person who is entitled under s. 583 of the Code of Civil Procedure to the restoration of a benefit of which he has been deprived by reason of a decree which has been subsequently reversed in appeal is entitled, if the thing to be restored is money, to interest for the time during which he has been deprived of the use of it, or, if the thing to be restored is land, to mesne profits for the time during which he has been kept out of possession. *Phul Chand v. Shankar Sarup* approved.
- HARDAT v. IZZAT-UN-NISSA XXI 1
- s. 586. See ACT IX OF 1887, s. 23.
- s. 586. *Suit of the nature cognizable in Courts of Small Causes—Act IX of 1887, s. 15.* Held that a suit to recover from a decree-holder money paid as the price of property sold in execution of a decree as the property of the judgment-debtors, on the ground that the judgment-debtors had no saleable interest in the property, is a suit of the nature cognizable in Courts of Small Causes within the meaning of s. 586 of the Code of Civil Procedure.
- MAKUND RAM v. BODH KISHEN XX 80
- s. 588 (24). *Appeal from order made under s. 485—Remand—Such order of remand not appealable—Civil Procedure Code, s. 562.* Held, that no appeal would lie from an order of remand made under s. 562 of the Code of Civil Procedure

Civil Procedure Code—(concluded.)

- when such order was itself made in an appeal under s. 588 from an order under s. 485 of the Code. *Mathura Nath Ghose v. Nobin Chandra Kundu Biswas* followed.
- JHANDAY LAL v. SARMAN LAL** XXI 291
- s. 591. *Appeal—Appeal from decree in suit, the grounds of appeal being solely directed against an interlocutory order in the suit. Held, that no appeal would lie where, the appeal being ostensibly against the decree in the suit, the grounds of appeal were solely directed against an interlocutory order passed in the suit. Sheo Nath Singh v. Ram Dan Singh* followed.
- SHER SINGH v. DIWAN SINGH** XXII 366
- s. 596. *Appeal to Her Majesty in Council—Decree affirming the decision of the Court immediately below—Decree dismissing an appeal to the High Court for default of prosecution. Held that a decree of the High Court dismissing an appeal for want of prosecution—the appellants not having supplied their counsel with materials upon which to argue the appeal when it was called on for hearing—was a decree affirming the decision of the Court immediately below, within the meaning of s. 596 of the Code of Civil Procedure.*
- BENI RAI v. RAM LAKHAN RAI** XX 367
- s. 596. *Appeal to Her Majesty in Council—Substantial question of law—Succession certificate not produced at the proper time—Act VII of 1889 (Succession Certificate Act), s. 4. The representative of a decree-holder applied for execution of the decree without producing before the Court a certificate of succession as required by Act VII of 1889, s. 4. The Court to which the application was made granted execution. The judgment-debtor appealed to the High Court, by which the order of the lower Court was sustained upon production before it (the High Court) of the necessary certificate of succession. Held that an objection that the said application for execution was improperly granted by reason of the non-production of the succession certificate before the lower Court did not raise a "substantial question of law" within the meaning of s. 596 of the Code of Civil Procedure, so as to warrant the High Court in granting leave to appeal to Her Majesty in Council.*
- SHUJA ALI KHAN v. RAM KUAR** XX 118
- s. 622. See ACT IX OF 1887, s. 25.
- s. 622. *Revision—Discretion of Court in exercising revisional powers—Civil Procedure Code, ss. 623 et seq.—Review of judgment. A Munsif granted a review of judgment on a ground which was no ground in law for granting a review, but his order in review had the effect of making the decree in the suit a right decree instead of a wrong decree. The District Judge allowed an appeal from that order on grounds which, having regard to s. 629 of the Code of Civil Procedure, were not open to him. On an application for revision of the Judge's appellate order, it was held that the proper course was to set aside only the District Judge's order and to leave standing the order of the Munsif granting a review of judgment, which order, though wrong in principle, was, it appeared, right in its results.*
- ABDUL SADIQ v. ABDUL AZIZ** XXI 152
- s. 622. *Revision—Erroneous decision on point of limitation. The fact that a Court, having power to decide whether or not a certain matter was barred by limitation, wrongly decided that it was not barred, and proceeded to deal with it affords no ground for revision under s. 622 of the Code of Civil Procedure. Amir Hussan Khan v. Sheo Baksh Singh and Sarman Lal v. Khuban* referred to.
- SUNDAR SINGH v. DORU SHANKAR** XX 78
- ss. 623 et seq. See s. 622.

Club—

Contract—Liability of the Secretary of a Club in respect of a contract entered into for the benefit of the members of the Club. Held that the Secretary of a Club could not, unless he specially accepted a personal liability, be sued personally on a contract entered into on behalf of the members of the Club by his predecessor in office; nor could the members of a Club collectively be sued through their Secretary as their representative.

THE N.-W.P. CLUB v. SADULLAH XX 497

Coercion—

See ACT IX OF 1872, ss. 15, 16, 19.

Company—

See ACT I OF 1879, SCH. I, ART. 8 : ACT VI OF 1882, SS. 55, 56 : CIVIL PROCEDURE CODE, S. 435.

Registration of transfer of shares. See ACT VI OF 1882, SS. 29, 58, 92.

Sale of shares in. See CONTRACT 2.

Suit against unregistered Company—Form of suit—Parties. Where a company is not registered under Act VI of 1882, a plaintiff bringing a suit against such company must make each individual member of the company a defendant to the suit, and he cannot escape from this obligation by stating in his plaint that he has been unable to discover who the individual members of the company are. *Koylash Chunder Roy v. Mr. Edward Ellis, Manager on behalf of the Bengal Indigo Company of Khalbolia Factory* considered. *The N.-W. P. Club v. Sadullah* followed.

GANESHA SINGH v. MUNDI FOREST COMPANY XXI 346

Complaints—

See ACT XV OF 1883, S. 69 : CRIMINAL PROCEDURE CODE, S. 203.

Compromise—

See CIVIL PROCEDURE CODE, S. 462.

Confession—

See CRIMINAL PROCEDURE CODE, S. 288 : EVIDENCE 1.

Construction of Document—

See ACT III OF 1877, S. 17 : CONTRACT 1 : EXECUTION OF DECREE 7 : MORTGAGE 2 : PRE-EMPTION.

1. *Award—Award of the nature of a family settlement directing an annuity to be paid "ta haiyat walidain."* An award drawn by an unprofessional arbitrator in India is not to be construed according to the same principles as an award settled by counsel or a solicitor in England, but in accordance with what may reasonably be supposed under the circumstances of the case to have been the intentions of the arbitrator. Where an award, which was of the nature of a family settlement between a father, mother and son, of certain property which had been given by the father to the mother in lieu of dower and then by the mother to the son, directed that a certain annuity should be paid out of the property to the father and mother "*ta haiyat walidain*," it was held that the annuity was to be paid during the joint lives of the father and mother and also during the life of the survivor.

ABDUL MAJID KHAN v. KADRI BEGAM XX 24b

2. *Grant of Land—Presumption as to boundaries where grant is described as bounded by a river or a road—Meaning of "river."* If land adjoining a high-way or river is granted, the half of the road or the half of the river is presumed to pass, unless there is something either in the language of the deed or in the nature of the subject-matter of the grant, or in the surrounding circumstances, sufficient to rebut that presumption; and this, though the measurement of the property which is granted can be satisfied without including half the road or half the bed of the river, and although the land is described as bounded by a river or a road, and notwithstanding that the map which is referred to in the grant does not include the half of the river or the road. And this rule of construction cannot be departed from merely because it is shown that it would have been to the interest of the grant or to retain half the bed of the river. This rule of construction applies equally whether the subject-matter be a grant from the Crown or a subject. *Micklethwaite v. Newlay Bridge Co., Ecroyd v. Coulthard and Lord v. The Commissioner of the City of Sydney* followed.

BALBIR SINGH v. THE SECRETARY OF STATE FOR INDIA XXII 96

3. *Lapse to the British Government of a foreign State in ceded territory—Grant of lands therein—Construction of official correspondence—Obari, or abatement of revenue on the estate.* The State of Jalaun, in the territory ceded in 1804 by the Peishwa, lapsed in 1840 to the British Government. Before the lapse the lands now in suit belonged to the chief, and were in the hands of managers on his behalf. The last manager, the ancestor of the present parties, remained, after 1840, in possession of the estate till his death in 1880, having been continued therein for life in 1852. In 1867 the Government directed the continuance of the entire estate to "the loyal members of his family." Held, that no proprietary interest in the estate had been shown to have belonged to the ancestors when Jalaun was a principality: that all that could be claimed by the defendants was derived from

Construction of Document—(continued.)

the Government, which, after the lapse of the State, had the right, at their discretion, to control the descent of the estate, and had exercised this discretion. There had been no formal sanad; but on the true construction of the official correspondence, as to which the Courts below had differed, the Government first continued the possession of the ancestor for life, and afterwards conferred the inheritance, as to one moiety of the estate, upon the defendant, who was one of the sons of the original holder, and, as to the other moiety of the estate upon the plaintiffs, who were the four brothers of the defendant, then living. The claim made by the plaintiffs, having been founded on a different title, was dismissed by the High Court. But this dismissal was accompanied by a declaration that the above grant had been made. This was now altered into a declaratory decree to the same effect, with the direction that inquiry be made as to who were entitled to the plaintiffs' moiety, and further directions were reserved.

SRI MAHANT GOBIND RAO v. SITA RAM KESHO... XXI 53

4. *Wajib-ul-arz—Pre-emption.* By the clause in a *wajib-ul-arz* which related to pre-emption it was provided as follows:—"When any co-sharer wishes to make a sale or mortgage of his share, it is incumbent on him to do so, first, in favour of a near co-sharer, next, in favour of a co-sharer of his *thok* and lastly, in favour of a co-sharer of another *thok*, at the rate of Rs. 20 per bigha of cultivated land and Rs. 5 per bigha of waste land. If none of these take it, then he may transfer it to an outsider. If any co-sharer (i.e., any co-sharer who wishes to sell or mortgage), fail to act as above directed, another co-sharer has the right of enforcing pre-emption in respect of the property. If the term of the mortgaged share of any co-sharer is about to expire and notice of foreclosure has been issued, and the co-sharer mortgagor has not the means to redeem, then another co-sharer, after paying up the money, may take back the share, and when the original mortgagor has the means, he, after paying the money, may take possession of the share." Held that, in the case of a conditional sale of property to which this *wajib-ul-arz* applied, there were only two stages contemplated by the *wajib-ul-arz*, and not three. The first stage was at or about the time of the execution of the deed of conditional sale, and at that time pre-emption might be had by a co-sharer at the rate indicated in the *wajib-ul-arz*. The second stage was when the conditional vendee had brought his suit for foreclosure, and at that time the pre-emptor would have to pay the amount found to be due under the deed of conditional sale. When once, however, the order for foreclosure had been made absolute, the co-sharer's right of pre-emption was gone and extinguished.

GAYA BHARTHI v. LAKHNATH RAI ... XX 103

Contract—

- See ACT IX OF 1872, SS. 23; 30; 148, 151 AND 152: ACT XIX OF 1873, s. 205B:
 • ACT IK OF 1890, SS. 72, 76: CLUB: MAHABRAHMANS.
 • *Breach of.* See CIVIL PROCEDURE CODE, SS. 51, 578.

1. *Contract construed as to interest claimed in part of purchase money left unpaid by arrangement—Tender.* By an agreement between vendor and vendee part of the purchase money was retained by the latter but not as a mere deposit by the vendor. The money was to be retained as security, that the property sold should be cleared of incumbrances and a good title made. The vendee was not liable for interest unless he should refuse, or omit, to pay the money so retained when the vendor should have shown readiness to clear off the incumbrances. Till then the vendee was not bound to pay or to tender to the vendor the money retained.

MUHAMMAD SIDDIQ KHAN v. MUHAMMAD NASIR-ULLAH KHAN ... XXI 223

2. *False representation alleged against vendor by purchaser—Inducement not proved—Share-holder buying shares from a director of the company.* To maintain a suit for damages upon a false representation alleged by purchaser against vendor, it must be established that the plaintiff was induced by the misrepresentation to enter into the contract. Shares in a Banking Company which shortly afterwards went into liquidation, were sold by a Director to the plaintiff, a shareholder. The latter now sued the vendor, alleging inducement to buy the shares by the vendor's false representations as to the state of the Bank's affairs. Both the Courts below concurred in finding that oral representations as to the latter alleged to have been made by the defendant to the plaintiff were not proved. Those Courts, however, had concurred in finding that the defendant, though he was not responsible for false balance-sheets issued before 1890, was well aware of the falseness of the one issued for the half-year ending on the 30th June 1890. The Judicial Committee saw no reason for interfering with these concurrent findings. The plaintiff, in this appeal, relied on the issue of the false balance-sheet

Contract—(continued.)

of 1890, the issue of a false report by the Directors, and a wrongful payment of dividend, for the period abovementioned, acts in which the defendant had taken part; these acts, as a series, constituting false representations, the Bank having in fact been insolvent at the time. But it was not shown by the evidence that the plaintiff had been induced to by the shares, which he had contracted to buy in two sets, one in September, the other later on in 1890, buy any of the representations so made; regard being had to the dates, respectively, and to his own knowledge. The dismissal of the suit was, therefore, maintained.

MACAULIFFE *v.* WILSON XXI 209

3. *Intention as to future action, expressed between parties, not amounting to a contract.* A mutual expression of intention between parties caused expectation on either side that the intention would be carried out, but no contract was made. A childless person, since deceased, expressed to the father of the minor son of his sister his intention to make the boy his heir, and that if he, the intending donor, should have children of his own he would give the boy a share of his property. The father assented, and made over charge of the boy. The widows, and mother, of the deceased, taking his estate for their lives, admitted the boy to joint possession with them; and on being sued by the reversioners of the family estate expectant upon their deaths, defended, as co-defendants with the boy, on the ground that they had, in obedience to the known wishes of the deceased, recognized the boy as heir to him. *Held*, that the reversioners could only be deprived of the inheritance after the death of the widows, who could not transfer any estate to last beyond their own lives, by the act of the deceased in contracting with the father of the boy to make the boy the heir, if such contract had been made. And that the substantial question was whether the representations made between the two had amounted to a contract to that effect. On evidence, wholly oral, it was found that no such contract had been made. Only enough had been said between the two to give rise to the expectation on either side that the boy would, the then intended course being followed, get the inheritance.

NARAIN DAS *v.* RAMANUJ DAYAL XX 209

Joint. See ACT IX OF 1872, S. 43.

Opposed to public policy. See ACT IX OF 1872, S. 23.

Copy—

Certified, of ancient document. See ACT I OF 1872, SS. 65, 90.

Corporation—

See CIVIL PROCEDURE CODE, S. 435.

Co-sharer—

See PRE-MORTGAGE.

Costs—

See EXECUTION OF DECREE 7.

Court-fee—

See ACT VII OF 1870, SS. 10 AND 12; 12 AND 23; ACT I OF 1894, SS. 12, 19, 32 AND 54; CIVIL PROCEDURE CODE, SS. 335; 539; LETTERS PATENT, S. 10; SUIT 4.

Court of Wards—

See ACT XIX OF 1873, S. 205B.

Procedure preliminary to taking estate under the. See ACT I OF 1872, SS. 65, 90.

Criminal Procedure Code—

s. 33. See ACT IX OF 1890, SS. 113, 732.

ss. 35 and 367. *Concurrent sentences not authorised by the Code.* There is no provision in the Code of Criminal Procedure by which a Court is empowered, on convicting an accused person of two or more offences at the same time, to direct that the sentences imposed in respect of such offences shall run concurrently.

QUEEN-EMPRESS *v.* ISHRI XX 1

s. 83. See ACT XIII OF 1959, S. 1.

ss. 87, 88, 89. *Absconding offender—Proclamation and attachment—Sale of attached property—Title of purchaser.* Where property was attached and sold as property of a proclaimed offender under ss. 87 and 88 of the Code of Criminal Procedure, it was *held* that although the proclamation was irregular, yet, the property having vested in third parties, strangers to the proceedings in which the proclamation was made, the sale could not be set aside.

ABDULLAH *v.* JITU XXII 216

Criminal Procedure Code—(continued.)

- ss. 110, *et seq.* *Security for good behaviour—Object of demanding security—Discretion of Magistrate in accepting or refusing sureties tendered.* The object of requiring security to be of good behaviour is not to obtain money for the Crown by the forfeiture of recognizances but to insure that the particular accused person shall be of good behaviour for the time mentioned in the order. It is therefore reasonable to expect and require that the sureties to be tendered should not be sureties from such a distance as would make it unlikely that they could exercise any control over the man for whom they were willing to stand surety. *Narain Sooboddhee* not followed.
- QUEEN-EMPRESS *v.* RAHIM BAKHSH XX 206
- ss. 110, 119. *Security for good behaviour—Power to order further inquiry—"Accused person"—Criminal Procedure Code, s. 437.* Held that a person against whom proceedings under Ch. VIII of the Code of Criminal Procedure are being taken is "an accused person" within the meaning of s. 437 of the Code. *Queen-Empress v. Mona Puna* and *Jhoja Singh v. Queen-Empress* followed.
- QUEEN-EMPRESS *v.* MUTASADDI LAL XXI 107
- ss. 110, 121, 514, Sch. V, Form No. XLVI. *Security for good behaviour—Conviction of principal—Forfeiture of bond—Mode of proving conviction.* Where a person has given a security bond under s. 118 of the Code of Criminal Procedure for the good behaviour of another, and the principal during the term for which the bond is in force is convicted of an offence punishable with imprisonment, the production of the conviction, and, if necessary, of proof of identity of the principal, is sufficient evidence upon which the Magistrate is authorized to issue notice to the surety under s. 514 of the Code to show cause why the penalty of the bond should not be paid. In such a case it is for the surety to show what cause he can. It is not incumbent on the Magistrate to re-summon the witnesses on whose evidence the principal was convicted and practically to re-try the case against the principal.
- QUEEN-EMPRESS *v.* MAN MOHAN LAL XXI 86
- ss. 133, 135. *Order of Magistrate for removal of unlawful obstruction—Application for appointment of a jury—Effect of verdict of jury.* Where a person against whom an order has been made under s. 133 of the Code of Criminal Procedure applies for a jury under s. 135 of the Code, the applicant is bound by the verdict of the jury, and cannot afterwards raise such a plea as that the obstruction was caused in the exercise of a *bona fide* claim of right.
- IN RE LACHMAN XXII 267
- ss. 133, 135 and 136. *Act XLV of 1860 (Indian Penal Code), s. 188—Power of Magistrate to order repair of a house not adjoining the public road.* Section 133 of the Code of Criminal Procedure does not empower a Magistrate to order the owner of a house standing apart from any public road in its own compound to repair such house. By "persons living or carrying on business in the neighbourhood," injury to whom the power to pass orders under s. 133 is intended to prevent, are meant, not the persons who in the exercise of their private rights may use a building supposed to be in a dangerous condition, but unascertained members of the public whose ordinary avocations may take them to the neighbourhood of such building. *Queen-Empress v. Narayana* and *Queen-Empress v. Bishamber Lal* distinguished.
- QUEEN-EMPRESS *v.* JASODA NAND XX 501
- s. 145. See CIVIL PROCEDURE CODE, s. 505.
- s. 146. See ACT XV OF 1877, SCH. II, ART. 47.
- s. 164. See ACT XLV OF 1860, s. 193.
- ss. 190, 191. *Cognizance taken by a Magistrate under s. 190, sub-sec. (1), cl. (c)—Jurisdiction of Magistrate to hold a preliminary inquiry not thereby ousted.* Held that the fact of a Magistrate having taken cognizance of a case under s. 190, sub-sec. 1, cl (c) of the Code of Criminal Procedure does not disqualify such Magistrate from holding a preliminary inquiry and committing the case to the Court of Session.
- QUEEN-EMPRESS *v.* ABDUL RAZZAK KHAN XXI 109
- s. 203. *Procedure—Complaint—Dismissal of complaint—Subsequent complaint arising out of the same matter.* When a competent tribunal has dismissed a complaint another tribunal of exactly the same powers cannot re-open the same

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- matter on a complaint made to it. *Nilratan Sen v. Jogesh Chundra Bhattacharjee* and *Komal Chandra Pal v. Gourchand Audhikari* followed. *Queen-Empress v. Puran* and *Queen-Empress v. Umedan* referred to.
- QUEEN-EMPRESS v. ADAM KHAN ... XXII 106
- s. 208. *Evidence—Procedure—Duty of Magistrate inquiring into a case triable by the Court of Session to take the evidence of the witnesses produced by the accused.* A Magistrate inquiring into a case under Ch. XVIII of the Code of Criminal Procedure is not empowered to frame a charge or make out an order for commitment until and after he has taken all such evidence as the accused may produce before him for hearing.
- QUEEN-EMPRESS v. AHMADI ... XX 264
- s. 253. *Discharge—Evidence—Duty of Magistrate in dealing with the evidence produced in a case triable by a Court of Session.* Held, that a Magistrate inquiring into a case triable by the Court of Session is not bound to commit simply because the evidence for the prosecution, if believed, discloses a case against the accused, but he is competent to consider the reliability of such evidence and to discharge the accused if he find it untrustworthy.
- IN RE KALYAN SINGH ... XXI 265
- s. 285. *Assessors—Effect of incapacity of assessors to understand the proceedings.* Three assessors were chosen to assist the Court at a trial. Before the case commenced it was discovered that one of the assessors was deaf, and his presence was accordingly dispensed with. The trial proceeded with two assessors present : but after the Public Prosecutor had closed his case, it was discovered that one of the remaining assessors was so deaf as to be incapable of understanding the proceedings. Under these circumstances it was held that the trial having been held with practically only one assessor, the proceedings ought to be set aside and a new trial ordered.
- QUEEN-EMPRESS v. BABU LAI ... XXI 106
- s. 288. *Admissibility of evidence—Statement of approver made before committing Magistrate and afterwards retracted in the Court of Session.* Pardon was tendered by a Magistrate to one of several persons who were being tried before him for dacoity. The pardon was accepted, and the person to whom it was tendered made a statement as a witness before the Magistrate. The case having been committed to the Court of Session, the approver in that Court totally repudiated his statement made before the Magistrate. Held that this repudiation did not prevent the Sessions Court from considering the evidence of the approver under the provisions of s. 288 of the Code of Criminal Procedure.
- QUEEN-EMPRESS v. SONEJU ... XXI 175
- s. 268. *Evidence—Use in Sessions Court of evidence taken before the committing Magistrate.* Although under certain circumstances a Court of Session may use evidence given before the committing Magistrate as if it had been given before itself, it is not proper for a Court of Session to base a conviction solely upon such evidence, there being no other evidence on the record to corroborate it. *The Queen v. Amanulla*, *Queen-Empress v. Bharamappa* and *Queen-Empress v. Dhan Sahai* referred to.
- QUEEN-EMPRESS v. JEOCHI ... XXI 111
- s. 288. *Previous statement to committing Magistrate retracted in Sessions Court—Use of such statement by Sessions Court as substantive evidence—Act I of 1872 (Indian Evidence Act), s. 30—Confession of co-accused—“Taking into consideration”—Finding of arms and stolen property in joint family house—Evidence—Act XLV of 1860 (Indian Penal Code), s. 412.* Where a witness who has made a statement before the committing Magistrate subsequently reciles from that statement in the Court of Session, the statement made before the committing Magistrate can be used under s. 288 of the Code of Criminal Procedure to contradict the witness ; but the use of such statement as substantial evidence of the facts alleged by the witness on the prior occasion is fraught with the gravest peril, and could never have been the intention of the Legislature. The words “take into consideration” in s. 30 of the Indian Evidence Act, 1872, do not mean that the confession referred to in the section is to have the force of sworn evidence. *Queen-Empress v. Khandia* referred to. Held: The bare finding of stolen property and arms in the house of a joint Hindu family is not such evidence of possession on the part of each of its members as would form a sufficient basis for a conviction.
- QUEEN-EMPRESS v. NIRMAL DAS ... XXII 445

Criminal Procedure Code—(continued.)

ss. 337 and 529. *Pardon—Tender of pardon by a Magistrate having powers under s. 337, but not being the Magistrate before whom the inquiry was being held.* A dacoity was committed in the district of Muttra and was being inquired into in that district. Pending such inquiry, one Partab Singh appeared before the Magistrate of the neighbouring district of Etah and obtained from him a tender of pardon in respect of the said dacoity, on the strength of which pardon he was examined as a witness by the Magistrate of the Etah District and made a statement implicating himself and others in the dacoity. Subsequently, on the case being committed to the Court of the Sessions Judge of Agra, the tender of pardon made by the District Magistrate of Etah was ignored and Partab Singh was tried and sentenced for the dacoity. *Held*, on appeal to the High Court, that the Magistrate of the Etah District had no jurisdiction under the circumstances to make the tender of pardon which he did, and that his action in that respect was not covered by s. 529 of the Code of Criminal Procedure.

QUEEN-EMPRESS v. CHIDDA... .. XX

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s. 339. *Pardon—Tender of pardon by Magistrate inquiring into a Criminal case—Pardon withdrawn after some of the witnesses for the prosecution had been examined—Effect of withdrawal of the pardon at that stage.* A Magistrate inquiring into a charge of dacoity tendered a pardon to one of the accused persons. The pardon was accepted, and the person to whom it was tendered was examined as a witness for the prosecution. Subsequently, and after certain other witnesses for the prosecution had been examined, the Magistrate, being of opinion that the person to whom pardon had been tendered had not made a full disclosure of the facts of the case, withdrew the pardon, put the person to whom it had been tendered back in the dock, and ultimately committed him along with the other accused to the Court of Session. *Held*, that the commitment of the person whose pardon had been withdrawn must be quashed, inasmuch as he had had no opportunity of cross-examining the witnesses for the prosecution who were examined before his pardon was withdrawn; but that it was not necessary that, if a fresh commitment could be made in time, his trial before the Court of Sessions should be postponed until the trial of his co-accused had been completed. *Queen-Empress v. Sudra and Queen-Empress v. Mulua* referred to.

QUEEN-EMPRESS v. BRIJ NARAIN MAN XX

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s. 342. *Evidence—Accused persons under trial separately for a substantive offence and for abetment of that offence competent witnesses on each other's behalf.* Prisoner A was tried for an offence under s. 403 of the Indian Penal Code and was convicted, but was sent to a Magistrate of higher powers than the convicting Magistrate to be sentenced. Whilst his case was pending before the second Magistrate, prisoner B, being on his trial separately for abetment of the offence for which A had been tried, applied for A to be summoned as a witness on his behalf. B's application was refused. *Held*, that s. 342 of the Code of Criminal Procedure was no bar under the circumstances to A's giving evidence for B, and that B's application ought to have been granted.

QUEEN-EMPRESS v. TIRBENI SAHAI XX

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s. 363. *Summary trial—Matters necessary to be stated in the record of a summary trial.* Where a Magistrate invested with powers under s. 260 of the Code of Criminal Procedure is trying a case summarily, it is desirable that he should set out under the column reserved for that purpose so much of the reasons that have influenced him as to satisfy the accused that the Magistrate has considered each of the ingredients necessary in law for the conviction to which the Magistrate has proceeded, and that while this should be recorded with brevity, the brevity should not be such as to tend to obscurity. The record of a summary trial contained in the column corresponding to cl. (h) of s. 263 of the Code of Criminal Procedure the following entry:—*The Police made a raid on information received and caught all the accused gambling. The defence of Mukundi, Mannu, Kali Charan, Ballan and Gulzari Lal involves the absurdity that the Police obtained a warrant to raid a house in which they could have no reason to suppose they would find any one. I convict Mukundi of keeping a common gaming-house,—s. 4, Gambling Act. I convict the other six defendants of gaming in a common gaming-house,—s. 3, Gambling Act.* *Held* that this entry, though it should have been more explicit, was a sufficient compliance with the requirements of the law.

QUEEN-EMPRESS v. MUKUNDI LAL XXI

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s. 395. *Whipping—Sentence of imprisonment in lieu of whipping—Powers of Magistrate.* Where a prisoner who has been sentenced to whipping is found to

Criminal Procedure Code—(concluded.)

be unfit to undergo such sentence, and such sentence is accordingly commuted to one of imprisonment, such substituted term of imprisonment must not bring the total term to which such prisoner is sentenced up to a term in excess of the maximum which the Court passing the sentence is competent to inflict.

QUEEN-EMPRESS *v.* RAM BARAN SINGH XXI 25

- s. 417. *Appeal by Government from an acquittal on the same footing as an appeal from a conviction—Act XLV of 1860, ss. 96 et seq—Right of private defence.* When a body of men are determined to vindicate their rights or supposed rights by unlawful force and when they engage in a fight with men who, on the other hand, are equally determined to vindicate by unlawful force their rights or supposed rights, no question of self-defence arises. In the Code of Criminal Procedure there is no apparent distinction between the right of appeal against an acquittal and a right of appeal against a conviction. *Empress v. Gayadin and Queen-Empress v. Gobardhan* referred to.

QUEEN-EMPRESS *v.* PRAG DAT XX 159

- s. 437. See SS. 110, 119.

- s. 437. *Orders for further inquiry—Order to the prejudice of an accused person—Notice to show cause.* Before any order is made to the prejudice of an accused person, notice should be given to that person to appear and show cause why the order should not be passed. *Queen-Empress v. Chotu* referred to.

QUEEN-EMPRESS *v.* AJUDHIA XX 339

- s. 555. *Jurisdiction—Appellate Court not disqualified by interest from granting permission to a subordinate Court to try a case.* The interest which might disqualify a Court from trying or committing for trial a case having regard to s. 555 of the Code of Criminal Procedure, will not prevent an appellate Court from giving the permission contemplated by that section.

QUEEN-EMPRESS *v.* FATEH BAHADUR... .. XX 181

- s. 556 *Act V of 1861 (Police Act), s. 29—Trial by District Magistrate for breach of orders of a Reserve Inspector of Police—Magistrate not “personally interested.”* Held, that the Magistrate of a district was not, on account of his being the head of the Police of the district, debarred by reason of s. 556 of the Code of Criminal Procedure from trying a person accused under s. 29 of the Police Act, 1861, of a breach of the orders of a Reserve Inspector of Police.

QUEEN-EMPRESS *v.* NARAIN SINGH XXII 340

Cross-examination—

See EVIDENCE 2.

Custom—

See LANDHOLDER AND TENANT 2. PRE-EMPTION 10.

Customary Right—

Prescription—Ghat dedicated to the public—Right to occupy specific portion of the ghat not susceptible of acquisition by prescription—Gangaputras. Held that no exclusive right of occupation could be acquired by prescription in any specific portion of a bathing ghat the use of which was dedicated to the public. *Husain Ali v. Matukman* followed. *Tyron v. Smith* and *Turner v. Ringwood Highway Board* referred to.

THE MUNICIPAL BOARD OF CAWNPORE *v.* LALLU XX 200

Dacoity—

See ACT XLV OF 1860, SS. 397, 34: CRIMINAL PROCEDURE CODE, s. 288.

Damages—

Measure of. See CIVIL PROCEDURE CODE, SS. 51, 578.

Declaratory Decree—

Suit for declaration of title to and possession in immoveable property—Limitation—Act XV of 1877 (Indian Limitation Act), sch. II, arts. 120, 144. A suit for a declaration of right to and of actual possession in immoveable property is governed by the limitation prescribed by art. 120 of the second schedule to the Indian Limitation Act, 1877. *Moru Bin Pallaji v. Gopal Bin Satu*, *Durga v. Haidar Ali*, *Bhikaji Baji v. Pandu* and *Mahomed Riasat Ali v. Hasin Banu* referred to. The judgment of OLDFIELD, J., in *Debi Prasad v. Jafar Ali* not followed.

LEGGE *v.* RAMBARAN SINGH XX 35

Decree—

See ACT I OF 1894, SS. 18, 19, 32 AND 54 : CIVIL PROCEDURE CODE, S. 409 : PARTIES TO A SUIT.

Against some only of several joint promisors. See ACT IX OF 1872, S. 43.

Construction of. See EXECUTION OF DECREE 6.

Declaratory. See DECLARATORY DECREE.

Ex parte. See CIVIL PROCEDURE CODE, S. 108.

Form of. See MORTGAGE 5.

For partition. See ACT IV OF 1893, S. 10.

For payment of money—Hypothecation decree. See CIVIL PROCEDURE CODE, S. 230.

Interpretation of. See CIVIL PROCEDURE CODE, SS. 13, 244.

Or order. See CIVIL PROCEDURE CODE, SS. 368, 582, 591.

"Personal" decree. See HINDU LAW 15.

Suit to set aside a fraudulent. See CIVIL PROCEDURE CODE, S. 108.

Decree-holder—

Application for leave to bid at sale. See CIVIL PROCEDURE CODE, S. 294.

Deed—

Suit for cancellation of a. See SUIT 1.

Defamation—

See ACT XLV OF 1860, S. 499.

Default of Appearance—

Dismissal of appeal for. See CIVIL PROCEDURE CODE, SS. 556, 558.

Discharge—

See CRIMINAL PROCEDURE CODE, S. 253.

Disqualified Proprietor—

See ACT I OF 1872, SS. 65, 90 : ACT XIX OF 1873, S. 205B.

Document—

Construction of. See CIVIL PROCEDURE CODE, S. 230.

Dower—

See CIVIL PROCEDURE CODE, S. 13, EXPL. II ; S. 14 : MUHAMMADAN LAW 1.

Easement—

See CUSTOMARY RIGHT.

Estoppel—

See ACT I OF 1872, S. 115 : ACT XII OF 1881, SS. 36 ; 36, 96 (b) : CIVIL PROCEDURE CODE, S. 214 : LANDHOLDER AND TENANT 1 : MORTGAGE 7.

Evidence—

See ACT XLV OF 1860, SS. 124A ; 192 AND 193 ; 498 : CIVIL PROCEDURE CODE, SS. 556 AND 558 : CONSTRUCTION OF DOCUMENT : CRIMINAL PROCEDURE CODE, SS. 110, 121, 514, SCH. V, FORM NO. XLVI ; SS. 208 ; 253 ; 288 ; 342 : SUIT 3.

Admissibility of. See CRIMINAL PROCEDURE CODE, S. 288.

1. *Confession—Value to be attached to a confession subsequently withdrawn.* It does not necessarily follow, because a confession made by an accused person is subsequently retracted and there is little or no evidence on the record to support the confession, that therefore the confession is to be rejected. The credibility of such a confession is in each case a matter to be decided by the Court according to the circumstances of each particular case, and if the Court is of opinion that such a confession is true, the Court is bound to act, as far as the person making it is concerned, upon such belief. *Queen-Empress v. Mahabir and Queen-Empress v. Rangī* referred to.

QUEEN-EMPRESS v. MAIKU LAL XX 133

Exclusion of oral, by documentary. See MORTGAGE 3.

2. *Prosecution witness examined before the Magistrate but not called in the Court of Session—Witness called by the defence—Cross-examination by defending counsel disallowed.* Where the prosecution declined to call in the Court of Session a witness for the Crown who had been examined in the Magistrate's Court, and such witness was thereupon placed in the witness-box by counsel for the defence, it was held that counsel for the defence was not entitled to commence his examination of the witness by questioning him as to what he had deposed in the Magistrate's Court. Questions as to his previous deposition were under the circumstances

Evidence—(continued.)

only admissible by way of cross-examination, with the permission of the Court, if the witness proved himself a hostile witness.

QUEEN-EMPRESS *v.* ZAWAR HUSEN XX 515

Excise Act—

See ACT XII OF 1856.

Execution of Decree—

See ACT XV OF 1877, SCH. II, ART. 179; ACT IV OF 1882, SS. 89; 90; CIVIL PROCEDURE CODE, SS. 206; 223; 230; 231; 244; 244, 258; 268; 273, 266, 268; 276; 285, 295, 4A; 287; 294; 311; 311, 312; 312 AND 320; 317; 319; 320 AND 322A; 326; 335; 544; 583; MESNE PROFITS 1.

applic

cedure by a person alleging himself to be beneficially entitled under a decree to execute such decree has been rejected, it is still competent to the applicant (no appeal lying from the order under s. 232 rejecting his application) to bring a separate suit for a declaration that he is the person entitled to execute the decree. *Ram Baksh v. Panna Lal and Halodhar Shaha v. Harogobind Das Koiburto* referred to.

SHEORAJ SINGH *v.* AMIN-UD-DIN KHAN XX 539

2. *Application for execution giving wrong date of decree—Amendment allowed after limitation—Amendment relating back to former applications.* I obtained a decree on two mortgage bonds on the 25th November 1885. That decree was set aside, but another decree was passed in his favour on the 21st of September 1886. The decree-holder made several applications to execute the decree, but in each described the decree as of the 25th November 1885. On the third application the judgment-debtor objected that the application was time-barred. The application was allowed to be amended, but the amendment took place after the expiry of limitation. *Held*, that the amendment would relate back to the preceding applications, and execution of the decree, was not time-barred. *Ajudhia Ram v. Muhammad Munir* followed.

JIWAT DUBE *v.* KALI CHARAN RAM XX 478

3. *Civil Procedure Code, s. 211—Mesne profits—Interest on mesne profits not given by decree—Interest not obtainable in execution—Costs of collection of rents by a trespasser in possession not to be set off against mesne profits.* A plaintiff sued for cancellation of a certain lease, and for ejectment of the defendant as a trespasser, and for mesne profits with interest on such mesne profits. The decree which he obtained was a decree for cancellation of the lease and ejectment of the defendant, and ordered that mesne profits should be ascertained in the execution department, but was silent as to interest. *Held* that interest on the mesne profits could not be obtained in execution of the decree. *Hurro Durga Choudhrani v. Surut Sundari Debi, and Kishna Nand v. Kunwar Partab Narain Singh* referred to. *Held* also that as the defendant had thrust himself into an estate and not acted in the exercise of a *bona fide* claim of right, he was not entitled to charge collection expenses in reduction of the mesne profits. *McArthur and Co. v. Cornwall* distinguished.

ABDUL GHAFUR *v.* RAJA RAM XXII 262

4. *Civil Procedure Code, s. 234—Successive deaths of judgment-debtor and his legal representative—Execution against legal representative of the legal representative.* The judgment-debtor under a simple money decree died before execution was taken out against him. Execution of the decree was sought against his legal representative, into whose hands it was found that certain of the assets of the deceased judgment-debtor had come; but before anything was recovered the legal representative, in turn, died. *Held*, that the decree-holder was entitled to execute his decree against the legal representative of the legal representative to the extent of any assets of the original judgment-debtor which might have come into her possession.

JAFRI BEGAM *v.* SAIRA BIBI XXII 367

5. *Civil Procedure Code, s. 244—Representative of a party to the suit—Purchaser of property under attachment in execution of a decree.* *Held*, that the purchaser of property which is at the time of the purchase under attachment in

Execution of Decree—(continued.)

execution of a decree is a representative of the judgment-debtor vendor within the meaning of s. 244 of the Code of Civil Procedure. *Lalji Mal v. Nand Kishore* followed. *Madho Das v. Ramji Patak* explained.

GUR PRASAD v. RAM LAL XXI 20

6. *Construction of decree—Act IV of 1882, ss. 86, 88, 89—Decree for sale on a mortgage—Interest allowable after date fixed by decree for payment of the mortgage-money.* A Court executing a decree, the terms of which are ambiguous, should, where it is possible, put such a construction upon the decree as would make it in accordance with law. *Amolak Ram v. Lachmi Narain, Purbhu Narain Singh v. Rup Singh and The Maharaja of Bhartpur v. Rani Kanno Dei*, quoad hoc approved. But in construing a decree for sale upon a mortgage, the terms of which are susceptible of being construed either as allowing interest only up to the date fixed by the decree for payment of the mortgage-debt or as allowing interest also after that date until realization, the proper construction, to make the decree in accordance with law, is that interest is allowed up to the date of realization and not merely up to the date fixed by the decree for payment of the mortgage-debt. *Amolak Ram v. Lachmi Narain, Nain Dat v. Harihar Dat and The Maharaja of Bhartpur v. Rani Kanno Dei* as to this point overruled. *Achalabala Bose v. Surendra Nath Dey and Subbaraya Ravuthaminda Nainar v. Ponnusami Nadar* referred to. *Rameswar Koer v. Mahomed Mehdi Hossein Khan* followed.

BAKAR SAJJAD v. UDIT NARAIN SINGH XXI 361

7. *Construction of decree—Act IV of 1882, s. 88—Civil Procedure Code, ss. 219, 206—Costs—Decree apparently awarding costs twice over.* A decree drawn up under s. 88 of the Transfer of Property Act, 1882, was properly framed in accordance with the requirements of that section, but, in addition to the prescribed contents of such a decree, contained a clause to the following effect:—"It is further ordered, that the defendant aforesaid do pay to the plaintiffs aforesaid the sum of Rs. 876-8-0, the amount of costs incurred by them in this Court." *Held*, that this latter clause was merely a formal compliance with the provisions of the Code of Civil Procedure, and was not intended to be a direction for the recovery of costs personally from the judgment-debtor. *Chiranji v. Moti Ram* on this point overruled.

MAQBUL FATIMA v. LALTA PRASAD XX 523

8. *Construction of decree—Duties of executing Court—Act IV of 1882, s. 88—Decree for sale on a mortgage wrongly allowing interest after date fixed for payment.* Where a decree for sale under the Transfer of Property Act as framed is ambiguous, the Court executing it must put its own construction on it, and if possible, will construe it as a decree properly framed according to law, but where there is no ambiguity in the decree, the executing Court is bound to execute it according to its terms, whether the decree be right or wrong. *Amolak Ram v. Lachmi Narain and Badshah Begum v. Hardai* referred to.

PIRBHU NARAIN SINGH v. RUP SINGH... .. XX 397

9. **Decree for sale on a mortgage—Powers of Court executing decree—Hindu law—Joint Hindu family—Objection by son that his interest in the property mortgaged is not saleable in execution of a decree obtained against his father.* *Held*, that it is not open to a son in a joint Hindu family, who has been made a party as the legal representative of his father to proceedings in execution of a mortgage decree against his father, to raise an objection in those execution proceedings that the decree against the father is not binding on him in his personal capacity by reason of his not having been made a party to the suit in which the decree was passed. *Bhawani Prasad v. Kallu* referred to. *Sanwal Das v. Bismillah Begam and Liladhar v. Chatarbhuji* approved. *Lochan Singh v. Sant Chandar* not followed.

HIRA LAL SAHU v. PARMESWAR RAI XXI 356

10. *Limitation—Act XV of 1877 (Indian Limitation Act), ss. 7 and 8—Minority.* Section 8 of the Indian Limitation Act, 1877, applies only to those cases in which the act of the adult joint creditor is *per se* a valid discharge. *Seshan v. Rajagopala and Govindram v. Tatia* followed. *Hargobind v. Srikishen* overruled. A decree was passed in 1881 in favour of two decree-holders. Subsequently one of the decree-holders died, and the names of his widow and his two minor sons and one minor daughter were entered as his representatives. In 1888 an application was made for execution by the widow on behalf of the minor sons, which was dismissed. In February 1894 the two sons of the deceased decree-holder being still minors made another application for execution through one

Execution of Decree—(concluded.)

Aijaz Husain. *Held* that s. 7 of the Limitation Act applied, and that this application was not time-barred. *Lolit Mohun Misser v. Janoky Nath Roy and Pahari v. Bhupendra Narain Roy* followed.

ZAMIR HASAN v. SUNDAR XXII 199

11. *Limitation—Act XV of 1877—(Indian Limitation Act), sch. II, art. 179 (4)—Application to take some step in aid of execution—Payment of process fee.* The mere payment of process fee for the issue of notice for the purpose of an inquiry under s. 287 of the Code of Civil Procedure, or the payment of costs for the issue of a proclamation of sale, unaccompanied by any application, will not operate to give a fresh starting point for limitation within the meaning of art. 179 (4) of the second schedule to the Indian Limitation Act, 1877. *Har Sahai v. Sham Lal and Dwarkanath Appaji v. Anandrao Ramchandra* followed. *Barmha Nand v. Sarbishwara Nand* distinguished. *Radha Prasad Singh v. Sundar Lal* dissented from.

THAKUR RAM v. KATWARU RAM XXII 358

Purchase by alleged agent of decree-holder at sale in execution. See CIVIL PROCEDURE CODE, ss. 294, 317.

12. *Restitution of benefit obtained under a decree which is reversed in appeal—Restitution sought by means of execution of appellate decree against a person not a party to the appeal.* *Held*, that appellants in the Privy Council who had, antecedently to filing their appeal to Her Majesty in Council, paid to the assignee of the decree appealed against, which was for costs only, the amount then payable under that decree, could not, on succeeding in their appeal, obtain restitution, merely by virtue of and in execution of the order of Her Majesty in Council, of the amount so paid, from the assignee when that assignee had been no party to the appeal to Her Majesty in Council. *Bhaqwati Prasad v. Jamma Prasad* referred to.

SADIQ HUSAIN v. LALTA PRASAD XX 139

13. *Sale in execution—Sale set aside—Second sale in execution of a different decree—First sale subsequently confirmed in suit for that purpose—Title of purchasers at first sale—Civil Procedure Code, ss. 311, 312.* Certain immoveable property was sold in execution of a decree, but on objections being raised by the judgment-debtors under s. 311 of the Code of Civil Procedure the sale was set aside. After the sale had been thus set aside the same property was again sold in execution of another decree. Subsequently in a suit brought by the purchasers at the first sale (in which suit the judgment-debtors, who alone were made defendants, confessed judgment) the first sale was confirmed. The purchasers at the first sale then sued the purchasers at the second sale for possession of the property sold. *Held* by STRACHEY, C.J., that the second purchasers having acquired their title at a time when the first sale had been set aside, their title was not affected by the subsequent confirmation of the sale and was good as against the first purchasers. *Held* further (by STRACHEY, C.J., and BANERJI, J.) on the finding that the decree confirming the first sale had been passed in a suit to which the purchasers at the second sale were no parties, and had, moreover, been obtained by means of collusion between the plaintiffs and the judgment-debtors, that such decree could not defeat the title acquired by the purchasers at the second sale. *Dagdu v. Panchamsing Gangaram, Kanapa v. Jonardan, Adhur Chunder Banerjee v. Aghore Nath Aroo and Ram Chunder Sadhu Khan v. Samir Ghazi* distinguished. *Nawab Zain-ul-abdin Khan v. Muhammad Asghar Ali Khan* referred to by STRACHEY, C.J.

BANKE LAL v. JAGAT NARAIN XXII 168

14. *Sale in execution—Title of auction-purchaser—Purchaser not bound to enquire into the validity of the order under which the sale takes place.* Where under a decree upon a mortgage the sale of certain property is ordered, and such property is sold at auction in pursuance of such order, and the sale is confirmed, the auction-purchaser takes a good title, even though the decree was one which the Court ought not to have made. The purchaser at a sale under a decree is under no obligation to look behind the decree to see whether the decree has been rightly made. *Matadin Kasodhan v. Kazim Husain* distinguished. *Rewa Mahton v. Ram Kishen Singh, and Mukhoda Dassi v. Gopal Chunder Dutta* referred to.

KAUNSILLA v. CHANDAR SEN XXII 377

Executor—

See ACT V OF 1881, s. 9.

Ex parte Decree—

• See CIVIL PROCEDURE CODE, s. 108.

False Evidence—

See ACT XLV OF 1860, s. 193.

False Information—

See ACT XLV OF 1860, s. 177.

Forgery—

See ACT XLV OF 1860, SS. 463 ET SEQ.

Fraud—

See ACT XLV OF 1860, SS. 463 ET SEQ.

Gangaputras—

See CUSTOMARY RIGHT.

Gift—

See ACT IV OF 1882, SS. 122 AND 123; MUHAMMADAN LAW 2.

Guardian and Minor—

See ACT VIII OF 1890, SS. 34; 47; CIVIL PROCEDURE CODE, s. 440.

Loans to a minor—Inquiries necessary to be made by lender—Burden of proof. A plaintiff who has advanced money to relieve the necessities of a minor must make all reasonable inquiries as to the facts of such necessities, and having made such inquiries and reasonably entertaining a *bona fide* belief in the existence of such necessities he can advance his money in safety, even though the sum borrowed by the guardian upon the security of the minor's estate is not in point of fact used for his necessities or his benefit. On the other hand a plaintiff who lends money without such inquiries cannot thereafter successfully have recourse to the minor's estate for the satisfaction of the debt. *Hanuman Pershad Pandey v. Babooee Munraj Kunweri* referred to.

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Guardian and Ward—

See ACT VIII OF 1890, s. 41.

High Court—

Revisional powers of. See ACT VIII OF 1897, SS. 4, 8 AND 16.

Hindu Law—

• See ACT XV OF 1856, s. 2; ACT XV OF 1877, s. 7, SCH. II, ART. 120; BURDEN OF PROOF 1 AND 2; EXECUTION OF DECREE 9.

1. *Adoption—Validity of the adoption of the only son of his natural father.* On the general question as to the validity by Hindu law of the adoption of the only son of his natural father decided in one judgment upon these two appeals, *held* that such an adoption is valid by that law. The authority of a widow, in reference to adoption, not being identical in different schools of Hindu law, it was *held*, on a question peculiar to the appeal from Madras, that it is there established in regard to the giving of a boy in adoption by the widow of his natural father that, unless there has been some express prohibition by the husband, the wife's power, with the concurrence of sapindas, where the concurrence of sapindas is required, is co-extensive with the power of the husband. The adoption of an only son is not an act so improper but that a widow has power to effect it with the assent of the sapindas in the absence of express power from her husband.

SRI BALUSU GURULINGASWAMI v. SRI BALUSU RAMALAKSHMAMMA ... XXI

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2. *Adverse possession—Limitation—Suit by reversioner to Hindu female heir.* Where property which should by law be in the possession of a female heir is held adversely to such heir by a trespasser, the possession of the trespasser is adverse also as against the reversioners of such female heir as well as against the female heir, and limitation will begin to run against the reversioners from the date of the commencement of such adverse possession. *Hanuman Prasad v. Bhagauti Prasad* approved. The Full Bench decision in *Ram Kali v. Kedarnath* has been impliedly overruled by the judgment of the Privy Council in *Mussamut Lachhan Kunwar v. Anant Singh*.

TIKA RAM v. SHAMA CHARAN

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3. *Estate of Hindu widow or daughter—Powers to alienate family estate—Ancestral family trade—Powers of manager.* The estate of a Hindu family, in which, after the death of the father and his widow, a daughter held an interest for life, comprised a family trade, carried on by a manager on her account. *Held* that the

Hindu Law—(continued.)

restriction upon her power to alienate remained the same, notwithstanding the trade, without being relaxed on that account. Justifying necessity, or good grounds, after due inquiry, for belief in its existence, would have been required to render valid an alienation made by her of the family estate. The case of a widow, or of a daughter under such circumstances, differs from that of the manager, or head of an undivided family, who manages an ancestral trade, and has a certain power to pledge for the requirements of the business. The validity of his charge, however, on the family estate, where there is a minority, or non-consent, among the members of the family, depends on proof that the charge was necessary, or was believed to be so by the mortgagee, after due inquiry. The manager, appointed by the daughter, on whom the family estate has devolved, has no larger power to pledge the ancestral assets than his principal. It is not incumbent on the defendant who relies on the absence of legal necessity for the borrowing by a woman, holding her limited estate, to plead or to prove such absence; but it is for the plaintiff to state and to prove all that will give validity to the charge. *Lala Amarnath Sah v. Rani Achhan Kunwar* referred to and followed.

- SHAM SUNDAR LAL *v.* ACHHAN KUNWAR XXI 71
4. *Hindu widow—Maintenance—Suit for arrears of maintenance—Discretion of Court in allowing arrears.* Where a Hindu widow sues for maintenance from the family and estate of her deceased husband, with arrears of such maintenance, the allowance of arrears of maintenance is a question for the discretion of the Court, and the Court, if it allows arrears of maintenance at all, will not necessarily allow arrears at the same rate as it may allow future maintenance, especially where the plaintiff has made serious delay in bringing her suit for maintenance.
- RAGHUBANS KUNWAR *v.* BHAGWANT KUNWAR XXI 183
5. *Hindu widow—Reversioners entitled to succeed successively on death of Hindu widow—Suit by some of such reversioners to set aside alienations made by widow in possession—Res judicata.* Where there are several reversioners successively entitled to succeed to property for the time being in the possession of a Hindu female, a decree in a suit by some of such reversioners seeking to set aside alienations made by the female in possession will not necessarily constitute *res judicata* in respect of a similar suit brought by other reversioners. *Bhagwanta v. Sukhi, Jumona Dassya Chowdhurani v. Bamasoondarat Dassya Chowdhurani and Isri Dut Koer v. Mussamat Hansbutti Koerain* referred to.
- CHHIDDU SINGH *v.* DURGA DEI XXII 382
6. *Hindu widow—Right to maintenance—Sale of property in respect of which the widow's right to maintenance might be enforceable—Act IV of 1892 (Transfer of Property Act), s. 39.* The maintenance of a Hindu widow is not a charge upon the estate of her deceased husband until it is fixed and charged upon the estate by a decree or by agreement; and the widow's right is liable to be defeated by a transfer of the husband's property to a *bond fide* purchaser for value even with knowledge of the widow's claim for maintenance, unless the transfer has, further, been made with the intention of defeating the widow's claim. *Sham Lal v. Banna and Lakshman Ramchandra Joshi v. Satyabhamabai* referred to.
- RAM KUNWAR *v.* RAM DAI XXII 326
7. *Hindu widow—Succession—Legal representative—Civil Procedure Code, s. 365.* A reversioner succeeding to the estate of a deceased person after the death of the widow of that person would be bound by a decree obtained against the widow provided that there was a fair trial of the suit in which the decree was passed. Consequently the widow's right to sue survives to, and devolves on, the heir of her husband entitled to the estate, and such heir, and not her personal heirs, should be held to be her legal representative for the purposes of s. 365 of the Code of Civil Procedure. *Katama Natchiar v. The Raja of Shivagunga, Hari Nath Chatterjee v. Mothurmohun Goswami and Premmoyi Choudhuran v. Preonath Dhur* referred to.
- TRIBHUWAN SUNDAR KUAR *v.* SRI NARAIN SINGH XX 341
8. *Impartible Raj—Allowance to younger sons—Matters which may be considered in assessing such allowance.* Held that in calculating what allowance might properly be made to the younger brother of the holder of an impartible raj regard might properly be had, not merely to the extent of the property constituting the raj, but to the other sources of income, whencesoever derived, possessed by the incumbent of the raj.
- MAHESH PARTAB SINGH *v.* DIRGPAL SINGH XXI 292

Hindu Law—(continued.)

9. *Invalidity of the adoption of a sister's son, mother's sister's son, and of a daughter's son.* The adoption of a mother's sister's son by a Hindu of any of the three regenerate classes, Brahman, Kshatriya, and Vaisiya, equally with the adoption of a daughter's son or a sister's son, is contrary to law and void. The ancient texts condemning such adoptions are not only admonitions, but have been judicially decided to be prohibitions of law for such a length of time that it is now not competent to a Court to treat them as open to question in this respect. The judgment in *The Collector of Madura v. Mootoo Ramalinga Sathupathy* gives no countenance to the conclusion that in order to bring a case under any rule of law, laid down by recognised authority for Hindus generally, evidence must be given of actual events to show that in point of fact the people subject to that general law regulate their lives by it.

BHAGWAN SINGH v. BHAGWAN SINGH XXI 412

0. *Joint Hindu family—Joint family or self-acquired property—General education acquired at the expense of the joint family funds.* Held, that the mere fact that a member of a joint Hindu family had acquired a certain general education of a not very advanced character at the expense of the joint family funds would not have the result of making all the subsequent earnings of that member joint family property, but they would remain his self-acquired property. *Pauliem Valoo Chetty v. Pauliem Sooryah Chetty* and *Krishnaji Mahadev v. Moro Mahadev* referred to and followed.

LACHMIN KUAR v. DEBI PRASAD XX 435

1. *Joint Hindu family—Joint family property sold in execution of a decree on a mortgage against the father alone—Decree satisfied—Subsequent recovery by the sons of part of the mortgaged property—Remedy of mortgagee.* A mortgagee held a mortgage of joint family property given by the father alone. He sued on his mortgage without making the sons parties to the suit, and having obtained a decree, brought the whole of the joint family property to sale and purchased it himself. This purchase, together with a further cash payment of Rs. 50, satisfied the mortgage-debt. After the mortgage had been thus satisfied, the sons brought a suit for recovery of their shares in the joint family property amounting to one-fourth, and obtained a decree, and got possession of the property claimed. The mortgagee then brought a suit against the sons to recover from them a share of the mortgage debt proportionate to the share in the joint family property owned by them. Held, that the original mortgage having become extinct the plaintiff was entitled to a decree for one-fourth of the price realized by the mortgaged property at auction sale and to recover the same by sale of the interest of the sons in the joint family property. *Bhawani Prasad v. Kallu* referred to. *Dharam Singh v. Angan Lal* followed.

LACHHMAN DAS v. DALLU XXII 394

2. *Joint Hindu family—Liability of sons to pay debts incurred by father—Creditor's remedy against sons not barred by reason of his having sued the father separately—Mortgage—Act IV of 1882 (Transfer of Property Act), s. 85.* Although a decree may have been obtained against the father of a joint Hindu family for a debt incurred by him, a subsequent suit is maintainable against the son in respect of the same debt for the enforcement of the son's liability for it, such debt being one which the son is legally bound to pay. The creditor may in his original suit implead the son, but his omitting to do so will not deprive him of his subsequent remedy against the son. There is no difference in principle as regards the subsequent remedy of the creditor against the son between the case of a debt secured by a mortgage and a simple money debt. *Lachmi Narain v. Kunji Lal*, *Balmakund v. Sangari*, *Bhawani Prasad v. Kallu*, *Ramasani Nandan v. Ulaganatha Goundan*, *Ariabudra v. Dora Sami* and *Nanomi Babuasin v. Modhun Mohun* referred to. The obligation of a Hindu son to pay his father's debt is not an obligation which he has incurred jointly with his father, and the creditor's cause of action is not a single cause of action which is exhausted upon a decree being obtained against one of them only. *Hemendro Coomar Mullick v. Rajendro Lal Moonshee*, *Dhunput Sing v. Sham Soonder Mitter* and *Hoare v. Niblett* referred to.

DHARAM SINGH v. ANGAN LAL XXI 301

3. *Joint Hindu family—Maintenance—Right of illegitimate son to maintenance.* In the regenerate classes of Hindus a son of illegitimate birth has no part in the family inheritance, but is entitled to maintenance out of his father's estate:—a right personal to him and not inherited by his offspring. *Chuoturya Run Murdun Syn v. Sakub Purbulad Syn* referred to and followed:—An allowance for

Hindu Law—(continued.)

maintenance was received by the plaintiff's father, that father having been an illegitimate son born to a collateral relation of the head of a family. The ancestral property was in the possession of the latter, who was in a senior line of descent. The plaintiff, who was himself the legitimate son of his father, claimed to be entitled to redeem a mortgage of part of the ancestral estate, that mortgage having been effected by the abovementioned head of the family. His ground of claim was that he had inherited the right to maintenance and had thus an interest or charge within the meaning of s. 91 of the Transfer of Property Act, 1884, to entitle him to redeem. The decision was that the High Court had rightly concluded that he had not inherited that right. The authority of the *Mitakshara* in Ch. I, ss. 11 and 12, was more consistent with a personal right of the illegitimate son.

ROSHAN SINGH v. BALWANT SINGH ... XXII 191

Joint Hindu family—Position of managing members. See ACT IX OF 1872, S. 43.

14. *Joint Hindu family—Rights of son in joint ancestral property—Mortgage.* A member of a joint Hindu family has no power in his father's lifetime to make a mortgage of any part of the ancestral family property. *Balgobind Das v. Narain Lal and Madho Prashad v. Mehrban Singh* referred to.

BHAGIRATHI MISR v. SHEOBHIK ... XX 325

15. *Liability of member of joint family though not made a party to the suit—"Personal" decree, Meaning of.* Where a decree provided for the sale of specified property of a joint family and, in the event of the amount of the decree not being thereby satisfied, for the realization of the balance from the defendants personally: *Held*, that a junior member of the joint family, who was liable for his share of the debt sued on, but who was not made a party to the suit, could not successfully plead that the decree being a personal one in regard to the unsatisfied balance, he was not liable in regard to such unsatisfied balance. *Beni Madho v. Basdeo Patak and Bhawani Prasad v. Kallu* referred to.

HARI RAM v. BISHNATH SINGH ... XXII 408

16. *Mitakshara—Impartible raj—Impartible raj not necessarily inalienable.* If amongst Hindus governed by the law of the *Mitakshara*, a raj happens to be impartible and governed by the rule of primogeniture, it does not therefore follow that it is inalienable. The condition of inalienability depends upon special custom, or, in some cases, upon the special tenure of the raj and must be clearly proved. *Rani Sartaj Kuari v. Rani Deoraj Kuari* referred to.

RUP SINGH v. PIRBHU NARAIN SINGH... XX 537

17. *Mitakshara—Power of a member of joint family to alienate—Self-acquired immoveables—Construction of words of a sanad granting an absolute estate of inheritance—Change of ancestral character of immoveables—Mortgage and foreclosure—Bonâ fide re-acquisition for value by mortgagor's descendant.* A father, being a member of an undivided family subject to the *Mitakshara*, can exercise full power of disposition at his own discretion over immoveables which he has himself acquired, as distinguished from ancestral property. The immoveables alienated by a father's gift, disputed by his son, partly consisted of zamindari rights in villages which had been, at one time ancestral in the family, but had been transferred to satisfy the debts of an ancestor, and had been acquired back by his descendant, the donor. As to one of those villages the Courts below had differed whether it was self-acquired property in the donor's hands. It had been mortgaged by the ancestors; and the mortgage had been foreclosed under Regulation XVII of 1806, before having been re-acquired by the donor. That the foreclosure and re-acquisition were genuine were facts found upon evidence, including that of prior, concurrent, decrees maintaining the foreclosure, as between other parties. *Held*, that the re-acquisition was not a redemption of an estate inherited from an ancestor, and merely encumbered; but that the once ancestral character of this village had been destroyed by the foreclosure. Like the other villages alienated by the father's gift it was self-acquired by the donor. Other immoveable property comprised in the gift consisted of a malikana payable out of other villages conferred upon the donor by a Government sanad granting a muafi on seven villages to him for life, and declaring that "the zamindars who now pay the revenue will pay it to him, and after him they shall ever pay ten per cent. as malikana allowance to his heir after the deduction of Government revenue for generation after generation." *Held*, that the grant of the malikana was absolute to the one grantee: that there were not two gifts, one for life to the grantee, and the other a distinct gift after his death, to the person who should then be his heir. The malikana formed part of the grantee's heritable property and was self-acquired. *Held*, also, in reference

Hindu Law—(concluded.)

- to the High Court's Act, 1861, in which no time is mentioned for the appointment of an acting judge on the occurrence of a vacancy, that such an appointment could not be questioned on the ground of its not having been made until after a period alleged to be unreasonable.
- BALWANT SINGH v. RANI KISHORI XX 267
- 18. *Mitakshara—Stridhan—What constitutes stridhan—Property inherited from a female—Descent of stridhan.* Amongst property which becomes *stridhan* according to the law of the *Mitakshara* is property inherited from a female. It is not the case that where such *stridhan* has once devolved according to the law of succession which governs the descent of this peculiar species of property it ceases to be ranked as *stridhan* and is ever afterwards governed by the ordinary rules of inheritance. *Thakoor Deyhee v. Rai Baluk Ram, Bhugwandeem Doobey v. Myna Bae, Chotay Lall v. Chunno Lall, Phukar Singh v. Ranjit Singh and Muttu Vaduganadha Tevar v. Dora Singha Tevar* referred to.
- DEBI SAHAI v. SHEO SHANKER LAL XXII 358
- 19. *Mitakshara—Succession—Daughter's daughter.* Held, that in the absence of preferential male heirs a daughter's daughter is heir to her maternal grand-father.
- BANSIDHAR v. GANESHI XXII 388
- 20. *Mitakshara—Succession—Sister's son.* Held that in the absence of nearer relatives a man may be heir to his mother's brother as regards property which is governed by the *Mitakshara* law of inheritance. *Thakoorain Sahiba v. Mohun Lall, Rao Kurun Singh v. Nawab Mahomed Fyz Ali Khan, Amrita Kumari Debi v. Lakee Narain Chakrabutty, Girdhari Lall Roy v. The Bengal Government, Naraini Kuar v. Chandi Din and Umaid Bahadur v. Udoi Chand* referred to.
- RAGHUNATH KUARI v. MUNNAN MISR XX 191
- 21. *Mitakshara—Sudras—Illegitimate sons—Collateral succession.* Amongst Sudras governed by the *Mitakshara* law an illegitimate son does not inherit collaterally to a legitimate son by the same father. *Sarasuti v. Mannu, Jogendra Bhupati Hurro Chandra Mahapatra v. Nityanand Man Singh, Sadu v. Baiza, Nissar Murtojuh v. Kowar Dhunwunt Roy and Krishnayyan v. Muttusami.*
- SHOME SHANKAR RAJENDRA VARERE v. RAJESAR SWAMI JANGAM XXI 99

Hindu Widow—

See ACT XV OF 1856, S. 2 : HINDU LAW 4 AND 7.

Rights of, as pre-emptor. See PRE-EMPTION 13.

Husband and Wife—

See SALE.

Impartible Raj—

See HINDU LAW 16.

Injunction—

See ACT XV OF 1883, SS. 29, 42, 44 : CIVIL PROCEDURE CODE, S. 493.

Discretion of Court as to granting mandatory injunctions—Delay on the part of the plaintiff in bringing his suit. A plaintiff brought his suit for proprietary possession of a plot of land, and, secondly, for a mandatory injunction to demolish certain buildings which the defendant had erected on such plot. The suit, however, was not brought until upwards of two years from the time when the buildings complained of were completed. It was found that the plaintiff was not entitled to proprietary possession of the land claimed by him, but that he had a right of user over it, and that the defendant was not entitled to build upon the land. The Court, however, on account of the plaintiff's delay in bringing his suit declined to grant the mandatory injunction asked for. *Benode Coomaree Dossee v. Soudaniney Dossee* referred to.

HAJI SYED MUHAMMAD P. GULAB RAI XX 345

Insolvency—

See CIVIL PROCEDURE CODE, SS. 344, ET SEQ.

Intention—

See ACT XLV OF 1860, S. 307.

Interest—

See CIVIL PROCEDURE CODE, S. 583 : EXECUTION OF DECREE 6.

Post diem. See ACT III OF 1877, S. 17.

Interpretation of Statutes—

See ACT VIII OF 1897, s. 16 : CIVIL PROCEDURE CODE, s. 317.

Joint Family Property—

Sale of, in execution. See HINDU LAW 11.

Joint Hindu Family—

See ACT VIII OF 1890, s. 34 : BURDEN OF PROOF 1 AND 2 : EXECUTION OF DECREE 9 : HINDU LAW 10, 11, 12, 13, 14 AND 15.

Judgment—

See RULES OF COURT.

Jurisdiction—

See ACT XIX OF 1873, SS. 111, 113, 241 : ACT XII OF 1881, s. 208 : ACT XXII OF 1881, SS. 27, 28, 29, 30, 34 AND 47 : ACT VIII OF 1897, s. 16 : CIVIL PROCEDURE CODE, SS. 25, 562 ; 223 ; 244 ; 539 : CRIMINAL PROCEDURE CODE, s. 555 : MARRIAGE : REGULATION I OF 1877, SS. 18 ET SEQ.

Civil and Revenue Courts. See ACT XIX OF 1873, s. 241 (i) : ACT XV OF 1877, SCH. II, ART. 32 : ACT XII OF 1881, SS. 36 ; 36, 96 (b) : CAUSE OF ACTION : LANDHOLDER AND TENANT 3 : LETTERS PATENT, s. 10.

1. *Civil and Revenue Courts—Act XII of 1881, ss. 34 et seq., 95 (d) and 206 et seq.—Landholder and tenant—Suit to eject a tenant on the ground that the tenant had denied the landholder's title.* The reason which a landholder may have for desiring to eject a tenant of agricultural land has nothing to do with the procedure to be adopted for the tenant's ejectment. Where the procedure laid down in ss. 36 et seq. of the N.-W.P. Rent Act, 1881, is available, the landholder must adopt that procedure, and the mere fact that the landholder's alleged cause of action is the denial by the tenant of the landholder's title will not give the landholder a right to sue for ejectment in a Civil Court.

RAM SUKH v. GOKUL CHAND XXI 143

2. *Civil and Revenue Courts—Suit in ejectment against a trespasser—Res judicata—Entries in revenue records.* Although a Civil Court cannot give a decree declaring or deciding the status of an agricultural tenant, yet where a plaintiff, having no remedy in the Revenue Courts, sues, on the allegation that he is a tenant entitled to possession, to eject a trespasser, it is competent to a Civil Court to grant a decree for possession on the ground that the plaintiff is a tenant, the class of his tenancy being left to the Revenue Courts to determine. *Held* also, that an entry in a revenue record which is based solely on the fact of possession cannot operate as *res judicata* on a question of title subsequently raised in a civil suit. *Ajudhia Rai v. Parmeshar Rai* and *Dukhna Kumwar v. Unkar Pande* referred to.

KALIANI v. DASU PANDE XX 520

3. *Civil and Revenue Courts—Suit to set aside on the ground of duress, an agreement by an ex-zamindar for surrender of his sir-land.* On the sale of a village the vendor covenanted with the vendee to hold his sir-land as a tenant of the vendee for a certain term and then to surrender it to the vendee. *Held* that there was nothing to preclude the vendee from suing in a Civil Court for a declaration that the said agreement was void and unenforceable and had been extorted from him by undue influence. *Mahesh Rai v. Chandar Rai, Ajudhia Rai v. Parmeshar Rai* and *Husain Shah v. Gopal Rai* referred to.

DAULAT RAM v. ANWAR HUSEN XX 241

Jury—

See CRIMINAL PROCEDURE CODE, SS. 133, 135.

Kumaon Rules, 1894, Rule 17. See ACT XIV OF 1874.

Lambardar and Co-sharer—

See ACT XII OF 1881, s. 93, CL. (h).

Powers of lambardar to deal with co-parcenary lands—Lease of such lands for ten years at an inadequate rent. *Held*, that a lambardar has no general power to grant any lease of co-parcenary land beyond such as the circumstances of the particular year or the particular season may require. *Jagan Nath v. Hardyal* followed.

BANSIDHAR v. DIP SINGH XX 498

Landholder and Tenant—

• See ACT XII OF 1881, SS. 44 ; 93 (b) ; 95 (n) ; 189.

1. *Law of landlord and tenant as to building by the tenant on the land—Acquiescence of lessor—Terms of special leave to appeal.* A lessor is not restrained by any rule of equity from bringing a suit to evict a tenant, the term of whose lease has expired, merely by reason of that tenant's having erected permanent structures on the land leased, such building having been within the knowledge of the lessor, and there not having been any interference on his part to prevent it. To raise an equitable estoppel against the lessor precluding him from suing, on the determination of the tenancy, for possession, the tenant should show facts sufficient to justify the legal inference that the lessor has by plain implication contracted that the right of tenancy should be changed into a right of permanent occupancy. Acquiescence by the lessor in this case was a legal inference to be drawn from such facts as were found. The onus of establishing sufficient cause for an equitable estoppel had not been discharged by the tenant in this instance. *Ramsden v. Dyson* and s. 108 of the Transfer of Property Act, 1882, referred to. Special leave to appeal had been granted on terms that the appellants should be liable to pay the respondents' costs in any event, if directed so to do. Costs were, however, directed to be paid by the respondents.

BENI RAM v. KUNDAN LAL XXI 496

2. *Rights of Zamindars in land forming part of the abadi—Custom—Customary law of the North-Western Provinces.* According to the general custom prevalent in the North-Western Provinces, a person, agriculturist or agricultural tenant, who is allowed by a zamindar to build a house for his occupation in the *abadi* obtains, if there is no special contract to the contrary, a mere right to use that house for himself and his family so long as he maintains the house, that is, prevents it falling down, and so long as he does not abandon the house by leaving the village. As such occupier of a house in the *abadi* occupying under the zamindar, he has, unless he has obtained by special grant from the zamindar an interest which he can sell, no interest which he can sell by private sale or which can be sold in execution of a decree against him, except his interest in the timber, roofing and wood-work of the house. *Narain Prasad v. Dammār and Chajju Singh v. Kanhia* referred to.

SRI GIRDHARIJI MAHARAJ v. CHOTE LAL XX 248

3. *Suit against an evicted tenant for damages for use and occupation—Jurisdiction—Civil and Revenue Courts.* If a landholder wishes to get rent from a tenant of his agricultural land he must, during the continuance of the tenancy, either come to an agreement with the tenant as to the rent to be paid or get the rent fixed by means of an application under Act XII of 1881. If no rent has been fixed, the landholder cannot, after the determination of tenancy, sue his *quondam* tenant in a Civil Court for damages for the use and occupation of the land. *Ram Prasad v. Dina Kuar, Radha Prasad Singh v. Jugal Das and Debi Singh v. Jhanno Kuar* referred to. *Brijbawan Singh v. Mehdi Ali and Ranjit Singh v. Diwan Singh* overruled.

DEBI SINGH v. MUHAMMAD ISMAIL KHAN XX 296

4. *Trees—Property in trees growing upon tenant's holding—Burden of proof—Civil Procedure Code, s. 561—Appeal—Objections filed by respondent—Letters Patent, s. 10.* Held, that the property in trees growing on a tenant's holding is by the general law, vested in the zamindar, and a tenant is not entitled, in the absence of special custom, the burden of proving which is on him, to cut down and sell such trees. *Imdad Khan v. Bhagirath, Nafar Chandra Pal Chowdhuri v. Ram Lal Pal and Ruttonji Edulji Shet v. The Collector of Tanna* referred to.

KAUSALIYA v. GULAB KUAR XXI 297

Legal Practitioner—

• See LETTERS PATENT, s. 8.

Legal Representative—

• See EXECUTION OF DECREE 4 : HINDU LAW 7.

Letters Patent—

- s. 8. *Appeal—Presentation of appeal by a person other than an advocate, vakil or attorney of the Court, or a suitor.* Held, that the presentation of an appeal by a person who was not an advocate, vakil or attorney, of the Court, nor a suitor, is not a valid presentation in law, having regard to s. 8 of the Letters Patent of the High Court.

SHIAM KARAN v. RAGHUNANDAN PRASAD XXII 331

Letters Patent—(continued.)

s. 8. *Removal of a vakil from the roll for reasonable cause—A conviction under s. 471 of the Indian Penal Code.* A vakil of the High Court was convicted, under s. 471 of the Indian Penal Code, of fraudulently using as genuine a document which he knew to be forged. This was affirmed on appeal, when the punishment to which he had been sentenced was reduced to two years. The High Court, while not allowing the propriety of the conviction and sentence to be questioned, had considered whether his culpability was such as to disqualify him for his profession, and has decided in the affirmative, removing him from the roll, under s. 8 of the Letters Patent, 1866. *Held*, that, in the present case, the conviction, followed by the sentence, was sufficient, without further inquiry, to justify the High Court in making that order. The appellant could not be allowed to have an indirect appeal against the judgment of the Sessions Judge confirmed by the High Court. The judgment of Lord MANSFIELD in *ex parte Brounsall* referred to as well explaining the disqualification of a member of the legal profession that attends such a conviction and sentence. *In re Wear* where the Court of Appeal looked to see what was the nature of the offence, and would not, as a matter of course, strike a solicitor off the roll because he had been convicted, distinguished from the present case. *In re Durga Charan* dealt with under s. 12 of Act XVIII of 1879, referred to as a case where the nature of the offence admitted of further inquiry and also distinguished. In regard to the finality of the judgment of the High Court in deciding the appeal from the conviction and sentence, *In re Macrea* was referred to.

IN RE RAJENDRO NATH MUKERJI XXII 49

s. 10. See CIVIL PROCEDURE CODE, s. 561.

s. 10. *Appeal—Appellant not entitled to be heard on points not argued before the single Judge—Practice—Jurisdiction—Civil and Revenue Courts—Act I of 1877, s. 42.* A plaintiff brought his suit in a Civil Court asking for a declaration of his right to the possession of certain lands as a tenant at fixed rates, or in the alternative for possession, alleging that the lands were the property of a joint Hindu family, of which he was a member, that the family still remained joint and that he was entitled as a member of such joint Hindu family to a one-third undivided share in this ancestral property. *Held* that the Civil Court was competent to give the plaintiff a decree declaring that he was a member of the joint Hindu family, that the family still remained joint, that the property in dispute was ancestral and had not been partitioned, and that the plaintiff was entitled to a one-third undivided share; further that s. 42 of the Specific Relief Act would not apply to the suit, inasmuch as the Civil Court, if the plaintiff was found to be out of possession, was not competent to grant consequential relief in the shape of a decree for possession as a tenant at fixed rates. *Held* also that in appeals under the Letters Patent, s. 10, an appellant is not entitled to be heard on points which he has not raised before the Judge against whose decree he is appealing.

BRIJ BHUKHAN v. DURGA DAT XX 268

s. 10. *Appeal from an order of remand under s. 562 of the Code of Civil Procedure—Court fee—Act VII of 1870 (Court Fees Act), s. 5, sch. II, art. 11.* *Held* that in an appeal under s. 10 of the Letters Patent, from an order of a single Judge of the Court remanding a case under s. 562 of the Code of Civil Procedure the proper Court-fee is Rs. 2.

BALLI RAI v. MAHABIR RAI XXI 178

License to sell Spirits—

See ACT XII OF 1896, s. 49.

Limitation—

See ACT XV OF 1877, SS. 7; 14; SCH. II, ARTS. 32; 47; 120; 134 AND 144; 144, 148; 179; ACT XII OF 1831, SS. 93, 94; 93 (h), 203; ACT IV OF 1882, s. 55, SUB-SEC. 4 (b); SS. 89; 90; ADVERSE POSSESSION: CIVIL PROCEDURE CODE, SS. 206; 230; 244; 294; 326; 396; DECLARATORY DECREE: EXECUTION OF DECREE 2, 10 AND 11; HINDU LAW 2: PRE-EMPTION 1, 2 AND 7.

Lit pendens—

See ACT IV OF 1882, s. 52.

Lodging-House—

See ACT I OF 1892 (LOCAL), s. 5, SUB-SEC. 2.

Lunatic—

See CIVIL PROCEDURE CODE, SS. 440 ET SEQ.

Magistrate—

Jurisdiction of. See ACT XV OF 1883, s. 46.

Powers of. See CRIMINAL PROCEDURE CODE, SS. 133, 135 AND 136; 190, 191; 387 AND 529; 395.

Maha-brahmans—

Agreement as to distribution of offerings—Contract—Cause of action. Amongst the Maha-brahmans of a particular village an agreement obtained that some of them should collect and receive offerings during certain months; that during those months the others should refrain from receiving any offerings, and that in certain other months the other Maha-brahmans should collect and receive the offerings and they should refrain from collecting offerings. *Held* that this was a good agreement and sufficient to support an action for damages by the persons entitled to the offerings in a particular month as against the persons who had received those offerings contrary to the agreement.

OOCHI v. ULFAT XX 234

Maintenance—

See HINDU LAW 4, 6 AND 13.

Marriage—

Nullity of. See ACT IV OF 1869, SS. 17, 20.

Suit for jactitation of marriage—Jurisdiction of Courts in British India to entertain such a suit between Muhammadans. *Held* that a suit for jactitation of marriage will lie in a Civil Court in British India, and is not within the ruling of the Privy Council in *Rajah Nilmony Singh v. Kally Churn Bhattacharjee*.

MIR AZMAT ALI v. MAHMUD-UL-NISSA... .. XX 96

Maxim—

Actus curie nemini facit injuriam. See PARTIES TO A SUIT.

Mesne Profits—

See CIVIL PROCEDURE CODE, s. 583: EXECUTION OF DECREE 3.

1. *Execution of decree—Objection to assessment of mesne profits—Trespasser not allowed expenses of obtaining decrees for rent during the term of his possession.* *Held* a trespasser, who, after having been for some time in possession of immoveable property, was ejected in execution of a decree obtained by the rightful owner, could not have allowed to him in reduction of mesne profits expenses incurred by him in obtaining decrees for rent against tenants on the property in the suit.

SHARF-UD-DIN KHAN v. FATEHYAB KHAN XX 208

2. *Res judicata—Civil Procedure Code, s. 13, expl. III—Suit for possession of land and mesne profits past and future—Future mesne profits not granted—Subsequent suit for such future mesne profits not barred.* *Held*, that where a suit has been brought for possession of immoveable property and for mesne profits both before and after suit, the mere omission of the Court to adjudicate upon the claim for future mesne profits will not, by reason of s. 13, expl. III, of the Code of Civil Procedure, operate as a bar to a subsequent suit for mesne profits accruing due after the institution of the former suit. *Mon Mohun Sirkar v. The Secretary of State for India in Council* followed. *Jiban Das Oswal v. Durga Pershad Adhikari*, *Pratab Chandra Bura v. Rani Swarnamayi*, *Julius v. The Bishop of Oxford*, *In re Baker*, *Bhivray v. Sitaram* and *Thyila Kandi Ummatha v. Thyila Kandi Cheria Kunhamed* referred to. *Ramabhadra v. Jagannatha* discussed. *Narain Das v. Khan Singh* overruled.

RAM DAYAL v. MADAN MOHAN LAL XXI 425

Minor—

See ACT VII OF 1889, SS. 6 AND 7: CIVIL PROCEDURE CODE, s. 462.

Suit brought on behalf of a person alleged to be, but not in fact, a minor—Procedure on discovery that the plaintiff was of full age at the commencement of the suit. A suit was instituted on behalf of a person alleged to be a minor, through her next friend. The plaintiff obtained a decree. The defendant appealed, and on this appeal the alleged minor applied to be placed on the record in her own right as respondent, stating that she had attained her majority since the institution of the suit. The affidavits, however, by which this application was supported, showed that she had been of full age at the time when the plaint was filed. *Held* that the suit must be dismissed. *Taqi Jan v. Obaid-ulla* dissented from.

SHEORANIA v. BHARAT SINGH XX 90

Minority—

See EXECUTION OF DECREE 10.

Misrepresentation—

See CONTRACT 2.

Mitakshara—

See HINDU LAW 16, 17, 20 AND 21.

Mortgage—

See ACT III OF 1877, s. 17: ACT XV OF 1877, SCH. II, ARTS. 134 AND 144; 144, 148: ACT IV OF 1882, SS. 60; 72; 85; 90: BENAMIDAR: CIVIL PROCEDURE CODE, s. 13, EXPL. II; s. 244: EXECUTION OF DECREE 9: HINDU LAW 12, 14 AND 17: PRE-EMPTION 2.

1. *Act IV of 1882 (Transfer of Property Act), s. 82—Purchase by mortgagee at auction of portion of the mortgaged property—Effect of such purchase in reducing the mortgage debt.* When a mortgagee buys at auction the equity of redemption in a part of the mortgaged property, such purchase has, in the absence of fraud, the effect of discharging and extinguishing that portion of the mortgage debt which was chargeable on the property purchased by him, that is to say, a portion of the debt which bears the same ratio to the whole amount of the debt as the value of the property purchased bears to the value of the whole of the property comprised in the mortgage. *Lakshmidas Ramdas v. Jannadas Shankar Lal* followed. *Nand Kishore v. Raja Hariraj Singh* and *Sumera Kuar v. Bhagwant Singh* and *Chunna Lal v. Anandi Lal* considered. *Mahabir Pershad Singh v. Macnaghten*, *Nawab Azmat Ali Khan v. Jawahir Singh* and *Mahtab Singh v. Misri Lal* referred to.

BISHESHUR DIAL v. RAM SARUP XXII 284

By conditional sale. See PRE-EMPTION 2.

2. *Construction of document—Mortgage of a mixed character partly simple and partly usufructuary—Decree for sale—Act IV of 1882 (Transfer of Property Act), s. 58.* In construing a mortgage-deed, the terms of which are of a doubtful character, the intention of the parties, as deducible from their conduct at the time of execution and other contemporaneous documents executed between them, is to be looked to. Mortgage-deeds of a mixed character and other than those expressly defined in s. 58 of the Transfer of Property Act, 1882, must be construed as far as possible in accordance with the covenants contained in them. Where a deed is partly of the nature of a usufructuary mortgage and partly of the nature of a simple mortgage the mortgagee is entitled to bring the mortgaged property to sale under the conditions set out in the deed. *Shunker Lall v. Poorrun Mull*, *Phul Kuar v. Murtidhar*, *Jugul Kishore v. Ram Sahai*, *Umrao Begam v. Vali-ullah*, *Ramayya v. Guruvu* and *Sivakami Ammal v. Savundram Ayyan* referred to.

JAFAR HUSEN v. RANJIT SINGH XXI

3. *Covenant for pre-emption of mortgaged property in favour of mortgagee—Collateral advantage—Covenant fettering redemption—Act IV of 1882 (Transfer of Property Act), s. 60.* A provision in a mortgage which has the effect of preventing redemption of the mortgaged property on payment of principal, interest and costs, in accordance with the terms of the mortgage, is a void provision which cannot be enforced; but a covenant conferring on the mortgagee a collateral advantage is enforceable, provided that it is not objectionable on the ground of unfairness or unreasonableness. Held that a covenant giving the mortgagee a right of pre-emption in respect of the mortgaged property at a price fixed by reference to another share in the same village, was *prima facie*, a good covenant and enforceable by the mortgagee. *Biggs v. Hoddinott*, *Santley v. Wilde*, and *Orby v. Trigg* referred to.

BIMAL JATI v. BIRANJA KUAR XXII 238

4. *Prior and subsequent incumbrancers, Rights of—Inter se—Act IV of 1882 (Transfer of Property Act), s. 85—Sale in execution of decree obtained by first mortgagee in a suit to which the second mortgagee was not a party—Rights of auction-purchaser and mortgagor as regards the second mortgagee.* A prior mortgagee, K, obtained a decree in a suit upon his mortgage, to which suit a puisne mortgagee, G, was not made a party, and subsequently one B, attached the decree, and, having put up the property for sale, purchased it himself. G, the puisne mortgagee, having brought a suit for redemption of K's mortgage and sale of the property, K sold his rights, to P, who was thereupon added as a defendant. G obtained a decree for redemption and sale. (Held per BANERJI, J., that P was entitled to the whole amount which G had to pay for redemption of the prior mortgage, with the exception of the amount of the purchase-money paid by B at the auction sale, which

Mortgage—(continued.)

amount, and which amount only, would be due to B or his representatives. *Dip Narain Singh v. Hira Singh* and *Baldeo Bharthi v. Hushiar Singh* approved. *Held* per AIKMAN, J., that the auction-purchaser, B (or his representatives), was entitled to the whole amount to be paid by G for redemption of the first mortgage. *Dip Narain Singh v. Hira Singh* dissented from, and *Baldeo Bharthi v. Hushiar Singh* distinguished.

WAHID-UN-NISSA v. GOBARDHAN DAS XXII

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5. *Prior and subsequent mortgages—Mortgaged property sold twice in execution of decrees in suits in each of which the other mortgagee was not a party—Suit for ejectment by one auction-purchaser against the other—Form of decree.* B mortgaged a house, first to D and subsequently to M and C. M and C brought a suit on their mortgage without making D a party to it, obtained a decree, and put the house up to sale, and it was purchased by ML. Subsequently, to the date of the decree in the above suit D brought a suit on his mortgage, without making M and C parties thereto, obtained a decree and put the house up to sale, and it was purchased by BD. BD then sued ML for ejectment and damages. *Held* that the plaintiff's suit must be dismissed; and that it was not competent to the Court to grant a decree in favour of the plaintiff conditioned on the failure of the defendant to redeem the mortgage upon which the plaintiff's title was ultimately based. *Hargu Lal Singh v. Gobind Rai* followed and explained.

MADAN LAL v. BHAGWAN DAS XXI

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Redemption of. See ACT IV OF 1882, SS. 86 AND 87.

6. *Sale of land and agreement for repurchase—Mortgage by conditional sale—Right to redeem—Intention—Regulations I of 1798 and XVII of 1806—Exclusion of extrinsic evidence to vary written instrument—Act I of 1872—(Indian Evidence Act), s. 92.* A deed of sale of land for value was accompanied by a deed of agreement between the parties for purchase back by the vendor of the land on payment by him of money to the vendee on a future date fixed. The deeds were followed by transfer of possession to the vendee, and his receipt of the profits. The vendor did not exercise his right of repurchase; but, after many years, gave notice of his intention to redeem, and brought this suit to enforce his right of redemption as upon a mortgage by conditional sale. *Held*; (1) that oral evidence for the purpose of ascertaining the intention of the parties to the deeds was not admissible, being excluded by the enactment in s. 92 of the Indian Evidence Act, 1872. This case had to be decided on a consideration of the documents themselves, with only such extrinsic evidence of circumstances as might be required to show the relation of the written language to existing facts. (2) That there were contained in the deeds indications that the parties intended to effect a mortgage by conditional sale. In such a mortgage it is not necessary that the mortgagor should make himself personally liable for the repayment of the loan. (3) The equity of redemption was rendered applicable to a mortgage of this class by the effect of the Regulation XVII of 1806. The Transfer of Property Act, 1882, s. 58, defines a mortgage of this character, stating the already existing law, and practice regarding it; but owing to its date did not apply in this instance. (4) Redemption had been rightly decreed in the Courts below. (5) Whether such a mortgage would be redeemable under the Regulation law independently of intention indicated in the instrument was not a point calling for decision. Indications in this case appearing in the deeds were (a) words in the agreement for repurchase similar to those in Regulation I of 1798, relating to the deposit of mortgage money in the Treasury, giving the like power to deposit; (b) the inclusion in the present security of a sum due on an account, open to be increased, other than the price fixed for the repurchase; and other matters. *Bhagwan Sahai v. Bhagwan Din* distinguished.

BALKISHEN DAS v. W. F. LEGGE XXII

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7. *Sale of mortgaged property under a decree other than a decree on the mortgage—Mortgage not disclosed—Effect of such non-disclosure on mortgagee's rights under his mortgage—Estoppel.* *Held*, that a mortgagee who causes the mortgaged property to be sold in execution of a decree other than a decree obtained upon his mortgage, without notifying to intending purchasers the existence of his mortgage lien, is estopped for ever from setting up that lien against the title of a bona fide purchaser. *Agar Chand Guman Chand v. Rakhma Hanmant and Dullab Sirkar v. Krishna Kumar Bakshi* followed.

MUHAMMAD HAMID-UD-DIN v. SHIB SAHAI XXI

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8. *Suit for sale—Pleadings—Purchaser of mortgaged property paying off prior incumbrances.* The purchaser of a portion of certain mortgaged property paid off

Mortgage—(concluded.)

certain prior mortgages on the property. The subsequent mortgagee brought a suit for sale on his mortgage and made the purchaser a defendant, but did not offer to redeem the prior mortgages. *Held*, that the suit would not for that reason necessarily fail, but the plaintiff ought to be given an opportunity of redeeming the defendant's prior mortgages. *Salig Ram v. Har Charan Lal* distinguished. *Kali Charan v. Ahmad Shah Khan* followed.

MUHAMMAD NIAMAT ALI KHAN *v.* GHAFAR MUHAMMAD KHAN ... XXI 272

9. *Usufructuary mortgage—Suit for redemption—Non-payment at the proper time of the whole mortgage money—Dismissal of suit—Second suit for redemption accompanied by payment in full—Res judicata—Act IV of 1882 (Transfer of Property Act), ss. 92, 93.* *Held*, that a decree in a suit for redemption of a usufructuary mortgage, not being a conditional decree for redemption under s. 92 of the Transfer of Property Act, 1882, but simply dismissing the suit on the ground that the mortgagor had not, prior to its institution, paid or tendered the whole of the mortgage money at a time authorized by the deed, did not have the effect of foreclosure or of *res judicata* so as to bar a second suit for redemption, the deed expressly authorizing redemption on payment of the mortgage money in a particular month in any future year after due date, and the plaintiff having tendered the whole in that month between the dismissal of the first suit and the institution of the second. *Inman v. Wearing, Marshall v. Shrewsbury, Curtis v. Holcombe, Collinson v. Jeffery, Karuthasami v. Jaganatha, Nainappa Chetti v. Chidambaram Chetti, Roy Dinkur Doyal v. Sheo Golan, Muhammad Sami-uddin Khan v. Mannu Lal* and *Sheikh Golan Hoosein v. Mussamut Alla Rukhee Beebe* referred to. *Hay v. Raziuddin* distinguished.

DONDH BAHADUR RAI *v.* TEK NARAIN RAI ... XXI 251

Muhammadian Law—

See CIVIL PROCEDURE CODE, S. 13, EXPL. II; S. 14: PRE-EMPTION 3, 4, 5 AND 6: SALE: SUIT 1.

1. *Dower—Widow's lien for dower personal and not heritable.* The lien which a Muhammadan widow whose dower is unpaid may obtain on lands which have belonged to her deceased husband is a purely personal right and does not survive to her heirs. *Ali Muhammad Khan v. Azizullah Khan* and *Ajuba Begam v. Nazir Ahmad* referred to.

HADI ALI *v.* AKBAR ALI ... XX 262

2. *Gift—Possession—Gift of property attached by Collector for arrears of revenue—Act XIX of 1873 (N.-W. P. Land Revenue Act), s. 154.* *Held* that it was possible to make a gift, which should be valid under the Muhammadan law, of property which had been attached by the Collector for arrears of revenue under s. 154 of Act XIX of 1873. All that was necessary to a valid gift was that the donor should transfer possession of such interest as he had at the time of the gift: it was not necessary that he should transfer possession of the corpus of the property. *Mullick Abdool Guffoor v. Muleka, Mahomed Buksh Khan v. Husseini Bibi, Rahim Bakhsh v. Muhammad Hasan and Mohinudin v. Manchershah* referred to. *ANWARI BEGAM v. NIZAM-UD-DIN SHAH* ... XXI 165

3. *Pre-emption—Invalid sale—Time when right of pre-emption arises.* No right of pre-emption arises upon a sale which, according to Muhammadan law, is invalid, as, for instance, by reason of uncertainty in the price or the time for delivery of the thing sold; but if such sale become complete, as by the purchaser getting possession of the thing sold, then the ownership of the purchaser becomes complete, and a right of pre-emption arises, but neither ownership nor the pre-emptive right relates back to the date of the contract of sale. *Begam v. Muhammad Yaqub* referred to.

NAJM-UN-NISSA *v.* AJAIB ALI KHAN ... XXII 343

4. *Pre-emption—Suit by pre-emptor not entitled to claim the whole of the property sold—Plaintiff not obliged to frame his suit as a suit for the whole.* *Held*, that where a pre-emptor by reason of the claim of other persons entitled equally with himself to claim pre-emption is only entitled to a certain portion of the property in respect of which he claims pre-emption, and not to the whole of it, he is not bound to frame his suit as a suit for the whole of the property sold, but only for so much as he would be entitled to having regard to the claims of the other pre-emptors. *Amir Hasan v. Rahim Bakhsh* and *Durga Prasad v. Munsu* referred to. *Kashi Nath v. Mukhta Prasad* and *Hulasi v. Sheo Prasad* distinguished.

ABDULLAH *v.* AMANATULLAH ... XXI 292

5. *Pre-emption—Talab-i-~~istishhad~~—Reference to talab-i-mawasibat necessary.* A pre-emptor claiming pre-emption under the Muhammadan law is bound, at the time

• **Muhammadan Law—(continued.)**

when he makes his *talab-i-ishtishhad*, to state distinctly that he has already made *talab-i-mawasibat*. *Rujjub Ali Chopedar v. Chundi Churn Bhadra* followed.

ABBASI BEGAM v. AFZAL HUSEN XX 457

6. *Waqf—Illusory dedication—Settlement for benefit of descendants of the settlers.* *Held*, that a mere charge for some charitable purposes on the profits of an estate strictly settled on the family of the settlers in perpetuity and not dedicated in substance to charitable uses is not sufficient to constitute a good and valid waqf. *Abul Fata Mahomed Ishak v. Russomoy Dhur Chowdhry, Kalsoolah Sahib v. Nasiruddeen Sahib and Sheik Mahomed Ahsanullah Chowdhry v. Amarchand Kundu* referred to.

MUHAMMAD MUNAWAR ALI v. RASULAN BIBI XXI 329

7. *Will—Construction of a letter containing a bequest—Suicide of testator.* A letter, written shortly before the testator's death, contained directions as to his property, conferring the proprietary right therein in equal shares on certain persons, to take effect on his death. Accordingly, the letter acted as a will under Muhammadan law. The testator died, within a few hours after, from poison administered by himself with the intention of suicide. The letter stated that he had taken poison, but this was construed as a representation of the state of things as they would present themselves at the time when the letter arrived. Title under the will having been disputed in this suit, on the ground that the will having been made by a person who had taken poison for the above purpose, was invalid by Muhammadan Law. *Held*, that the burden of proving that the will was written after the taking the poison was on the party impugning the will; that the letter was consistent with its having been written before the taking the poison; that the other evidence tended strongly to show that it was written before; and that, therefore, the reason alleged against the validity of the will was not applicable to the case.

MAZHAR HUSEN v. BODHA BIBI XXI 91

Municipal Board—

See ACT XV OF 1883, SS. 29, 42, 44 : SUIT 2.
Powers of. See ACT XV OF 1883, s. 69.

Notice—

See ACT III OF 1877, s. 50: BURDEN OF PROOF 1.

Notification—

No. 458 of the 18th March 1898. See ACT I OF 1878, s. 19 (f).

• **Nullity of Marriage—**

See ACT IV OF 1869, SS. 17, 20.

• **Objections—**

By respondents to an appeal. See CIVIL PROCEDURE CODE, s. 561.

• **Offence—**

- See ACT IX OF 1890, SS. 113, 132.

Order or Decree—

See CIVIL PROCEDURE CODE, SS. 368, 582, 591.

Parda-nashin Women—

Presumptions as to transactions by. See SALE.

Pardon—

See CRIMINAL PROCEDURE CODE, SS. 337 AND 529; 339.

Parties—

See CIVIL PROCEDURE CODE, s. 539.

Liability of member of joint Hindu family. See HINDU LAW 15.

Non-joinder of. See ACT IV OF 1882, s. 85.

To an action. See SUIT 2.

To an appeal. See CIVIL PROCEDURE CODE, SS. 372 AND 582; 544.

To a suit. See CIVIL PROCEDURE CODE, s. 30: COMPANY.

To a suit. Death of plaintiff after hearing but before judgment—Judgment given by Court in ignorance of plaintiff's death—Judgment and decree valid—Doctrine of nunc pro tunc. The successful plaintiff in a suit died a few days after the hearing of the suit had been concluded and judgment reserved. Unaware of the death of the plaintiff, the Court proceeded to deliver judgment and pass a decree in favour

Parties—(continued.)

of the deceased plaintiff. *Held*, that nothing remaining to be done by the parties on the day when judgment was reserved, the judgment should read as from that date, and the decree was a valid decree. *Cumber v. Wane, Ramacharya v. Anantacharya and Surendro Keshub Roy v. Doorgasoondery Dossee* followed.

CHETAN CHARAN DAS *v.* BALBHADRA DAS XXI 314

Partition—

See ACT IX OF 1872, s. 23: ACT XIX OF 1873, SS. 111, 113 AND 241: ACT IV OF 1893, s. 10: PRE-EMPTION 9 AND 10.

By Revenue Courts. See ACT XIX OF 1873, s. 107.

Decree for. See CIVIL PROCEDURE CODE, s. 13, EXPL. II.

Of Mahal. See PRE-EMPTION 9.

Suit for. See CIVIL PROCEDURE CODE, s. 396.

Partnership—

1. *Arbitration—Authority of one partner to sue on behalf of the firm—Authority of one partner to bind the firm by a submission to arbitration—Act 1 of 1877 (Specific Relief Act), s. 21.* *Held* that one partner though entitled to bring a suit on behalf of the firm of which he is a member to recover a debt due to the firm, has no power, in the absence of special authority, to bind the firm by a submission to arbitration of the claim so brought. *Stead v. Salt and Strangford v. Green* referred to.

RAM BHAROSE *v.* KALLU MAL XXII 135

2. *Parties to a suit—Suit for a partnership debt—Representative of partner who dies pending the suit not a necessary party—Act IX of 1872, s. 45.* In a suit to recover a debt due to a trading partnership in which it happens that a deceased person was a partner up to the time of his death, it is not necessary to join as a plaintiff any representative of the deceased partner. *Gobind Prasad v. Chandar Sekhar, Ram Narain Nursing Doss v. Ram Chunder Jankee Loll and Motilal Bechardass v. Ghellabhai Hariram* referred to.

DEBI DAS *v.* NIRPAT XX 365

Patwari—

See ACT IX OF 1872, s. 23.

Pauper Suit—

See CIVIL PROCEDURE CODE, SS. 406, 407.

Plaint—

See CIVIL PROCEDURE CODE, s. 244: PRACTICE 3.

Signature of. See CIVIL PROCEDURE CODE, SS. 51, 578.

Verification of. See CIVIL PROCEDURE CODE, s. 53.

Pleadings—

See ACT I OF 1872, s. 105: MORTGAGE 8: PRACTICE 3.

Possession—

See MUHAMMADAN LAW 2.

Formal. See CIVIL PROCEDURE CODE, s. 313.

Practice—

See CIVIL PROCEDURE CODE, SS. 25; 32; 556 AND 588: CRIMINAL PROCEDURE CODE, s. 437: EVIDENCE 1 AND 2: LETTERS PATENT, s. 10.

1. *Appeal—Alteration of conviction in appeal.* Where, on appeal against a conviction for one offence, it became apparent that, although there was not sufficient evidence to support the conviction, there was evidence which might have led to the conviction of the appellants for an essentially different offence, with which they had not been charged, the Court declined to consider that evidence with a view to altering the conviction of the appellants. *Queen-Empress v. Parbati* referred to. QUEEN-EMPRESS *v.* YUSUF XX 107

2. *Appeal—Plea of res judicata taken for the first time in appeal—Court not bound to entertain it if by so doing further findings of fact will be rendered necessary.* Although the plea of *res judicata* may be taken at any stage of a suit, including first or second appeal, an appellate Court is not bound to entertain the plea if it cannot be decided upon the record before that Court, and if its consideration involves the reference of fresh issues for determination by the lower Court. *Muhammadi Ismail v. Chatter Singh and Tek Narain Rai v. Dhondh Bahadur Rai* referred to.

KANAHAI LAL *v.* SURAJ KUNWAR XXI 446

Practice—(continued.)

3. *Cause of action—Pleadings—Plaint disclosing no cause of action—Discovery at the stage of an appeal under the Letters Patent of defect in the plaint—Dismissal of suit.* Where in an appeal under s. 10 of the Letters Patent it was brought to the notice of the Court that the plaint in the suit disclosed no cause of action against the defendant named therein, the Court entertained the plea and dismissed the suit. *THE SECRETARY OF STATE FOR INDIA v. SUKHDEO* ... XXI 341

Pragwal—

See ACT I OF 1892 (LOCAL), s. 5, SUB-SEC. 2.

Pre-emption—

See ACT XIX OF 1873, s. 107: CONSTRUCTION OF DOCUMENT 4: MORTGAGE 3: MUHAMMADAN LAW 3, 4 AND 5.

1. *Limitation—Date of accrual of cause of action—Mortgage—Act IV of 1882, ss. 86 and 87.* Held, that where a right of pre-emption arises on the foreclosure of a mortgage under the Transfer of Property Act, 1882, the right to sue for pre-emption accrues, not from the date fixed in the decree under s. 86 as the date upon which the payment is to be made by the mortgagor, but from the date on which the mortgagee obtains an order absolute under s. 87 of the said Act. *Raghubir Singh v. Nandu Singh, Ali Abbas v. Kalka Prasad and Poresb Nath Mojumdar v. Ramjodu Mojumdar* referred to. *ANWAR-UL-HAQ v. JWALA PRASAD* ... XX 358
2. *Mortgage by conditional sale—Limitation—Act XV of 1877 (Indian Limitation Act), sch. II, art. 120—Act IV of 1882 (Transfer of Property Act), ss. 86 and 87.* A plaintiff sued for pre-emption, his claim arising out of the foreclosure of a mortgage by conditional sale of a share in an undivided zamindari village. Held, that the limitation applicable to the suit was that prescribed by art. 120 of sch. II of Act XV of 1877, and that limitation began to run from the date when the mortgagee obtained an order absolute for foreclosure under s. 87 of Act IV of 1882. *Batul Begam v. Mansur Ali Khan, Poresb Nath Mojumdar v. Ramjodu Mojumdar and Anwarul Haq v. Jwala Prasad* referred to. *RAHAM ILHAI KHAN v. GHASITA* ... XX 375
3. *Muhammadan law—Right of pre-emption not surviving to heir of pre-emptor.* According to the Muhammadan law applicable to the Sunni sect, if a plaintiff in a suit for pre-emption has not obtained his decree for pre-emption in his lifetime, the right to sue does not survive to his heirs. *MUHAMMAD HUSAIN v. NIAMAT-UN-NISSA* ... XX 88
4. *Muhammadan law—Shias and Sunnis—Pre-emption claimed on ground of vicinage—Vendors and vendee Sunnis, pre-emptor a Shia.* Held that a Muhammadan of the Shia sect could not maintain a claim for pre-emption based on the ground of vicinage under the Muhammadan law when both the vendors and the vendee were Sunnis. *Gobind Dayal v. Inayat-ullah and Pir Bakhsh v. Sughra Bibi* referred to. *MURBAN HUSAIN v. CHOTE* ... XXII 102
5. *Muhammadan law—Talab-i-ishtishhad—Reference necessary to the previous talab-i-marwasibat.* When in asserting a claim for pre-emption the making of the talab-i-ishtishhad is required, it is absolutely necessary that at the time of making this demand reference should be made to the fact of the talab-i-marwasibat having been previously made, and this necessity is not removed by the fact that the witnesses to both demands are the same. *Rujjub Ali Chopedar v. Chundi Churn Bhudra, Akbar Husain v. Abdul Jalil and Abasi Begam v. Afzal Husen* followed. *Nundo Persad Thakur v. Gopal Thakur* dissented from. *ABID HUSEN v. BASHIR AHMAD* ... XX 499
6. *Muhammadan law—Wajib-ul-arz—Pre-emptor disentitled by his own conduct to pre-empt part of the property sold—Pre-emptor not entitled to pre-empt any portion thereof.* Where a pre-emptor sued for possession by right of pre-emption of certain property sold by one and the same sale deed, claiming as to one portion of the property sold under the Muhammadan law and as to another under the *wajib-ul-arz*, and it was found that he had by his own acts or omissions disentitled himself from claiming that portion of the property to which the Muhammadan law applied, it was held that the pre-emptor was not entitled to pre-emption in respect of any portion of the property covered by the said sale deed. *Muhammad Wilayat Ali Khan v. Abdul Rab* followed. *MUJIB-ULLAH v. UMED BIBI* ... XXI 119
7. *Suit for pre-emption based on a mortgage by conditional sale—Limitation—Act XV of 1877 (Indian Limitation Act), sch. II, arts. 10 and 120—"Physical possession."*

Pre-emption—(continued.)

Held (1) that, the other conditions being present necessary to make art. 10 of the second schedule to Act XV of 1877 applicable, art. 10 would apply to a sale which, in its inception was a mortgage by conditional sale, but which, either by the operation of Regulation XVII of 1806 or by the operation of Act IV of 1882, had become in effect an absolute sale with the right of redemption gone. (2) That in such a case as above limitation begins to run, where Regulation XVII of 1806 applies, from the expiry of the year of grace. (3) That a share in an undivided zamindari mahal is not susceptible of "physical possession" in the sense of art. 10 of the second schedule to Act XV of 1877. (4) That constructive possession, e. g., by receipt of rent from tenants, is not "physical possession" within the meaning of the said article. *Ali Abbas v. Kalka Prasad, Nath Prasad v. Ram Paltan Ram, Goordhun v. Heera Singh, Ganeshee Lall v. Toola Ram, Jageshwar Singh v. Jawahir Singh and Unkar Das v. Narain* referred to.

BATUL BEGAM *v.* MANSUR ALI KHAN XX 315

8. *Wajib-ul-arz—Co-sharers in the Khalisa Mahal distinguished from owners of separate plots of muafi lands in the mahal.* The co-sharers in a mahal and the owners of separate plots of muafi land included in the area of the mahal have as a rule no connection with one another, and it by no means follows that the custom adopted by or existing among the members of the khalisa co-parcenary body would be applicable to the owners of the muafi plots. Strict evidence is always necessary to prove that the same custom is applicable to each. *Kalyan Mal v. Madan Mohan* referred to.

NARAIN DAS *v.* RAM SARAN DAS XX 419

9. *Wajib-ul-arz—Partition—Effect of partition on pre-emptive rights, no new wajib-ul-arz being framed—Cause of action—Extinction of cause of action before suit brought.* In order that a suit for pre-emption may be successfully maintained, it is necessary not only that a cause of action should arise in favour of the pre-emptor at the time of the sale on which the suit is based, but that such cause of action should subsist at the time when the suit is brought.

JANKI PRASAD *v.* ISHAR DAS XXI 374

10. *Wajib-ul-arz—Perfect partition of mahal—Act XIX of 1873, s. 191—No new wajib-ul-arz framed on partition—Pre-emption claimed under wajib-ul-arz of undivided mahal—Custom—Co-sharers—Hissadar deh.* Where, on the perfect partition of a mahal under the North-Western Provinces Land Revenue Act, 1873, no new wajib-ul-arz has been framed for any of the new mahals, the question whether or how far a contract or a custom of pre-emption recorded in the wajib-ul-arz of the undivided mahal is still in force, or who is entitled to claim the benefit of it, is not capable of any absolute or invariable answer. It depends in each case upon the proper construction of the terms of the particular contract or the proper interpretation of the particular custom recorded, assuming that there is no evidence of any intention on the part of the co-sharers at the time of partition to put an end to the contract or the custom. But there is a strong presumption against such claims for pre-emption when made after perfect partition by persons who are no longer co-sharers of the vendor; and where the language of the wajib-ul-arz is ambiguous this presumption may be decisive. The wajib-ul-arz of a village forming one undivided mahal recorded a right of pre-emption by custom as existing in favour of "hissadaran deh" in cases of transfer by a "hissadar" of his share or "hissa" to a stranger. After a perfect partition, on which no new wajib-ul-arz was framed and after a subsequent sale to a stranger of land in one of the new mahals, a person who, prior to the partition, was a co-sharer of the vendor in the undivided mahal, but who, since the partition, owned a share only in another of the new mahals, claimed pre-emption under the old wajib-ul-arz as a "hissadar deh." *Held* by the Full Bench, upon the construction of the wajib-ul-arz, that he was not entitled to pre-emption.

DALGANJAN SINGH *v.* KALKA SINGH XXII 1

11. *Wajib-ul-arz—Plaintiff's title to sue for pre-emption lost after suit but before decree—Suit to be dismissed.* Where a plaintiff who had filed a suit for pre-emption based on the provisions of a wajib-ul-arz lost during the pendency of the suit the right to pre-empt by reason of the mahal in which both properties were originally comprised having become the subject of a perfect partition, it was held that the suit for pre-emption should be dismissed. *Sakina Bibi v. Amiran* distinguished.

RAM GOPAL *v.* PIARI LAL XXI 441

Pre-emption—(concluded.)

PAGE

12. *Wajib-ul-arz—Sale to a stranger—Re-sale before suit to a co-sharer—Effect of such re-sale.* In cases of pre-emption based upon a *wajib-ul-arz* the right of pre-emption does not survive, if the land, which is subject to pre-emption having been sold to a stranger is subsequently re-sold by the stranger vendee before suit to a co-sharer having equal rights with those seeking pre-emption.

• **SEBH MAL v. HUKAM SINGH** XX 100

13. *Wajib-ul-arz—Transfer to plaintiff pre-emptor after sale—Hindu widow in possession for widow's estate.* Held that the daughter of Hindu widow to whom the widow had relinquished a share in a village, of which share she was in possession for a widow's life estate, was entitled to pre-emption in respect of a sale which had taken place in the village prior to the relinquishment made to her by her mother. *Sheo Narain v. Hira* distinguished.

MUHAMMAD YUSUF ALI KHAN v. DAL KUAR XX 148

Pre-mortgage—

Wajib-ul-arz—Co-sharer—Mortgagee of a co-sharer not himself a co-sharer. Two co-sharers in a village, A and G, mortgaged their proprietary interest, with possession, to L. L made either an assignment or a sub-mortgage of her interest under the mortgage for a term of twenty years to B, with a foreclosure clause in case of non-payment. B afterwards transferred to X for an unexpired period of sixteen years and eleven months the interest in the property which he had acquired from L. One N L, a co-sharer in the village, thereupon brought a suit for pre-mortgage in respect of the transfer to X, on the basis of the village *wajib-ul-arz*, which gave a right of pre-emption or pre-mortgage when the share of a co-sharer should be sold or mortgaged. Held, that, inasmuch as B could not be regarded as a co-sharer, no right of pre-mortgage arose in favour of NL in respect of the transfer of the mortgagee interest from B to X. The principle laid down in *Khair-un-nissa Bibi v. Amin Bibi* and in *Ali Ahmad v. Rahmat-ul-lah* followed.

NAND LAL v. BANSI XX 19

Prescription—

See CUSTOMARY RIGHT.

Presumption—

See ACT XLV OF 1860, S. 307 : ACT I OF 1872, S. 105 : CONSTRUCTION OF DOCUMENT.

Private Defence—

• See CRIMINAL PROCEDURE CODE, S. 417.

Right of. See ACT I OF 1872, S. 105.

Probate—

See ACT V OF 1881, SS. 3 ; 9.

Procedure—

See ACT VII OF 1870, SS. 10 AND 12 : ACT XV OF 1883, SS. 29, 42, 44 : APPEAL : CIVIL PROCEDURE CODE, SS. 285, 295, 4A : CRIMINAL PROCEDURE CODE, SS. 203 ; 208 ; 288 ; 339 : LETTERS PATENT, S. 10 : MINOR.

Error in. See ACT XV OF 1877, S. 14.

Profits—

Suit for recorded share of. See ACT XII OF 1881, SS. 93, 94.

Promissory Note—

See ACT I OF 1879, S. 61 : ACT XXVI OF 1881, SS. 64, 66.

Public Nuisance—

See ACT XLV OF 1860, SS. 268, 290.

Public Servant—

See ACT XLV OF 1860, SS. 21 AND 161.

Railway Company—

See ACT IX OF 1890, SS. 72, 76.

Reasonable and Probable Cause—

See SUIT 3.

Receiver—

See CIVIL PROCEDURE CODE, S. 505.

Recital in Deed—

Admissibility of oral evidence to contradict. See ACT I OF 1872, S. 92.

Redemption of Mortgage—

See ACT IV OF 1882, SS. 86 AND 87 : MORTGAGE 9.

Reference to Arbitration—

See ARBITRATION.

Reformatory School—

See ACT VIII OF 1897, SS. 4, 8, 16 ; 16.

Register of Share-holders—

Inspection of. See ACT VI OF 1882, SS. 55, 56.

Registered and Unregistered Documents—

See ACT III OF 1877, S. 50.

Registration—

See ACT III OF 1877, SS. 17 ; 35 : ACT IV OF 1882, SS. 122 AND 123.

Regulation—

I of 1798. See MORTGAGE 6.

XXXI of 1803, s. 6. *Revenue-free grant—Settlement in favour of daughter purporting to render other lands than the lands settled liable in the hands of the settlor and his heirs for the revenue of the settled lands.* One Bakhshish Ali in 1843 settled certain lands on his daughter, Rahmat-un-nissa, and covenanted that he and his heirs would pay the land revenue due on the estate so assigned along with the land revenue for their own estate. The deed of settlement then went on to provide that if at any time the heirs of the settlor, or whoever might be in possession of the rest of his estate, should demand from Rahmat-un-nissa or the person in possession of the lands assigned to her, the revenue assessed on those lands, then Rahmat-un-nissa and her heirs would be entitled to claim and take possession of the legal share in the settlor's estate to which she would be entitled under the Muhammadan law of inheritance. *Held*, that as regards a person who had acquired a portion of the settled property partly by private sale and partly by sale at auction the settlement contravened the provisions of s. 6 of Regulation XXXI of 1803, and the heirs of the settlor could not be compelled to pay the land revenue due on the portion of the settled lands acquired by the said purchaser, nor had the purchaser any right under the deed of settlement to a proportionate part of the inheritance which would have come to Rahmat-un-nissa from her father.

SAHIB ALI v. SUBHAN ALI

XXI 12

LII of 1803, s. 37. See ACT I OF 1872, SS. 65, 90.

XVII of 1806. See MORTGAGE 6.

I of 1877, ss. 18 et seq. *Reference by Commissioner of Ajmere—Powers of High Court—Jurisdiction.* *Held* that where a point of law or a question as to the construction of a document is referred to the High Court by an order purporting to be made under s. 18 of the Ajmere Courts Regulation, the High Court cannot consider whether the point referred arises in the case in which the reference before it has been made or not ; but its functions are limited to pronouncing an opinion on any point which may be so referred to it.

KALIAN MAL v. RAM KISHEN

XXI 163

Remand—

See ACT XIV OF 1874, S. 6 : CIVIL PROCEDURE CODE, SS. 25 AND 562 ; 588 (24).

Representative—

See CIVIL PROCEDURE CODE, S. 244.

Res judicata—

See ACT IV OF 1882, S. 90 : CIVIL PROCEDURE CODE, SS. 13 ; 13, EXPL. II : HINDU LAW 5 : JURISDICTION 2 : MESNE PROFITS 2 : MORTGAGE 9 : PRACTICE 2.

As between defendants. See CIVIL PROCEDURE CODE, SS. 13, 544.

Decree in previous suit defining rights of party to a subsequent suit—Effect of such decree as against such party until set aside by proper procedure. Where an order adding a defendant under s. 32 of the Code of Civil Procedure was not appealed against and no objection was taken thereto in the memorandum of appeal from the decree in the suit in which it was passed, an oral objection taken in appeal to such order was disallowed. *Tilak Raj Singh v. Chakardhari Singh* referred to. Where there is a subsisting decree in a previous suit which as regards the subject-matter of a subsequent suit would take effect under s. 13 of the Code of Civil Procedure, it is not open to the party whose rights are affected by

Res judicata—(continued.)

decree to question in the subsequent suit the validity of such decree, though ~~it~~ have been open to such party in a separate suit to get the decree set
See. *Karamali Rahimbhoy v. Rahimbhoy Habibhoy* referred to.

BANSI LAL v. RAMJI LAL XX 370

Restitution—

Of benefit obtained under a decree which is reversed in appeal. See EXECUTION OF DECREE 12.

Revenue Courts—

Power to partition. See ACT XIX OF 1873, s. 107.

Revenue-free Grant—

See REGULATION XXXI OF 1803, s. 6.

Reversioners—

Suit by. See HINDU LAW 5.

Review of Judgment—

See CIVIL PROCEDURE CODE, s. 622 : SUIT 4.

Revision—

See ACT XVIII OF 1879, s. 36 : ACT IX OF 1887, s. 25 : ACT VIII OF 1897, ss. 4, 8, 16 ; 16 : CIVIL PROCEDURE CODE, 516 ; 622.

Rules of Court—

Of the 18th January 1898, Rule 83. Finality of judgment or order of the High Court—Judgment or order not complete until sealed. Held that a judgment order of the High Court is not complete until it is sealed in accordance with Rule 83 of the Rules of Court of the 18th January 1898, and up to that time may be altered by the Judge or Judges concerned therewith without any formal procedure by way of review of judgment being taken.

QUEEN-EMPRESS v. LALIT TIWARI XXI 177

Rule 2— See CIVIL PROCEDURE CODE, ss. 368, 582, 591.

Sale —

See CONTRACT 1 AND 2.

For arrears of revenue. See ACT XIX OF 1873, s. 184.

Of house in default of payment of takavi loan. See ACT XIX OF 1873, ss. 166, 167 168.

Of villages by a wife to her husband. The purchase money had not been paid on what purported to be a deed of sale of villages by a Muhammadan wife to her husband for a price which, however, the deed acknowledged to have been paid. After her death two of her relations, disputing the due execution of the sale deed, sued the husband, who had obtained possession, claiming, in the alternative, either that they should obtain their shares in the property of the deceased, or, if the sale of the villages should be maintained, that they should receive their proportion of the price as due to the estate left by her. The two Courts below concurred in finding that the wife, a *parda-nashin*, was capable of managing her own affairs, and that she had not received the price. The first Court inferred from the state of things that the wife had in a manner made a gift of the villages to the husband. The High Court reversed that judgment, and decided that, with regard to the probability of influence on the part of the husband, the absence of any independent advice for the wife and other circumstances, the transaction was without effect. The Judicial Committee found that there had not been a case of undue influence exercised, either made by the plaintiff or raised by the issues ; they found no evidence that the price stated was inadequate, or the sale an improvident one, or that the husband had been released from having to pay the price. From the findings on the evidence the presumption was that the wife intended to pass the property for some purpose, and that, the suggestion of a gift being excluded, the deed operated as a sale according to what it purported to be. They did not throw any doubt on the sound doctrine, laid down in numerous cases, as to the obligations upon persons taking benefits from *parda-nashin* ladies. To the one surviving plaintiff was awarded a moiety of the price payable by the husband, who himself inherited the balance.

HAKIM MUHAMMAD IKRAM-UD-DIN v. NAJIBAN

Second Appeal—

See ACT VII OF 1870, ss. 10 AND 12.

Secretary of Club—

Validity of. See CLUB.

Security for Good Behaviour—

See CRIMINAL PROCEDURE CODE, SS. 110, ET SEQ; 110, 119; 110, 121, 514,
SCH. V, FORM NO. XLVI.

Sedition—

See ACT XLV OF 1860, S. 124A.

Sentence—

See ACT IX OF 1890, SS. 113, 132; CRIMINAL PROCEDURE CODE, SS. 35 AND
367; 395.

Specific Relief—

See INJUNCTION.

Stamp—

See ACT I OF 1879, S. 61; SCH. I ART. 8; HINDU LAW.

Statutes—

24 and 25 Vic., Cap. CIV, s. 15. See ACT XVIII OF 1879, S. 36.

Stridhan—

See HINDU LAW 18.

Succession—

See HINDU LAW 19 AND 21.

Succession Certificate—

See CIVIL PROCEDURE CODE, S. 596.

Sudras—

Succession amongst. See HINDU LAW 21.

Suit—

"Contentious" See ACT IV OF 1882, S. 52.

Dismissal of. See PRACTICE 3.

Dismissal of, for default. See CIVIL PROCEDURE CODE, SS. 102, 103, 157.

1. *For cancellation of a deed—Muhammadian law—Plea that the deed was inoperative according to the personal law of the parties.* Held, in the case of a deed of gift between Muhammadans, that it was no ground for cancellation of the deed that possession of the property, the subject of the deed, not having been made over to the donee, the deed might be, according to the Muhammadan law, inoperative.

UMRAO BIBI v. JAN ALI SHAH XX 465

2. *For declaration of right to be entered in list of candidates for appointment as member of a Municipal Board—Jurisdiction—Suit brought against the Municipal Board for its corporate capacity.* Where a plaintiff sued for a declaration of his right to have his name entered in the list of persons entitled to be candidates for election as members of a Municipal Board and brought his suit against the Board in its corporate capacity, it was held that such a suit would not lie against the Board, even if, which was not decided, it might lie against the revising authority, by the irregular action of which it was alleged, the plaintiff's name had been excluded from the list of candidates.

ABDUR RAHIM v. THE MUNICIPAL BOARD OF KOIL XXII 143

For jactitation of marriage. See MARRIAGE.

3. *For Malicious prosecution—Reasonable and probable cause—Evidence—Conviction of plaintiff by a Criminal Court.* The fact that the plaintiff in a suit for damages for malicious prosecution has been convicted by a competent Court, although he may subsequently have been acquitted on appeal, is evidence, if unrebutted, of the strongest possible character against the plaintiff's necessary plea of want of reasonable and probable cause. *Parimi Bapirazu v. Bellamkonda Chinna Venkayya* followed.

JANUBAR SINGH v. SHEO SARAN SINGH XXI 26

Form of. See CIVIL PROCEDURE CODE, S. 435; COMPANY.

For sale on a mortgage. See MORTGAGE 9.

In forma pauperis. See CIVIL PROCEDURE CODE, SS. 406, 407.

4. *In forma pauperis—Review of judgment—Court-fee—Act VII of 1870 (Court Fees Act), sch. I, c. 5—Civil Procedure Code, s. 410.* Held, that when an

Suit—(*continued*).

Application for review is presented in a suit *in forma pauperis*, that application, of the plaintiff in the suit, is not liable to any Court fee.

ADA BIBI v. NAIMA BIBI XX 410

Of the nature cognizable by Courts of Small Causes. See ACT IX OF 1887, s. 23.

On foreign judgment. See CIVIL PROCEDURE CODE, s. 14.

Parties to a. See PARTNERSHIP 2.

Right of. See BENAMIDAR.

To eject a tenant. See ACT XII OF 1881, s. 93 (b).

5. *To recover compensation in respect of property sold under a decree—Decree not reversed or superseded.* A zamindar applied to a revenue officer to commute the rent hitherto paid in kind by certain of his tenants to a fixed money rent to be paid in future. The Assistant Collector made the order asked for and fixed the money rent to be paid in future. After that order had been made the zamindar brought a suit for arrears of rent against the tenants in a Court of Revenue and obtained a decree for rent at the rate which had been fixed by the order of the Assistant Collector. Against this decree the tenants did not appeal, and it became final. The decree was put into execution: property of the tenants was attached and sold, and the decree was partially satisfied out of the sale proceeds. Subsequently to the passing of the decree for rent the Board of Revenue set aside the order of the Assistant Collector commuting the rent in kind to a fixed money rent. The tenants thereupon sued to recover compensation on account of the sale of their property under the decree for rent. *Held* that the suit would not lie, inasmuch as the decree for rent under which the plaintiff's property was sold was unreversed and not superseded by any competent Court. *Marriot v. Hampton, Shama Parshad Roy Choudhery v. Hurro Parshad Roy Chowdhery, Jogesh Chunder Dutt v. Kali Churn Dutt and Raja Nilmoney Singh Deo Bahadoor v. Sharoda Parshad Mookerjee* referred to.

KISHEN SAHAI v. BAKHTAWAR SINGH... .. XX 237

To set aside decree obtained by fraud. See CIVIL PROCEDURE CODE, s. 108.

To set aside sale in execution. See CIVIL PROCEDURE CODE, s. 244.

Summary Trial—

See CRIMINAL PROCEDURE CODE, s. 363.

Surety—

See ACT IX OF 1872, ss. 135, 137.

Takavi Loan—

Sale of house in default of payment of loan. See ACT XIX OF 1873, ss. 166, 167, 168.

Talab-i-ishtishhad—

See MUHAMMADAN LAW 5: PRE-EMPTION 5.

Tender—

See CONTRACT 1.

Transfer—

See CIVIL PROCEDURE CODE, s. 25.

Of suit. See CIVIL PROCEDURE CODE, ss. 25 AND 562.

Trees—

See LANDHOLDER AND TENANT 4.

Trespass—

See CAUSE OF ACTION.

Trust—

See ACT XV OF 1877, SCH. II, ARTS. 134 AND 144: CIVIL PROCEDURE CODE, s. 539.

Undue Influence—

See ACT IX OF 1872, ss. 15, 16 19.

Yakil—

• See LETTERS PATENT, s. 8.

Vendor's Lien—

ACT IV OF 1882, s. 55, SUB-SEC. 4 (b).

Volunteers—

ACT XI OF 1878, s. 19 (f).

Wajib-ul-arz—

See ACT XIX OF 1873, s. 107 : CONSTRUCTION OF DOCUMENT 4 : ~~PRE-EMPTION~~
8, 9, 10, 11, 12 AND 13. : PRE-MORTGAGE.

Waif—

See MUHAMMADAN LAW 6.

Warrant—

See ACT XIII OF 1859, s. 1.

Of arrest. See CIVIL PROCEDURE CODE, s. 230.

Widow—

See HINDU LAW 5 AND 6.

Alienation by. See HINDU LAW 5.

Will—

See ACT V OF 1881, s. 3 : MUHAMMADAN LAW 7.

Witness—

See CRIMINAL PROCEDURE CODE, s. 342 : EVIDENCE 2.

